**[2017] WASC 269**

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| **JURISDICTION** | **:** | SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS |
| **CITATION** | **:** | BREWER -v- JOHN FRANCIS O'SULLIVAN, WARDEN AT KALGOORLIE [No 2] [2017] WASC 269 |
| **CORAM** | **:** | PRITCHARD J |
| **HEARD** | **:** | 24 OCTOBER 2016 |
| **DELIVERED** | **:** | 15 SEPTEMBER 2017 |
| **FILE NO/S** | **:** | CIV 1862 of 2016 |
| **BETWEEN** | **:** | GERARD VICTOR BREWER<br>GLENN ALAN HAYTHORNTHWAITE<br>Applicants<br><br>AND<br><br>JOHN FRANCIS O'SULLIVAN, WARDEN AT KALGOORLIE<br>First Respondent<br><br>MINISTER FOR MINES<br>Second Respondent<br><br>MINING REGISTRAR FOR THE BROAD ARROW MINERAL FIELD<br>Third Respondent<br><br>SIBERIA MINING CORPORATION PTY LTD (ACN 097 650 194)<br>Fourth Respondent<br><br>ANGELA PINTABONA, AS THE DELEGATE OF THE MINISTER FOR MINES PURSUANT TO SECTION 12 OF THE MINING ACT 1978 (WA)<br>Fifth Respondent |

ATTORNEY GENERAL OF WESTERN AUSTRALIA
Intervener

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*Catchwords:*

Judicial review - Leave to apply - Where knowledge or notice of decision obtained less than six months before making application for review

Judicial review - Certiorari - Declarations - Whether jurisdictional error affected decisions of mining warden and delegate of Minister

Procedure - Joinder of parties - Joining delegate of Minister - Whether necessary to ensure all matters effectually and completely determined

Statutory interpretation - *Mining Act 1978* (WA) - Meaning of 'aggregate exploration expenditure' in s 102(2a) - Meaning of 'apportioned' in s 102(2)(h) - *Mining Regulations 1981* (WA) - Meaning of 'total exploration expenditure shown in each relevant operations report' in reg 58A

Procedural fairness - Requirement to notify interested parties - Sufficient interest - Whether applicant for forfeiture of mining leases to be notified of applications for exemption and extension of time

*Legislation:*

*Interpretation Act 1984* (WA), s 19, s 44
*Mining Act 1978* (WA), s 8, s 12, s 82, s 97, s 98, s 99, s 102, s 103, s 115A, s 162B
*Mining Regulations 1981* (WA), r 31, r 32, r 54, r 58A, r 96C, r 137, r 140, r 141, r 144, r 145, r 146, r 147, r 148, r 165
*Rules of the Supreme Court 1971* (WA), O 18 r 6, O 56 r 2

*Result:*

Applications dismissed

*Category:* B

**Representation:**

*Counsel:*

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| Applicants | : | Mr A Papamatheos |
| First Respondent | : | No appearance |
| Second Respondent | : | No appearance |
| Third Respondent | : | No appearance |
| Fourth Respondent | : | Mr S K Dharmananda SC & Ms L A Shave |
| Fifth Respondent | : | No appearance |
| Intervener | : | Mr A Shuy |

*Solicitors:*

| | | |
|---|---|---|
| Applicants | : | Lawton Lawyers |
| First Respondent | : | No appearance |
| Second Respondent | : | No appearance |
| Third Respondent | : | No appearance |
| Fourth Respondent | : | Gilbert + Tobin |
| Fifth Respondent | : | No appearance |
| Intervener | : | State Solicitor for Western Australia |

**Cases referred to in judgment:**

Abraham v Hon Peter Charles Collier MLC, Minister for Aboriginal Affairs [2016] WASC 269

Ainsworth v Criminal Justice Commission [1992] HCA 10; (1992) 175 CLR 564

Annetts v McCann [1990] HCA 57; (1990) 170 CLR 596

Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd [1998] HCA 49; (1998) 194 CLR 247

Brewer v O'Sullivan [2016] WASC 275

Cambridge Credit Corp Ltd v Parkes Developments Pty Ltd [1974] 2 NSWLR 590

Carltona Ltd v Commissioner of Works [1943] 2 All ER 560

CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384

Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 322; (1993) 43 FCR 280

Commonwealth v Baume [1905] HCA 11; (1905) 2 CLR 405

Courtney v Peters [1990] FCA 526; (1990) 27 FCR 404

Craig v The State of South Australia [1995] HCA 58; (1995) 184 CLR 163

Darling Casino Ltd v New South Wales Casino Control Authority [1997] HCA 11; (1997) 191 CLR 602

Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503

Homestyle Pty Ltd v City of Belmont [1999] WASCA 59

J v Lieschke [1987] HCA 4; (1987) 162 CLR 447

John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd [2010] HCA 19; (2010) 241 CLR 1

Johns v Australian Securities Commission [1993] HCA 56; (1993) 178 CLR 408

Kioa v West [1985] HCA 81; (1985) 159 CLR 550

Kirk v Industrial Relations Commission (NSW) [2010] HCA 1; (2010) 239 CLR 531

Minister for Immigration and Border Protection v SZSSJ [2016] HCA 29; (2016) 90 ALJR 901

Nashua Australia Pty Ltd v Channon (1981) 36 ALR 215

News Ltd v Australian Rugby Football League Ltd [1996] FCA 370; (1996) 64 FCR 410

Owendale Pty Ltd v Anthony [1967] HCA 52; (1967) 117 CLR 539

Pegang Mining Co Ltd v Choong Sam (1969) 2 MLJ 52

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31; (2012) 246 CLR 636

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

QGC Pty Ltd v Bygrave [2011] FCA 1175

R v Anderson; Ex parte Ipec-Air Pty Ltd [1965] HCA 27; (1965) 113 CLR 177

Re Calder; Ex parte St Barbara Mines Ltd [1999] WASCA 25

Re Heaney; Ex parte Tunza Holdings Pty Ltd (1997) 18 WAR 420

Re Leszek Wladyslaw Srokowski v Minister for Immigration, Local Government and Ethic Affairs [1988] FCA 216

Re Reference under Ombudsman Act; Ex parte Director-General of Social Services (1979) 2 ALD 86

Re Warden Calder; Ex parte Lee [2007] WASCA 161; (2007) 34 WAR 289

SAAP v Minister for Immigration, Multiculturalism and Indigenous Affairs [2005] HCA 24; (2005) 228 CLR 294

Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 241 CLR 252

Saraceni v Australian Securities and Investments Commission [2013] FCAFC 42; (2013) 211 FCR 298
Strickland v Native Title Registrar [1999] FCA 1089
Thiess v Collector of Customs [2014] HCA 12; (2014) 250 CLR 664
Tiao v Lai [No 2] [2010] WASCA 189
Vandervell Trustees Ltd v White [1971] AC 912
Walsh v Motor Fuel Licensing Board (1991) 25 ALD 737
Wei v Minister for Immigration and Border Protection [2015] HCA 51; (2015) 257 CLR 22
XCIV v Australian Crime Commission [2015] FCA 586; (2015) 234 FCR 274
XX v Australian Crime Commission [2014] FCA 177; (2014) 321 ALR 575

**Table of Contents**

1 **PRITCHARD J**: Siberia Mining Corporation Pty Ltd holds three mining leases in the Broad Arrow Mineral Field, namely leases M24/846, M24/847 and M24/848 (the Mining Leases). Each of the Mining Leases, together with a large number of other tenements, form part of a 'combined reporting group' (number 83/2008) for the purposes of s 115A of the *Mining Act 1978* (WA) (the Act).

2 On 15 June 2015, the Applicants applied for the forfeiture of each of the Mining Leases (Forfeiture Applications).

3 By letter dated 30 June 2015 (which was received on 10 July 2015), Siberia Mining applied for certificates of exemption, pursuant to s 102 of the Act, in respect of leases M24/846 and M24/848 (Exemption Applications). (As I explain below, it had also applied for an exemption certificate in respect of lease M24/847 but that application and its outcome are not the subject of the application for judicial review.) On the same date, Siberia Mining also applied for extensions of time to lodge the Exemption Applications (Extension Applications).

4 On 14 July 2015, the First Respondent (Warden) granted the Extension Applications (the Warden's Decision[1]).

5 On 10 March 2016, Ms Pintabona, in her capacity as the delegate of the Minister for Mines (Delegate), determined to grant the Exemption Applications (the Delegate's Decision[2]).

6 The Applicants have applied for judicial review of the Warden's Decision and of the Delegate's Decision. The Applicants say that both Decisions were vitiated by jurisdictional errors and that a writ of certiorari should be granted to quash them, or alternatively that the Court should declare that each Decision was invalidly made.

7 It appears that in seeking to quash the Warden's Decision and the Delegate's Decision, the Applicants' objective is to secure the opportunity to object to the grant of exemption certificates in respect of leases M24/846 and M24/848, to persuade the Warden to recommend the

[1] Strictly speaking, it appears that the Mining Warden made two decisions on 14 July 2015: the grant of an extension of time to lodge an application for an exemption certificate in respect of mining lease M24/846 and in respect of mining lease M24/848. However, for the sake of convenience, and to reflect the parties' use of terminology, I will refer to those decisions collectively as the Warden's Decision.

[2] Ms Pintabona in fact made two decisions: to grant an exemption certificate in respect of mining lease M24/846 and to grant an exemption certificate in respect of mining lease M24/848. Again, however, for the sake of convenience, and to reflect the parties' use of terminology, I will refer to those decisions collectively as the Delegate's Decision.

forfeiture of the Mining Leases, and ultimately to secure the grant of those Leases themselves.[3]

8 For the reasons which follow, the application for judicial review should be dismissed because neither the Warden's Decision nor the Delegate's Decision was vitiated by jurisdictional error. I also set out below my reasons for deciding (as I did in the course of the hearing) that the Delegate be joined as the Fifth Respondent to the judicial review application.

9 In these reasons for decision I deal with the following matters:

1. The legislative and factual background to the Warden's Decision and the Delegate's Decision;

2. The Warden's Decision and the Delegate's Decision;

3. Whether the Applicants require leave to bring the application for judicial review in respect of the Warden's Decision out of time;

4. Why Ms Pintabona, in her capacity as the Delegate, should be joined as the Fifth Respondent;

5. The grounds of judicial review;

6. Grounds 1 and 2: Whether the Mining Warden or the Delegate failed to afford procedural fairness to the Applicants, by failing to notify the Applicants of the Extension Applications or the Exemption Applications respectively; and

7. Ground 3: Whether the Delegate made a jurisdictional error in determining to grant exemption certificates in respect of leases M24/846 and M24/848.

## 1. The legislative and factual background to the Warden's Decision and the Delegate's Decision

10 In this section of my reasons I deal with the following:

(a) The parties to the judicial review application, and their participation in the hearing;

(b) The affidavit evidence and objections to the affidavit evidence; and

[3] ts 67.

(c) The legislative framework for, and the factual background to, the Exemption Applications, the Forfeiture Applications and the Extension Applications.

## (a) The parties to the judicial review application, and their participation in the hearing

11 The Mining Warden, the Minister for Mines and Petroleum, the Mining Registrar for the Broad Arrow Mineral Field and Siberia Mining were all initially named as parties to the judicial review application. The Mining Warden, the Minister and the Mining Registrar filed Notices of Intention to Abide by the decision of the Court. Siberia Mining appeared and was represented by counsel.

12 After the Applicants filed the judicial review application, it became apparent that the decision to grant the exemption certificates in respect of mining leases M24/846 and M24/848 was in fact made by the Delegate. In the course of the hearing of the judicial review application, I decided that Ms Pintabona, in her capacity as the Delegate, should be joined as a party to the application. I set out the reasons for that decision below.

13 On 19 July 2016, I granted an application by the Attorney General for Western Australia to intervene in the judicial review application. My reasons for that decision are published as ***Brewer v O'Sullivan***.[4] Counsel for the Attorney General appeared at the hearing, and made helpful submissions, especially in respect of the legislative history and purpose of the provisions of the Act which deal with expenditure conditions on mining tenements, and exemptions from those conditions.

## (b) The affidavit evidence and objections to the affidavit evidence

14 A number of affidavits were read without objection: the affidavits of Gary Hamilton Lawton sworn 25 May 2016 and 27 June 2016, the affidavits of Timothy Paul O'Leary affirmed 29 July 2016 and 3 October 2016, and the affidavit of Angela Pintabona sworn 19 August 2016. Each of the Applicants also swore an affidavit in support of the application for judicial review, namely the affidavit of Glenn Alan Haythornthwaite sworn 18 October 2016 and the affidavit of Gerard Victor Brewer sworn 18 October 2016.

15 The factual background to the Exemption Applications, the Forfeiture Applications and the Extension Applications, which was largely undisputed, is drawn from these affidavits.

[4] ***Brewer v O'Sullivan*** [2016] WASC 275.

16 The Applicants also sought to rely on the affidavits of Shannon Terrence McMahon affirmed 18 October 2016, the affidavit of Ross William Collins sworn 19 October 2016, the affidavit of Christopher Clegg sworn 2 September 2016, and the affidavit of Anthony Thomas Bullen sworn 20 October 2016 (the challenged affidavits). Siberia Mining objected to the Applicants' reliance on these affidavits on a variety of bases. In the course of the hearing, I determined that Mr Clegg's affidavit (apart from two paragraphs) was admissible and indicated that I would rule on the admissibility of the other challenged affidavits in these reasons. I do so below at [123] - [125].

17 The challenged affidavits addressed the only factual issue that was in contention between the Applicants and Siberia Mining, namely the question whether, at the date of the Warden's Decision, there was a practice within the Department of notifying an applicant for the forfeiture of a mining lease of the subsequent lodgement of an exemption application in respect of that lease (the notification practice). I deal with that issue separately below at [116] - [133].

## (c) The legislative framework for, and the factual background to, the Exemption Applications, the Forfeiture Applications and the Extension Applications

18 Before turning to the facts relevant to the grounds of review, it is convenient to briefly set out an overview of some of the conditions to which mining leases are deemed to be subject, and which were of significance in this case.

### *(i) Conditions on mining leases - Form 5 operations reports and minimum expenditure*

19 All mining leases are deemed to be subject to a number of conditions. One of those conditions is that the lessee will lodge such periodical reports and returns as may be required.[5] One of the periodical reports which the holder of a mining lease is required to file is a report in the form prescribed in Form 5 under the Regulations (Form 5 operations report),[6] in which the lessee is required to set out expenditure on activities on the tenement. The Form 5 operations reports are discussed further below at [167] - [174]. In addition, the holder of a mining tenement may also be required to file a mineral exploration report, in conjunction with a Form 5 operations report, in the circumstances set out

[5] *Mining Act 1978* (WA) s 82(1)(e).
[6] *Mining Regulations 1981* (WA) r 32(1).

in guidelines published under the Regulations (guidelines), or whenever required by the Minister.[7] Mineral exploration reports are also discussed further below at [156].

20 Every mining lease is also deemed to be granted subject to a condition that the lessee will 'comply with the prescribed expenditure conditions applicable to such land unless partial or total exemption therefrom is granted in such manner as is prescribed'.[8] The term 'expenditure conditions' in relation to a mining tenement (which includes a mining lease[9]) 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'.[10]

### *(ii) The Form 5 operations reports lodged by Siberia Mining for the 2015 year*

21 On 22 May 2015, Siberia Mining lodged Form 5 operations reports for the Mining Leases with the Department of Mines and Petroleum (the Department).[11]

22 In respect of M24/846, the operations report[12] indicated that total expenditure on the tenement over the reporting period (25 March 2014 to 24 March 2015) was $63,736, and that there was no expenditure for 'Mining Activities'. That total included the sum of $33,898 for 'Mining - Exploration Activities', and also included other expenditure for 'Annual Tenement Rent and Rates' and for 'Administration / Overheads'. According to the Register of particulars relating to mining tenements and applications for mining tenements in Western Australia (the Register), the minimum expenditure commitment condition which applied to M24/846 for the 2015 year was $60,700.[13]

23 In respect of M24/848, the operations report[14] indicated that the total expenditure over the reporting period (25 March 2014 to 24 March 2015) was $84,252, and that there was no expenditure for 'Mining Activities'. That total was the sum of expenditure of $45,487 for

[7] *Mining Act 1978* (WA) s 115A(2).
[8] *Mining Act 1978* (WA) s 82(1)(c).
[9] See the definition of mining tenement in *Mining Act 1978* (WA) s 8.
[10] *Mining Act 1978* (WA) s 8.
[11] Affidavit of Garry Hamilton Lawton sworn 25 May 2016 (First Lawton Affidavit) [6] - [8]; GHL4, GHL5, GHL6.
[12] First Lawton Affidavit GHL4.
[13] First Lawton Affidavit GHL1.
[14] First Lawton Affidavit GHL5.

'Mining - Exploration Activities', and included expenditure for 'Annual Tenement Rent and Rates' and for 'Administration / Overheads'. According to the Register, the minimum expenditure commitment condition which applied to M24/848 for the 2015 year was $78,900.[15]

24 In respect of M24/847, the operations report[16] indicated that total expenditure over the reporting period (25 March 2014 to 24 March 2015) was $49,908, and that there was no expenditure for 'Mining Activities'. That total included expenditure of $10,015 for 'Mining - Exploration Activities', and also included expenditure for 'Annual Tenement Rent and Rates' and for 'Administration / Overheads'. According to the Register, the minimum expenditure commitment condition which applied to M24/847 for the 2015 year was $81,200.[17]

25 Siberia Mining's position was, and remains, that it met its minimum expenditure commitment condition for the 2015 year in respect of M24/846 and M24/848, but not in respect of M24/847.[18]

### *(iii) Exemptions from expenditure conditions*

26 The holder of a tenement may apply[19] for an exemption from the expenditure conditions applicable to the tenement. The exemption is granted in the form of a certificate of exemption.[20] An exemption certificate for a mining lease may totally or partially exempt the mining lease from the prescribed expenditure conditions which apply to it, in an amount not exceeding the amount required to be expended in a period of five years.[21] The effect of the grant of an exemption certificate is that the holder of the mining tenement in question is deemed to be relieved, to the extent, and subject to the conditions specified in the certificate, from his obligations under the prescribed expenditure conditions relating to the mining tenement.[22]

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[15] First Lawton Affidavit GHL3.
[16] First Lawton Affidavit GHL6.
[17] First Lawton Affidavit GHL2.
[18] Supplementary Affidavit of Garry Hamilton Lawton sworn 27 June 2017 (Supplementary Lawton Affidavit) GHL38, GHL39 and GHL40.
[19] An application for an exemption must be made in the form of Form 18, which is prescribed in the Regulations: see *Mining Regulations 1981* (WA) r 54(1).
[20] *Mining Act 1978* (WA) s 102(1). The prescribed form is Form 18 in the Regulations.
[21] *Mining Act 1978* (WA) s 102(1)(b).
[22] *Mining Act 1978* (WA) s 103.

27 An application for an exemption certificate must be made within a prescribed time period.[23] Within 28 days after the application for exemption is lodged the applicant must lodge a statutory declaration setting out its reasons for seeking the exemption.[24]

28 After an application for an exemption is lodged, the mining registrar is required to post a copy of that application on the notice board at his office.[25]

29 Any person may object to an exemption application. An objection must be lodged within 35 days after the exemption application is lodged.[26]

30 An application for an exemption is ordinarily required to be forwarded to the Minister for determination by the Minister. However, in the event that an objection to the application is lodged, the application for the exemption must be heard by the mining warden.[27] After the hearing of the application, the mining warden is required to transmit to the Minister his recommendation as to whether the application for an exemption should be granted or refused, together with his reasons for that recommendation, and supporting documentation.[28]

31 The Minister may grant a certificate of exemption if the warden finds that the reasons given by the holder of the mining lease are sufficient to justify the grant of the exemption certificate, or if the Minister is so satisfied.[29] A variety of reasons for which a certificate of exemption may be granted are set out in s 102(2) and s 102(3) of the Act.

### *(iv) Siberia Mining's application for an exemption certificate in respect of lease M24/847*

32 On 22 May 2015, Siberia Mining lodged an application for an exemption certificate with respect to M24/847[30] (the M24/847 exemption application). It sought that exemption certificate pursuant to s 102(2)(h) of the Act. It is not necessary to say more about the precise details of that application, although the basis for it overlaps with the Exemption Applications which were the subject of the Delegate's Decision.

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[23] The exemption application must be made prior to the end of the year to which the proposed exemption relates, or (subject to an extension, granted under s 162B of the Act), within the prescribed period (of 60 days, under r 54(1a)) after the end of that year: see s 102(1) of the *Mining Act 1978* (WA).
[24] *Mining Regulations 1981* (WA) r 54(3).
[25] *Mining Regulations 1981* (WA) r 54(1b).
[26] *Mining Regulations 1981* (WA) r 146(2)(b).
[27] *Mining Act 1978* (WA) s 102(5).
[28] *Mining Act 1978* (WA) s 102(6).
[29] *Mining act 1978* (WA) s 102(7).
[30] First Lawton Affidavit [9]; GHL7, 41 - 42.

### *(v) The Forfeiture Applications*

*The legislative basis for a forfeiture application under the Act*

33 Another of the conditions to which every mining lease is deemed to be subject is that the lessee will be liable to have the lease forfeited if they are in breach of any of the covenants or conditions of the lease.[31]

34 Non-compliance with minimum expenditure conditions may result in the forfeiture of a mining lease. Any person may apply for the forfeiture of the mining lease on that basis.[32] An application for forfeiture of that kind is heard by the mining warden.[33]

35 The applicant for forfeiture must serve the application after it is lodged.[34] If the lessee intends to dispute the application for forfeiture, the lessee must lodge a response, and serve that on the applicant for forfeiture.[35] Particulars of an application or response are also required[36] and an applicant for forfeiture may be required to provide documents in support of the application.[37]

36 If the mining warden finds that a lessee of a mining lease has failed to comply with the requirements of the Act in respect of the expenditure conditions, the warden may recommend the forfeiture of the lease, or may impose a penalty as an alternative, or may dismiss the application for forfeiture.[38] A recommendation that the lease be forfeited shall not be made unless the warden is satisfied that the non-compliance is, in the circumstances, of sufficient gravity to justify the forfeiture.[39] If the warden recommends the forfeiture of the lease, that recommendation must be forwarded to the Minister with any notes of evidence, and a report from the warden.[40]

37 Upon receipt of the warden's recommendation, the Minister may, if he or she thinks fit, declare the lease forfeited or impose a penalty or

[31] *Mining Act 1978* (WA) s 82(1)(g).
[32] *Mining Act 1978* (WA) s 98(1).
[33] *Mining Act 1978* (WA) s 98(3).
[34] *Mining Regulations 1981* (WA) r 140(3).
[35] *Mining Regulations 1981* (WA) r 141.
[36] *Mining Regulations 1981* (WA) r 144.
[37] *Mining Regulations 1981* (WA) r 145.
[38] *Mining Act 1978* (WA) s 98(4A).
[39] *Mining Act 1978* (WA) s 98(5).
[40] *Mining Act 1978* (WA) s 98(6).

decide to take no action.[41] Alternatively, the Minister may require the warden to take further evidence or rehear the application.[42]

38 If an applicant for forfeiture does not proceed with that application, the warden may award the lessee costs and expenses.[43] Parties to proceedings before the warden may also be ordered to pay costs in certain circumstances.[44]

*The Forfeiture Applications made by the Applicants*

39 On 15 June 2015, the Applicants lodged the Forfeiture Applications in respect of each of the Mining Leases.[45]

40 Siberia Mining filed and served its responses to the Forfeiture Applications on 3 July 2015.[46] In its responses, Siberia Mining denied that it had failed to comply with the expenditure requirements for M24/846 and M24/848. In respect of M24/847 it acknowledged that the expenditure requirement had not been met, but indicated that it had lodged an application for an exemption certificate for that lease, and that if that exemption certificate was granted, the expenditure condition for that lease would be satisfied.

### *(vi) The Exemption Applications made by Siberia Mining*

41 The Exemption Applications in respect of M24/846 and M24/848 were dated 30 June 2015.[47] A variety of reasons under s 102 of the Act were relied upon in support of those applications.[48] Relevantly for present purposes, Siberia Mining relied upon s 102(2)(h) of the Act. Under s 102(2)(h), an exemption certificate may be granted in respect of a tenement in a combined reporting group if the aggregate *exploration* expenditure for the tenements in that group would have been such as to satisfy the expenditure requirement in question, had that aggregate *exploration* expenditure been apportioned between the combined reporting tenements. The term 'aggregate exploration expenditure' is defined in s 102(2a) of the Act and the manner for working out the aggregate exploration expenditure is set out in r 58A(2) of the

[41] *Mining Act 1978* (WA) s 99(1).
[42] *Mining Act 1978* (WA) s 98(6).
[43] *Mining Act 1978* (WA) s 98(8).
[44] *Mining Regulations 1981* (WA) r 165.
[45] First Lawton Affidavit [4]; GHL1, 13; GHL2; GHL3, 29.
[46] First Lawton Affidavit GHL8, 43 - 45.
[47] Affidavit of Angela Pintabona sworn 19 August 2016 (Pintabona Affidavit), AP1.
[48] The reasons included those set out in s 102(2)(b), (2)(e), (2)(f), (2)(h)(i), (2)(h)(ii) and s 102(3) of the *Mining Act 1978* (WA) (the Act).

Regulations. Those provisions are discussed in detail in the context of ground 3 of the grounds of review ([136] and following).

42 Initially, it was far from clear why Siberia Mining sought exemption certificates for M24/846 and M24/848 when it was clearly of the view that the minimum expenditure commitment condition for each of those leases was satisfied. However, at the hearing, counsel for Siberia Mining submitted that the exemption certificates for those leases were sought 'as a safeguard', apparently to protect Siberia Mining's position in the event that it had erred in its calculation that it had exceeded the minimum expenditure condition applicable to each of those leases.[49] That Siberia Mining made the Exemption Applications in those circumstances is perhaps not entirely surprising in view of the fact that the Applicants had made the Forfeiture Applications in respect of all of the Mining Leases.

43 Broadly speaking, Siberia Mining's view that it had exceeded its minimum expenditure commitment for M24/846 and M24/848 was based on the fact that it had not expended any funds on mining on those tenements, but had expended funds on and in connection with exploration, and that it was entitled to rely upon the total of that expenditure to satisfy its minimum expenditure commitment. If, on the other hand, Siberia Mining was only entitled to rely on funds actually expended on exploration activities, in satisfaction of its minimum expenditure commitment, then an issue would arise as to whether it had met its minimum expenditure commitments condition for the 2015 year.

44 The time for making an objection to the Exemption Applications expired on 19 August 2015. No objection was made by the Applicants to the Exemption Applications. Their case is that they were not aware of the Exemption Applications until after the Delegate's Decision was made.

### *(vii) The Extension Applications*

45 At the same time as it lodged the Exemption Applications, Siberia Mining made the Extension Applications.[50] The Extension Applications were applications for an extension of time in which to lodge the Exemption Applications. The Extension Applications appear to have been made under s 162B(1) of the Act. Under that section, the Minister or a warden has the power to extend the time for doing any thing which the Act provides to be done within a prescribed period or prescribed time.

[49] ts 114.
[50] Pintabona Affidavit AP1.

46 Siberia Mining needed an extension of time in which to lodge the Exemption Applications because they were not lodged within the prescribed time for doing so. The basis on which each of the Extension Applications was sought was set out in a letter from a tenement administration officer, acting on behalf of Siberia Mining, to the Mineral Titles section of the Department.[51] A copy of that letter, which contained the Extension Applications, was in evidence. In that letter, the tenement officer stated:

> On 22 May 2015, Siberia Mining … lodged its Form 5 Operations Reports for [M24/846 and M24/848] for the expenditure year that ended on 24 March 2015.
>
> On lodgement of the Form 5s, Siberia Mining considered that it had good grounds for exemption from the expenditure conditions for the Mining Leases, but did not, at that time, lodge applications for exemption, given the expenditure recorded on the Form 5s exceeded the minimum expenditure requirements. Siberia Mining now seeks to apply for exemption from the expenditure conditions … and respectfully requests an extension of time under section 162B of the [Act] in order to do so. I enclose Siberia Mining's Form 18 applications for exemption in respect of each of the Mining Leases.
>
> The applications for exemption are made 46 days outside of the statutory period, and no third parties will be prejudiced by the grant of the extension of time. On that basis, Siberia Mining submits that the extension sought is not unreasonable, and requests that the Minister exercises his discretion to grant the extension of time.

## 2. The Warden's Decision and the Delegate's Decision

### The Warden's Decision

47 The Extension Applications requested that the Minister extend the time for lodging the Exemption Applications. However, it appears that the decision to extend the time was in fact made by the Warden.[52]

48 The Register indicates that the Warden's Decision was made on 14 July 2015.[53] There was no written record of the Warden's Decision in evidence and there was no evidence as to the basis for the Warden's Decision.

[51] Pintabona Affidavit AP1.
[52] First Lawton Affidavit [15].
[53] First Lawton Affidavit [14].

## The Delegate's Decision

49 The Delegate's Decision was made on 10 March 2016.[54] The Delegate granted exemption certificates to Siberia Mining in respect of M24/846 and M24/848. In respect of M24/846, the exemption certificate provided that the exemption had been granted under s 102(2)(h) of the Act in the amount of $60,700 for the year ending 24 March 2015. In respect of M24/848, the exemption certificate provided that the exemption had been granted under s 102(2)(h) of the Act in the amount of $78,900 for the year ending 24 March 2015.[55]

50 Annexed to the Delegate's affidavit was a copy of the Delegate's Decision in respect of each of the Exemption Applications. The Delegate's Decision indicated that the Exemption Application in each case was granted under s 102 of the Act.[56] The Delegate's Decision indicated that the Delegate's 'Reason for Determination' was: [57]

> 102(2)(h) - 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
>
> - 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.

51 What was not clear on the face of the exemption certificates or the Delegate's Decision was how the Delegate reached her Decision. On 19 July 2016, I ordered that the Minister provide an affidavit from the Delegate setting out her decision-making process.[58] That order was not intended to require the Delegate to provide her reasons, because this Court does not have the power to require a decision-maker to provide reasons for a decision which is under challenge in a judicial review application.[59] It was, however, intended that the Delegate's affidavit would make clear how it was that she approached the decision, and the materials upon which she relied.

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[54] First Lawton Affidavit: GHL17, 73 - 74.
[55] First Lawton Affidavit GHL17, 73-74.
[56] Pintabona Affidavit AP5.
[57] Pintabona Affidavit AP5.
[58] ***Brewer v O'Sullivan*** [2016] WASC 275.
[59] Cf *State Administrative Tribunal Act 2004* (WA) s 22.

52 The basis for the Delegate's Decision is discussed in further detail below at [140] - [144].

53 Checklists completed by the Delegate in dealing with the Exemption Applications indicate that she was aware that M24/846 and M24/848 were the subject of the Forfeiture Applications, and that she was aware that no objections to the Exemption Applications had been made.[60]

## 3. Whether the Applicants require leave to bring the application for judicial review in respect of the Warden's Decision out of time

54 The Applicants filed this application for judicial review on 25 May 2016.

55 Initially the Applicants sought leave to bring the application for judicial review in respect of the Warden's Decision, because the application was filed more than six months after the Warden's Decision. (In so far as it pertained to the Delegate's Decision, the application for judicial review was made within time.) In the course of the hearing,[61] however, counsel for the Applicants made clear that the extension of time was only sought to the extent it was actually necessary, and that in fact the Applicants did not consider that it was necessary, because the application for judicial review was made within six months of the date on which the Applicants became aware of the Warden's Decision.

56 For the reasons which follow, the Applicants do not require leave to bring the application for judicial review in respect of the Warden's Decision.

57 Order 56 r 2(4) provides that if an application for judicial review is made outside the 'limitation period', the applicant must make an application for leave to proceed with the application, supported by an affidavit. In relation to a decision which is the subject of an application for judicial review, the term 'limitation period' means six months after the later of the date of the decision, or the date on which the applicant became aware of the decision.

58 Regrettably, it is not entirely clear, on the evidence, precisely when the Applicants became aware of the Warden's Decision. The Applicants' solicitor, Mr Lawton, deposed that neither he nor the Applicants received notice of the Extension Applications before they were granted by the

[60] Pintabona Affidavit AP5.
[61] ts 37.

Mining Warden.[62] Mr Lawton also deposed that he and the Applicants were unaware of the Exemption Applications prior to his receipt of a letter dated 23 March 2016 from Siberia Mining's solicitors.[63] In that letter, the solicitors advised Mr Lawton of the Delegate's Decision, and invited the Applicants to agree to the dismissal of the Forfeiture Applications, and to agree to withdraw their objections to the M24/847 exemption application.[64] The Applicants themselves confirmed that they were unaware of the existence of the Exemption Applications until after their solicitors provided them with a copy of that letter.[65]

59 There was also evidence that the Forfeiture Applications, and the M24/847 exemption application, were listed for mentions before a Mining Warden on various occasions between August 2015 and March 2016.[66] However, it appears that the existence of the other Exemption Applications was never discussed at those hearings.[67] Mr Lawton deposed that he had 'relied on [his] knowledge that Expenditure reports had been filed in respect of M24/846 and M24/848 claiming that full expenditure had been met and further the Responses which had been filed to the [Forfeiture Applications] which claimed that full expenditure had been made'.[68]

60 None of this evidence was challenged, and I accept it. However, none of that evidence indicated when the Applicants or their solicitor became aware of the Warden's Decision.

61 In my view, it can be inferred that the receipt of the letter dated 23 March 2016 from Siberia Mining's solicitors prompted the Applicants' solicitor to make enquiries about how the Exemption Applications came to be granted, and that in the course of doing so, he became aware of the Warden's Decision.

62 I am, therefore, satisfied that the Applicants became aware of the Extension Applications, and of the Warden's Decision, shortly after 23 March 2016 (when their solicitor became aware). Accordingly, in my view, the application for judicial review, in so far as it pertained to the Warden's Decision, was made within six months of the date on which the Applicants became aware of the Warden's Decision.

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[62] First Lawton Affidavit [15], [17].
[63] First Lawton Affidavit [34].
[64] First Lawton Affidavit [33]; GHL17, 72.
[65] Affidavit of Gerard Victor Brewer sworn 11 October 2016 (Brewer Supplementary Affidavit) [4]; Affidavit of Glenn Alan Haythornthwaite sworn 18 October 2016 (Haythornthwaite Supplementary Affidavit) [4].
[66] First Lawton Affidavit.
[67] First Lawton Affidavit [32].
[68] First Lawton Affidavit [34].

63 In any event, I would have granted leave to the Applicants to proceed outside the limitation period in Order 56 of the *Rules of the Supreme Court 1971* (WA) (RSC), , given the overlap between the factual foundation for the Applicants' challenge to the Warden's decision and the Delegate's Decision.

64 For the avoidance of any doubt, my conclusion that the Applicants became aware of the Extension Applications, and of the Warden's Decision, shortly after 23 March 2016 is not intended to suggest that it would not have been possible for the Applicants to have discovered the existence of the Extension Applications and the Exemption Applications, or the Warden's Decision, prior to 23 March 2016. The evidence clearly established that that information was available and could readily have been found by the Applicants, had they sought it out. Exemption applications are posted on the notice board of the relevant office of the Mining Registrar.[69] In addition, the fact that the Extension Applications and the Exemption Applications had been made was ascertainable by a search of the Register. Extracts from the Register annexed to Mr Lawton's affidavit show that the Extension Applications and the Exemption Applications were made on 10 July 2015, and that the Warden's Decision was made on 14 July 2015.[70] Further, the Register also indicates that exemption certificates were granted on 10 March 2016 in respect of M24/846 and M24/848 for the 2015 year.[71] Mr O'Leary deposed that the Register is able to be searched online, without incurring any fee, and that he has done so in the past in order to obtain access to the information in the Register.[72]

## 4. Why Ms Pintabona, in her capacity as the Delegate, should be joined as the Fifth Respondent

65 The Delegate deposed that she dealt with the Exemption Applications in her capacity as the delegate of the Minister responsible for tenements located in the Broad Arrow Mineral Field.[73] While the Delegate did not annexe a copy of a written delegation from the Minister, it was uncontentious that the Delegate was delegated power under s 12 of the Act, pursuant to a written instrument of delegation from the Minister.[74]

[69] Affidavits of Timothy Paul O'Leary affirmed 29 July 2016 (First O'Leary Affidavit) [8].
[70] First Lawton Affidavit [12] - [14].
[71] First Lawton Affidavit GHL1, GHL3.
[72] Affidavit of Timothy Paul O'Leary affirmed 3 October 2016 (Supplementary O'Leary Affidavit) [7] - [8].
[73] Pintabona Affidavit [6] - [8].
[74] ts 33.

66 The Applicants proposed that the Delegate be joined as a party to the application for judicial review. Siberia Mining did not oppose the Delegate's joinder but took the view that her joinder was unnecessary. The Delegate's position was that she consented to being joined as a party if the Court determined that it was appropriate that she be joined, and if joined as a party, she intended to abide the decision of the Court. All of the parties agreed that it was appropriate for the Minister (the Second Respondent) to remain a party, so that the Minister would be bound by any orders made by the Court.

67 Counsel for both the Minister and the Delegate advanced a variety of reasons why it was not necessary or desirable to join the Delegate as a party. These were that the Delegate's rights or liabilities would not be affected by the decision of the Court; that by the time of the hearing the Delegate was no longer the delegate of the Minister, so that if her decision were to be quashed, and the Exemption Applications had to be re-determined, she would not be the decision-maker in respect of those applications, and in that event, it would suffice that the Minister is a party; that there is a considerable body of case law in which delegates have not been joined as parties to applications for judicial review of their decisions, but, where the delegator of the power has been joined as a party; that there is authority that it is not necessary to join a delegate as a respondent in judicial review proceedings in some situations (for example, if the delegate has offered an undertaking to abide by, and implement, the orders of the court); and that the Delegate had no separate or independent interest to that of the Second Respondent.

68 Having reflected on those submissions, in the end I was unable to agree that the Delegate's joinder was unnecessary or inappropriate. Consequently, at the hearing, I made an order that Ms Pintabona, as the delegate of the Minister, pursuant to s 12 of the Act, be joined as the Fifth Respondent. I indicated that I would give my reasons for making that order in the course of these written reasons. My reasons for that decision were as follows.

69 Order 18 r 6(2)(b) RSC provides that at any stage of the proceedings, the Court may, of its own motion or on application, order that any person who ought to have been joined as a party, or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, be added as a party. The rule serves a number of purposes. One is to ensure that any person may be joined whose presence is necessary to ensure that all the questions between the original parties are effectually

and completely disposed of.[75] Another purpose of the rule is to enable the Court to prevent injustice if a person whose rights will be affected by its judgment would otherwise be denied the opportunity of being heard in the proceedings.[76] A further purpose is to ensure that any person whose rights and liabilities are liable to be directly affected by any order in the proceedings[77] is bound by the orders made in the proceedings. If the Court makes an order affecting a person who should have been joined, that person will be entitled to have the order set aside.[78]

70 In the context of an application for judicial review, the language of 'rights and liabilities' does not aptly reflect the 'interest' of the decision-maker in the decision under review. However, there is authority for the proposition that a person may be added as a defendant if the validity of their conduct is in issue between existing parties.[79] In some cases, it may be important that the decision-maker is named as a party in order to establish the Court's jurisdiction to deal with the matter.[80]

71 Given that Ms Pintabona made the Delegate's Decision in her capacity as the Minister's delegate, she ought to have been joined as a party. As a general rule, where an applicant for judicial review seeks a writ of certiorari to quash a decision, the decision-maker is a proper party and ought be joined, and it is not adequate simply to join an appropriate contradictor.[81] Where the decision-maker nominated by the statute delegates his or her statutory power to another person, it is the delegate him or herself who is the decision-maker,[82] and a delegate exercises the delegated statutory power in his or her own name.[83] Unless the statute expressly reserves a power of dictation to the delegator,[84] a delegate will

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[75] ***Vandervell Trustees Ltd v White*** [1971] AC 912, 936.
[76] ***Homestyle Pty Ltd v City of Belmont*** [1999] WASCA 59 [30] (Templeman J, Malcolm CJ & Owen J agreeing) citing ***Pegang Mining Co Ltd v Choong Sam*** (1969) 2 MLJ 52, 55 - 56 (Lord Diplock).
[77] See, for example, ***News Ltd v Australian Rugby Football League Ltd*** [1996] FCA 370; (1996) 64 FCR 410, 524, 525; ***Homestyle Pty Ltd v City of Belmont*** [1999] WASCA 59 [30] - [31] (Templeman J, Malcolm CJ & Owen J agreeing); ***Tiao v Lai [No 2]*** [2010] WASCA 189 [109] - [111] (Buss JA, Owen & Murphy JJA agreeing).
[78] ***John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*** [2010] HCA 19; (2010) 241 CLR 1 [137]; ***Tiao v Lai [No 2]*** [2010] WASCA 189 [116] (Buss JA, Owen & Murphy JJA agreeing).
[79] ***Cambridge Credit Corp Ltd v Parkes Developments Pty Ltd*** [1974] 2 NSWLR 590, 605 (Hope JA), 615 (Hutley JA), 616 (Glass JA).
[80] ***SAAP v Minister for Immigration, Multiculturalism and Indigenous Affairs*** [2005] HCA 24; (2005) 228 CLR 294 [43] (McHugh J), [91] (Gummow J, Kirby & Hayne JJ agreeing at [153], [180]).
[81] Cf ***SAAP v Minister for Immigration, Multiculturalism and Indigenous Affairs*** [2005] HCA 24; (2005) 228 CLR 294 [43] (McHugh J), [91] (Gummow J, Kirby & Hayne JJ agreeing [153], [180]).
[82] ***Re Reference under Ombudsman Act; Ex parte Director-General of Social Services*** (1979) 2 ALD 86, 94 (Brennan J).
[83] ***Owendale Pty Ltd v Anthony*** [1967] HCA 52; (1967) 117 CLR 539, 562 (Windeyer J)), 611 (Owen J); ***Re Reference under Ombudsman Act; Ex parte Director-General of Social Services*** (1979) 2 ALD 86, 94 (Brennan J).
[84] See, for example, s 496(1A) of the *Migration Act 1958* (Cth).

commit a jurisdictional error if they act at the behest or dictation of the delegator.[85] Consequently, the decision of a delegate is not treated as an act vicariously done by the delegator, nor is the delegate an agent of the delegator, nor is the delegator simply exercising power as an alter ego,[86] or pursuant to an authorisation to act on behalf of the delegator, so that the exercise of power is to be treated as having been undertaken by the delegator. For that reason, it was not sufficient in this case that the Minister be a party to the application for judicial review.

72 Counsel for the Delegate submitted that there was authority which suggests that there may be instances where it is unnecessary to join a delegate. He relied, in particular, on the decision of Besanko J in ***XX v Australian Crime Commission***,[87] and on the decision of Wigney J in ***XCIV v Australian Crime Commission***.[88] Those were not cases about delegates. Nevertheless, those authorities were useful, because they addressed the question whether decision-makers themselves should ordinarily be joined as parties to judicial review proceedings, and they supported the conclusion I reached as to the Delegate's joinder.

73 In ***XX v Australian Crime Commission***, Besanko J considered an application to join the Board of the Australian Crime Commission, as a party to proceedings. The Board had granted authorisation to an examiner who then issued a summons to compel the applicant to attend for an examination under the *Australian Crime Commission Act 2002* (Cth). Both the validity of the summons, and the validity of the authorisation given by the Board to the examiner, were challenged in the proceedings. The Australian Crime Commission and the examiner had been named as parties to the proceedings, but not the Board itself. Besanko J held that, subject to other objections to joinder, the Board should be joined as its decision was said to be invalid.[89] In the end, however, his Honour concluded that as the Board was not a juristic entity it should not be joined, and instead he took the view that at least one of the members of the Board, named by his or her office as representing the members of the Board, should be joined.[90] (His Honour later made an order that the Chief

[85] ***R v Anderson; Ex parte Ipec-Air Pty Ltd*** [1965] HCA 27; (1965) 113 CLR 177, 201 - 202 (Menzies J), 203 - 204 (Windeyer J); ***Nashua Australia Pty Ltd v Channon*** (1981) 36 ALR 215, 230 - 231; ***Re Leszek Wladyslaw Srokowski v Minister for Immigration, Local Government and Ethic Affairs*** [1988] FCA 216 [5] - [7].
[86] Cf ***Carltona Ltd v Commissioner of Works*** [1943] 2 All ER 560.
[87] ***XX v Australian Crime Commission*** [2014] FCA 177; (2014) 321 ALR 575.
[88] ***XCIV v Australian Crime Commission*** [2015] FCA 586; (2015) 234 FCR 274.
[89] ***XX v Australian Crime Commission*** [2014] FCA 177; (2014) 321 ALR 575 [6] (Besanko J).
[90] ***XX v Australian Crime Commission*** [2014] FCA 177; (2014) 321 ALR 575 [20] (Besanko J).

Executive Officer of the Australian Crime Commission, representing the members of the Board, be joined as a respondent to the proceeding.[91])

74 In ***XCIV v Australian Crime Commission*** there was a similar challenge to a decision of the Board of the Australian Crime Commission. Wigney J observed that if the Board was not a juristic entity, the proper course would be to join the members of the Board, in that capacity, or an individual member of the Board, as a representative of the other members.[92] His Honour also observed, in obiter, that it may also be possible for the parties to reach agreement to join the Commonwealth in lieu of the members of the Board, but failing such agreement, there would appear to be no basis for the contention that the members of the Board would not be proper parties to such an application.[93] (His Honour appears to have had in mind the joinder of the Commonwealth as a representative defendant (representing the individual members of the Board). In any event, it is not necessary to explore that issue further because there was no agreement of that kind between the parties in this case.)

75 One of the reasons why joinder was resisted in ***XX v Australian Crime Commission*** was that the Australian Crime Commission had proffered an undertaking that it would abide by and implement any orders made by the Court. Justice Besanko did not consider that sufficient, as the undertaking was not given on behalf of the Board itself.[94] However, he did not dismiss outright the suggestion that such an undertaking would constitute a reason for refusing the joinder of the Board. It is unnecessary to decide whether such an undertaking would suffice here. Although the Delegate indicated that she would abide the decision of the Court, she did not proffer an undertaking to implement the decision of the Court (indeed, she could not have done so as she is no longer the delegate of the Minister).

76 Finally, counsel for the Delegate drew my attention to the existence of a number of judicial review cases, especially in migration matters, involving challenges to the decisions of decision-makers exercising statutory power delegated by a Minister, and in which the Minister was joined but the delegate was not.[95] It is fair to say that those cases suggest that in the judicial review context, a somewhat inconsistent approach has

[91] ***XX v Australian Crime Commission (No 2)*** [2015] FCA 23.
[92] ***XCIV v Australian Crime Commission*** [2015] FCA 586; (2015) 234 FCR 274 [51] (Wigney J).
[93] ***XCIV v Australian Crime Commission*** [2015] FCA 586; (2015) 234 FCR 274 [51] (Wigney J).
[94] ***XX v Australian Crime Commission*** [2014] FCA 177; (2014) 321 ALR 575 [7] (Besanko J).
[95] Counsel pointed to ***Wei v Minister for Immigration and Border Protection*** [2015] HCA 51; (2015) 257 CLR 22 and ***Saeed v Minister for Immigration and Citizenship*** [2010] HCA 23; (2010) 241 CLR 252.

been taken to the joinder of a delegate.[96] However, in none of those cases was argument or attention directed to the question whether the delegate ought to have been joined. Furthermore, counsel did not identify any authority to suggest that a delegate should not be joined as a party to an application for judicial review of the delegate's decision.

## 5. The grounds of judicial review

77 The grounds of the judicial review application are as follows:

> 1. The [Warden] made a jurisdictional error, or alternatively erred in law, or alternatively denied the applicants procedural fairness, in purporting to make [the Warden's Decision] that [Siberia Mining], as holder of mining leases 24/846 and 24/848, be granted extensions of time, under s 162B(1) of the *Mining Act 1978* (WA) and regulation 54(1a) of the *Mining Regulations 1981* (WA), to [the Exemption Applications] and failing to:
>
> (a) Ensure that notice of the [Extension Applications] had been provided to the applicants (being the applicants in [the Forfeiture Applications]);
>
> (b) Further and alternatively, afford an opportunity to be heard to the applicants as to the [Extension Applications].
>
> 2. The [Minister] made a jurisdictional error, or alternatively erred in law, or alternatively denied the applicants procedural fairness, in purporting to make a decision of 10 March 2016 that [Siberia Mining] as holder of mining leases 24/846 and 24/848, be granted exemption from expenditure conditions, pursuant to section 102 of the *Mining Act 1978* (WA), for the 2015 expenditure year for the mining leases and failing to:
>
> (a) Ensure that notice of the [Exemption Applications] had been provided to the applicants (being the applicants in the [Forfeiture Applications]);
>
> (b) Further and alternatively, afford an opportunity to be heard to the applicants as to the [Exemption Applications].
>
> 3. Further and in the alternative, the [Minister] made a jurisdictional error in considering the [Exemption Applications] by identifying a wrong issue, asking the wrong question, ignoring a relevant consideration or taking into account an irrelevant consideration, or, alternatively erred in law, by adding all expenditure reported on the operations reports for all tenements in the relevant combined

[96] Compare, for example, ***QGC Pty Ltd v Bygrave*** [2011] FCA 1175 (where the delegate of the Native Title Registrar was joined as a party) and ***Strickland v Native Title Registrar*** [1999] FCA 1089 (where the Registrar was joined, although the challenge was to the decision of the Registrar's delegate).

> reporting group when, under the *Mining Act 1978* (WA) section 102(2a)(b) and *Mining Regulations 1981* (WA) regulation 58A(2):
>
> (a) [the Minister] was only permitted to add together exploration expenditure shown in each relevant operations report for the tenements in the combined reporting group;
>
> (b) [the Minister] was not to include the amounts for rates, rents, administration and overheads in each operations report to ascertain the 'aggregate exploration expenditure'.

78 In so far as grounds 2 and 3 challenge the decisions of the Minister, those grounds must now be understood to challenge the Delegate's Decision.

79 Counsel for Siberia Mining submitted that if the Applicants were unsuccessful in respect of ground 3, then grounds 1 and 2 would be futile because the Applicants could not succeed in challenging the Delegate's Decision in any event, so that irrespective of the merits of those grounds, the Court would refuse relief in the exercise of its discretion.[97] The correctness of that submission was disputed by the Applicants. Despite the merit in the submission by counsel for Siberia Mining, in deference to the detailed submissions advanced in relation to grounds 1 and 2, it is appropriate to set out my views about those grounds.

80 I therefore turn to deal with grounds 1 and 2, which can conveniently be dealt with together.

## 6. Grounds 1 and 2: Whether the Mining Warden or the Delegate failed to afford procedural fairness to the Applicants, by failing to notify the Applicants of the Extension Applications or the Exemption Applications respectively

81 In this section of my reasons I deal with the following issues:

(a) Overview of the case advanced by the Applicants and by Siberia Mining in respect of grounds 1 and 2;

(b) Principles in relation to the existence of a duty to afford procedural fairness;

(c) Why the Applicants' contentions that the Warden and the Delegate owed them a duty of procedural fairness must be rejected;

[97] ts 131.

(d) The admissibility of the challenged affidavits and the notification practice.

## (a) Overview of the case advanced by the Applicants and by Siberia Mining in respect of grounds 1 and 2

82 The key question in relation to whether grounds 1 and 2 are made out is whether the Warden and the Delegate were required to afford procedural fairness to the Applicants in relation to the Extension Applications and the Exemption Applications respectively. The existence of that duty turned on the question whether the Applicants' rights or interests were liable to be adversely affected by the Warden's Decision or the Delegate's Decision.

83 The Applicants contended that the duty of procedural fairness required them to be given notice of the Extension Applications and the Exemption Applications.[98] The Applicants contend that the Warden was obliged to give them notice of the existence of the Extension Applications,[99] including the nature of the application and the nature and content of the information that the Warden might take into account as a reason for coming to a decision adverse to the Applicants.[100] Similarly, the Applicants contended that the Delegate was obliged to afford them procedural fairness by providing them with written notice that the Exemption Applications had been lodged,[101] and that this could have been done by a letter indicating that the applications had been made.[102]

84 The Applicants contended that both the Warden and the Delegate had failed to afford them procedural fairness. In that respect, counsel for the Applicants sought to establish that at the date of the Warden's Decision and the Delegate's Decision, there existed, within the Department, a practice whereby an applicant for forfeiture of a mining tenement would be advised, in writing, by the mining registrar for the relevant mineral field if, prior to the determination of the forfeiture application, an application were received for an exemption certificate in respect of that tenement (the notification practice). Some of the evidence relevant to the existence of the notification practice was set out in the challenged affidavits. The Applicants submitted that the failure to comply with the

[98] ts 83.
[99] Applicants' Submissions [56].
[100] Applicants' Submissions [57].
[101] Applicants' Submissions [84] - [85], [88].
[102] ts 83.

notification practice was evidence of the denial of procedural fairness in this case.[103]

85 The Applicants contended that because they were denied procedural fairness, in that they were not notified of either the Extension Applications or the Exemption Applications, they lost the opportunity to apply for an extension of time to object, and to then in fact object, to the Exemption Applications.[104]

86 Siberia Mining's position was that neither the Warden nor the Delegate was subject to a duty to afford procedural fairness to the Applicants, because the Applicants did not have any right or interest which was liable to be adversely affected by the grant of the Extension Applications or the Exemption Applications.[105] Further, while not couched in terms that the Act manifested a clear intention to exclude any duty of procedural fairness in respect of the Exemption Applications, Siberia Mining contended that on the proper construction of the Act, it was apparent that posting copies of exemption applications on the notice board, and including a note of such applications in the Register, constituted sufficient notice of exemption applications.[106] Further, Siberia Mining submitted that the Applicants could have become aware of the Exemption Applications by monitoring the notice board or checking the Register, and consequently had a reasonable opportunity to lodge an objection to the Exemption Applications in any event.[107]

87 For the reasons which follow, the Applicants did not have any right or interest which was liable to be adversely affected by the Warden's Decision or the Delegate's Decision. Consequently, neither the Warden nor the Delegate was under a duty to afford procedural fairness to the Applicants in respect of the Extension Applications and the Exemption Applications. Grounds 1 and 2 must therefore be dismissed.

88 In view of that conclusion, it is unnecessary to deal with any of the other issues canvassed in the submissions of counsel in relation to grounds 1 and 2. However, it is appropriate to deal with the admissibility of the challenged affidavits, and to make factual findings about the extent of the notification practice on which the Applicants relied.

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[103] ts 38 - 39, ts 42, citing ***Darling Casino Ltd v New South Wales Casino Control Authority*** [1997] HCA 11; (1997) 191 CLR 602.
[104] Applicants' Submissions [89].
[105] Siberia Mining's Submissions [94] - [95].
[106] Siberia Mining's Submissions [101] - [102]; ts 119.
[107] Siberia Mining's Submissions [78], [84] - [89], [106]; ts 121 - 122.

89 As the Applicants' case on procedural fairness fails because neither the Warden nor the Delegate was required to afford them procedural fairness, it is convenient to begin by setting out the principles which govern when a decision-maker will be required to afford procedural fairness in relation to a decision.

## (b) Principles in relation to the existence of a duty to afford procedural fairness

90 When a statute confers power on the executive government to adversely affect the rights or interests of a person, the common law will ordinarily imply into that statute, as a matter of statutory interpretation, a condition that the power be exercised in compliance with the requirements of natural justice (or, as is more commonly put, procedural fairness[108]) to that person.[109] Observance of the requirement to afford procedural fairness is a condition which attaches to the statutory power and governs its exercise, so that a failure to fulfil that condition will result in an invalid exercise of power.[110] Consequently, a failure to afford procedural fairness (where the requirement to do so exists) constitutes a jurisdictional error.[111]

91 The requirement to afford procedural fairness will not be confined to those cases where legal rights may be affected, but extends also to those cases where a person's interests will be adversely affected. The term 'interest' bears a wide meaning which encompasses the 'interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy'.[112] The implication of a requirement to afford procedural fairness has usually been determined by reference to the character of the interest which the exercise of the power is liable to affect, and the degree of potential impact on that interest (for example, that the exercise of the power may destroy, or prejudice, or substantially adversely affect, that interest).

92 To speak of an 'interest' is to refer to some position, benefit or entitlement which is possessed or enjoyed by a person prior to the making

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[108] The term 'procedural fairness' (in contradistinction to 'natural justice') refers to 'the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case': see ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 585 (Mason J).

[109] ***Minister for Immigration and Border Protection v SZSSJ*** [2016] HCA 29; (2016) 90 ALJR 901 [75] (the Court).

[110] ***Saeed v Minister for Immigration and Citizenship*** [2010] HCA 23; (2010) 241 CLR 252, [11] - [13] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ).

[111] ***Kirk v Industrial Relations Commission (NSW)*** [2010] HCA 1; (2010) 239 CLR 531 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

[112] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 616 - 617 (Brennan J) approved in ***Plaintiff S10/2011 v Minister for Immigration and Citizenship*** [2012] HCA 31; (2012) 246 CLR 636 [66] (Gummow, Hayne, Crennan & Bell JJ).

of the administrative decision in question, and which is liable to be adversely affected by that decision.[113] Typically, personal liberty,[114] status,[115] the preservation of livelihood and reputation,[116] proprietary or financial interests[117] or familial interests[118] have been accepted as constituting 'interests' in this context. However, as Brennan J observed, an 'almost infinite variety'[119] of interests are protected by the principles of procedural fairness.

93 What constitutes an interest which is sufficient to give rise to the requirement to afford procedural fairness is not entirely settled. The test most commonly applied in the cases is whether the decision under challenge would have an immediate or direct impact on the applicant's interests, rather than an indirect and inconsequential impact.[120] (Perhaps for this reason it has been noted that the test for sufficiency of the interest in this context is similar to the requirement that an applicant demonstrate standing, either at common law or in equity, to seek a public law remedy,[121] by identifying some interest in the remedy, over and above that of a member of the public.[122] However, in the standing context, there is debate as to the level of directness or remoteness of a connection with the decision under challenge which is required before an applicant for relief will have standing.[123])

94 Decisions which have merely an indirect impact on an individual will not give rise to a requirement to afford procedural fairness. So, for example, a decision to impose rates, or general charges for services rendered to ratepayers, each of which affects the rights and interests of

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[113] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 619 (Brennan J).
[114] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 582 (Mason J).
[115] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 582 (Mason J), 632 (Deane J) (immigration status); ***Courtney v Peters*** [1990] FCA 526; (1990) 27 FCR 404 (eligibility for grant of a pension).
[116] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 582 (Mason J), 616 - 617, 619 (Brennan J); ***Ainsworth v Criminal Justice Commission*** [1992] HCA 10; (1992) 175 CLR 564, 578 (Mason CJ, Dawson, Toohey & Gaudron JJ), 585 (Brennan J); ***Johns v Australian Securities Commission*** [1993] HCA 56; (1993) 178 CLR 408, 437 (Dawson J), 471 (McHugh J); ***Annetts v McCann*** [1990] HCA 57; (1990) 170 CLR 596, 608 - 609 (Brennan J).
[117] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 582 (Mason J), 616 - 617, 619 (Brennan J).
[118] ***J v Lieschke*** [1987] HCA 4; (1987) 162 CLR 447, 457 - 458 (Brennan J, Mason, Wilson & Dawson JJ agreeing), 463 - 464 (Deane J).
[119] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 617 (Brennan J).
[120] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 584 (Mason J); see also ***Walsh v Motor Fuel Licensing Board*** (1991) 25 ALD 737, 744 (Olsson J).
[121] ***Plaintiff S10/2011 v Minister for Immigration and Citizenship*** [2012] HCA 31; (2012) 246 CLR 636, 659 [68] (Gummow, Hayne, Crennan & Bell JJ), referring to ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 621 (Brennan J).
[122] See, for example, ***Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*** [1998] HCA 49; (1998) 194 CLR 247, 275 (McHugh J).
[123] See, for example, ***Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*** [1998] HCA 49; (1998) 194 CLR 247, 275 (McHugh J).

citizens generally, and in an indirect way, will not attract the duty to afford procedural fairness.[124] Similarly, a decision by ASIC to authorise an application for a summons for the mandatory examination of an individual in relation a company's affairs is not subject to a requirement to afford procedural fairness to that individual. While such an authorisation increases the possibility that the individual will be subject to an examination, there is no direct prejudice to that individual's interests.[125]

### (c) Why the Applicants' contentions that the Warden and the Delegate owed them a duty of procedural fairness must be rejected

#### *The Applicants' contentions*

95 Counsel for the Applicants advanced a variety of bases for the existence of a duty to afford procedural fairness to the Applicants. Counsel for the Applicants submitted that the Applicants had a right or interest in the Extension Applications and the Exemption Applications on the basis that the Applicants:[126]

> are applicants for forfeiture [of M24/846 and M24/848]. They have commenced a process they're entitled to by law. They are currently in that process with an expectation that they will have a hearing so that they can seek forfeiture in a right and priority, to take the ground the subject of the [mining leases] upon its forfeiture.

96 Counsel for the Applicants characterised the Applicants' interest in the Extension Applications and the Exemption Applications as an 'interest … in not losing the right under the statutory process that they've invoked to succeed at forfeiture and then to get a right in priority'[127] and as a right to bring the application for forfeiture and to have it heard.[128] He submitted that that interest would be adversely affected by the grant of an exemption certificate (or an extension of time in which to bring an application for an exemption certificate).[129]

97 Counsel for the Applicants also submitted that the Applicants had a financial interest in the outcome of the forfeiture process. He contended that 'the primary interest is in seeking forfeiture of a tenement… so that [the Applicants] could obtain a right in priority to apply for their own

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[124] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 584 (Mason J).
[125] ***Saraceni v Australian Securities and Investments Commission*** [2013] FCAFC 42; (2013) 211 FCR 298 [13] - [16] (North J), [135] - [136] (Jacobson J, Gilmour J agreeing).
[126] ts 44.
[127] ts 73.
[128] ts 74.
[129] ts 74 - 75.

[tenement]'[130] but that the Minister was entitled to award to the applicant for forfeiture any fine imposed as an alternative to forfeiture of the lease.[131]

98 Counsel for the Applicants also submitted that the Applicants' entitlement to procedural fairness derived from the potential liability for costs that his clients would face if they did not proceed with the Forfeiture Applications. Counsel submitted that the Applicants:[132]

> also could face liability. So if their application for forfeiture does not proceed they could pay costs. So if their application for forfeiture fails by reason of some intervention such as an application for exemption, defeating the application for forfeiture, they have liability.

99 Counsel for the Applicants submitted that there was an interrelationship between the exercise of the statutory power in relation to each of the Extension Applications, the Exemption Applications and the Forfeiture Applications. In short, that was because the grant of an exemption certificate relieved Siberia Mining of the obligation to comply with the minimum expenditure requirements applicable to leases M24/846 and M24/848, and that would remove the basis for the Forfeiture Applications.[133] Counsel for the Applicants submitted that it would be 'a fundamental mistake to proceed with an approach that each power is to be exercised separately without regard to the existence and exercise of the other'.[134] He therefore submitted that the determination of an exemption application logically preceded the determination of a forfeiture application, and that when an application for exemption was made out of time, and accompanied by an extension application, the determination of the extension application itself had the potential to affect the forfeiture application, and thus logically preceded the determination of both the exemption application and the forfeiture application.[135] Counsel for the Applicants submitted that the interrelationship between these statutory powers had the result that the Warden and the Delegate were required to afford procedural fairness to the Applicants because they had made the Forfeiture Applications.[136]

100 Counsel for the Applicants submitted that the fact that an applicant for forfeiture would be affected by a decision to grant an exemption was

[130] ts 74.
[131] ts 84.
[132] ts 44; see also ts 75 - 76, 84.
[133] ts 68 - 69.
[134] ts 70.
[135] ts 69, 70.
[136] ts 70 - 71.

recognised by the Full Court of this Court in ***Re Heaney; Ex parte Tunza***.[137] He also submitted that what was required by way of procedural fairness depended upon the applicable circumstances, and that those circumstances in this case included 'the existence of other applications which could potentially affect the Forfeiture Application[s]'.[138] He submitted that the decision of the High Court in ***SSZJ*** supported that analysis.

101 Finally, counsel for the Applicants also submitted that the duty to afford procedural fairness with respect to the question whether there had been non-compliance with the minimum expenditure condition (that is, the duty to afford procedural fairness to the Applicants in respect of the Forfeiture Applications) 'necessarily encompasse[d] a duty to accord procedural fairness to any subsequent application made by the tenement holder for exemption from expenditure requirements and for an extension of time within which to seek such an exemption'.[139]

### *Why the Applicants' contentions must be rejected*

102 The Applicants' contentions must be rejected, for the following reasons.

103 **First**, in so far as the Exemption Applications are concerned, as no objection had been lodged by the Applicants in respect of the Exemption Applications at the date of the Delegate's Decision, it could not be said that that Decision would have any adverse effect on the rights or interests of the Applicants. The Delegate's Decision obviously affected the rights or interests of Siberia Mining. But it had no effect, or at least no direct effect, at all, on the Applicants' rights or interests. (The position would have been different had it been the case that the Applicants had lodged an objection to the Exemption Applications, because from that point onwards, Siberia Mining would have been required to serve the Applicants with copies of any documents filed in those proceedings.[140])

104 **Secondly**, in so far as the Extension Applications are concerned, the Applicants had no interest at all in the outcome of those applications. The Extension Applications were made under s 162B of the Act. The Applicants were not a party to those applications, and no right or interest of theirs would be adversely affected by the grant of an extension of time to permit Siberia Mining to pursue the Exemption Applications. In so far

[137] ts 84.
[138] ts 71.
[139] ts 72 - 73.
[140] *Mining Regulations 1981* (WA) r 141, r 144, r 148.

as it was contended that the grant of the extensions enabled Siberia Mining to pursue the Exemption Applications, the link between the Warden's decision in that matter, and the Applicants' prospects in the Forfeiture Applications, was even further removed than the asserted link between the Delegate's Decision on the Forfeiture Applications.

105 **Thirdly**, in so far as the Applicants claimed to have a 'right' to succeed in the Forfeiture Applications, that claim must also be rejected. While the Act entitles any person to bring an application for the forfeiture of a mining lease on certain grounds (including that the minimum expenditure conditions of the lease have not been met) an applicant has no 'right' to a particular outcome of that application. I accept the submissions of counsel for ***Siberia Mining*** that the Applicants had no more than 'a hope that the forfeiture application[s] will come to fruition'[141] and an 'inchoate expectation about a possibility of attaining the benefits that are described in s 99 and s 100(2)' of the Act.[142] An application for forfeiture must be determined by the Minister in accordance with the Act. The Act confers on the Minister a discretion not to order either the forfeiture of a lease or the imposition of a penalty for non-compliance with a minimum expenditure condition.[143] Furthermore, the Delegate's Decision did not affect the Applicants' continued pursuit of the Forfeiture Applications. Nothing in the Act or the Regulations had the result that the grant of exemption certificates would mean that the Forfeiture Applications could not proceed. It was open to the Applicants to continue to pursue those applications.

106 That is not to ignore the fact that the Delegate's Decision to grant the exemption certificates would mean that the Forfeiture Applications would inevitably fail if the Applicants chose to continue them. That is because the Forfeiture Applications in this case were based solely on the alleged non-compliance by Siberia Mining with the minimum expenditure conditions applicable to leases M24/846 and M24/848. The grant of the exemption certificates would mean that Siberia Mining was not obliged to comply with the minimum expenditure conditions applicable to those leases. However, whether the Forfeiture Applications failed in due course would depend on the decision of a decision-maker in an entirely separate application pursued under an entirely separate section of the Act. The Warden's Decision and the Delegate's Decision thus had no direct effect on the Forfeiture Applications, or the Applicants' continued pursuit thereof.

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[141] ts 124.
[142] ts 125.
[143] *Mining Act 1978* (WA) s 99(1)(d).

107 **Fourthly**, even in so far as it might be said that the Applicants had a financial interest in the outcome of the Forfeiture Applications, any such interest would entitle the Applicants to procedural fairness in respect of the decision of the Minister, acting under s 99(1) of the Act in respect of the Forfeiture Applications (and in any proceeding before the Warden under s 98(3) of the Act, held to enable the Warden to determine a recommendation for the Minister). Having applied for the forfeiture of leases M24/846 and M24/848, the Applicants were entitled to be served with Siberia Mining's response to those applications, and to be heard in respect of those applications, as the Regulations expressly recognised.[144] However, any entitlement the Applicants had to procedural fairness arising from their interest in the Forfeiture Applications was an entitlement to procedural fairness from the decision-maker acting in those applications and not the decision-makers in respect of the Extension Applications (the Warden) and the Exemption Applications (the Delegate).

108 **Fifthly**, in so far as the Applicants' claim to an entitlement to procedural fairness sought to rely on the interrelationship between Exemption Applications and Forfeiture Applications, that argument, with respect, overstated the extent of that inter-relationship. Until such time (if at all) as an objection to an exemption application is lodged, an exemption application and a forfeiture application in relation to the same tenement are conducted as entirely separate applications. The exemption application will be forwarded directly to the Minister for determination,[145] and the forfeiture application will be heard by the Warden, whose recommendation will subsequently be forwarded to the Minister for determination.[146] If an objection to an exemption application is lodged, however, that proceeding, together with any forfeiture application in respect of the same tenement, may be heard together by the Warden.[147] The Warden will then forward his or her recommendation on each application to the Minister for determination.

109 The requirements for the service of documents under the Regulations clearly proceed on the assumption that until such time as an objection to an exemption application is made, only the rights and interests of the tenement holder are liable to be affected by a decision of the Minister in respect of an exemption application. So, for example, after the lodgement of an exemption application, the mining registrar is required to post a

[144] *Mining Regulations 1981* (WA) r 141(3), r 144(1), r 154(1)(b), r 156(1).
[145] *Mining Act 1978* (WA) s 102(5)(b).
[146] *Mining Act 1978* (WA) s 98(3) s 98(6), s 99(1).
[147] *Mining Regulations 1981* (WA) r 147.

copy of the application on the notice board at his or her office.[148] (That requirement no doubt reflects a view that it is appropriate for third parties to be able to monitor compliance by tenement holders with the conditions applicable to the tenement, including minimum expenditure conditions. The Regulations provide for ample time for a person to become aware of the exemption application and to then lodge an objection, should they wish to do so.[149]) That position may be contrasted with the service requirements that apply under the Regulations after an objection has been lodged. From that point, the objection to the exemption application constitutes a 'proceeding'[150] and a document filed by one party to that proceeding must be served on each other party to the proceeding.[151]

110 **Sixthly**, the decision of the Full Court of this Court in ***Re Heaney; Ex parte Tunza Holdings***[152] does not assist the Applicants. In that case, the Court considered an application for a writ of certiorari in respect of a decision of the mining warden, on applications for exemptions to which objections had been made, to recommend that the Minister grant certificates of exemption. It was contended that there was an error of law on the face of the warden's decision in that case. No decision had been made by the Minister. The tenement holder submitted that certiorari was not available in respect of the warden's decision in that case because that decision did not have any discernible legal effect upon rights, and was not a condition precedent to an exercise of power that would affect legal rights. The Court rejected that submission. Malcolm CJ (with whom Ipp J and Murray J agreed) concluded that certiorari was available because the warden's report conditioned the exercise by the Minister of his power to grant or refuse the exemption application. His Honour observed:[153]

> The grant or refusal of an application for exemption affects rights in that it protects the right of the holder to retain the tenement notwithstanding non-compliance with the expenditure conditions. It also affects the right of an objector who was also an applicant for forfeiture. If successful and order for forfeiture is made, s 96(4) provides that the applicant '… shall have, for a period of 14 days after the date of the order, a right in priority to any other person to mark out or apply for or both, a mining tenement upon the whole or part of the land that was the subject thereof'.

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[148] *Mining Regulations 1981* (WA) r 54(1b).
[149] *Mining Regulations 1981* (WA) r 146(2)(a)(ii).
[150] *Mining Regulations 1981* (WA) r 137(1).
[151] *Mining Regulations 1981* (WA) r 148.
[152] ***Re Heaney; Ex parte Tunza Holdings Pty Ltd*** (1997) 18 WAR 420.
[153] ***Re Heaney; Ex parte Tunza Holdings Pty Ltd*** (1997) 18 WAR 420, 430 (Malcolm CJ, Ipp J & Murray J agreeing).

> It follows that a recommendation made by the Warden that the application for exemption not be granted in a context where forfeiture is ordered, or a recommendation that an application for exemption be granted where forfeiture is applied for, has the capacity to affect the rights of the applicant for forfeiture.

111 Of significance for present purposes is that in ***Tunza***, the applicant for forfeiture had also lodged an objection to the tenement holder's application for an exemption. It was not a case, like the present, where no objection had been made by the applicant for forfeiture. And the case did not involve an alleged failure to afford procedural fairness. As I have observed, the position in the present case would have been very different if an objection to the Exemption Applications had been made by the Applicants.

112 **Finally**, in so far as the Applicants sought to rely on the decision of the High Court in ***Minister for Immigration and Border Protection v SZSSJ***[154] that decision does not advance their case. The basis on which a duty of procedural fairness was found to exist in that case involved the application of settled principles to the facts, which were entirely distinguishable from those here. And in so far as the decision concerned whether procedural fairness had in fact been afforded, the content of any duty of procedural fairness is an enquiry which follows the conclusion that the duty exists in the first place.

## (d) The admissibility of the challenged affidavits and the notification practice

113 In his written submissions, counsel for the Applicants submitted that it was a policy of the Department and the practice of mining registrars to notify existing applicants for forfeiture of a tenement when exemption applications were subsequently lodged in respect of that tenement.[155] Counsel for the Applicants submitted that there was a reasonable expectation on the Applicants' part that they would be notified if applications for extensions of time for late exemption applications were made.[156]

114 Consequently, it initially appeared that the Applicants intended to advance an argument that their entitlement to procedural fairness in respect of the Extension Applications derived from an expectation that a policy or practice that had been adopted by mining wardens, or by the

[154] ***Minister for Immigration and Border Protection v SZSSJ*** [2016] HCA 29; (2016) 90 ALJR 901.
[155] Applicants' Submissions [50].
[156] Applicants' Submissions [51].

Department, would be observed in this case. (It appeared that the challenged affidavits, on which the Applicants sought to rely, were intended to be read for that purpose.) However, in the course of the hearing, counsel for the Applicants denied that the challenged affidavits were relied upon as establishing a basis for the entitlement to procedural fairness claimed by the Applicants. Instead, the evidence in those affidavits was said to be relevant only to the content of the duty of procedural fairness which the Applicants claimed was owed to them, and to the alleged denial of procedural fairness.[157]

115 Given my conclusion that neither the Warden nor the Delegate owed a duty of procedural fairness to the Applicants, it is not necessary to consider matters such as the content or breach of any such duty. However, in the event that others have a different view, it is appropriate that I address the admissibility of the challenged affidavits, and the evidence as to the notification practice which the Applicants claimed to have existed.

### *The notification practice*

116 In his supplementary affidavit of 27 June 2016, Mr Lawton deposed that he:[158]

> was aware of a practice which was followed for many years in the various Mining Registries around the State to advise Plaintiffs of the filing of Exemption Applications, if such an Application were filed subsequent to the filing of the Plaint. I have from time to time been notified in writing by a Mining Registrar when this has occurred.
>
> I do not believe that the practice had any statutory authority, but it was the subject of an announcement by the then Department of Minerals and Energy in [the] Minerals Title Update in September 2000.

117 The Mineral Titles Update of September 2000 (the Update) was annexed to Mr Lawton's supplementary affidavit. It provided: [159]

> An anomaly arises in instances where an application for exemption from expenditure conditions is lodged after plaint action has commenced.
>
> Under the Mining Act a copy of an exemption application is placed on the notice board and recorded in the tenement register. There are instances where an exemption application is lodged after a plaint has been received,

[157] ts 38 - 39, 45, 118.
[158] Supplementary Lawton Affidavit [3] - [4].
[159] Supplementary Lawton Affidavit GLH20, 8.

> however there is no mechanism for the plaintiff to become aware of the exemption application and therefore is generally not in a position to object.
>
> This undermines the plaint process and it is therefore intended to advise the plaintiff in these circumstances.

118 Mr O'Leary deposed that he was not aware of any such practice being followed by Mining Registrars in Western Australia, nor was he aware that it was a requirement under the Act or the Regulations for mining registrars in Western Australia, nor was he aware that it was carried out pursuant to any policy of the Department.[160]

119 Mr Clegg's affidavit referred to the existence of a notification practice. I admitted Mr Clegg's affidavit[161] over the objection of counsel for Siberia Mining (other than for 2 paragraphs in that affidavit which counsel for the Applicants accepted constituted hearsay evidence). Mr Clegg was employed for 17 years within the Department of Minerals and Energy (as the Department was then known) where he worked in a number of the regional mining registries, and carried out the functions of a mining registrar in a number of regions for three to four years. Mr Clegg deposed that:[162]

> In my personal experience it has been both the duty and the practice of Mining Registrars to notify an Applicant for Forfeiture of the existence of a subsequent Exemption Application where that Exemption Application is filed after the date of the filing of the Application for Forfeiture.

120 Mr Clegg also deposed that the notification practice to which he referred was one which was referred to in the Update and had been adopted and followed by all Mining Registrars.[163] However, Mr Clegg did not indicate whether his personal knowledge of that notification practice pertained only to the period prior to 1987 when he resigned from his employment in the Department.

121 Mr Clegg also annexed to his affidavit a copy of a document described as 'Procedural Paper MTD 51'It appears to have been issued by the Director, Mineral Titles, and is undated, although it appears that MTD 51 was issued in about August 2000. MTD 51 indicates:

> Pursuant to Regulation 54(1a) an exemption application must be lodged within 60 days of tenement anniversary. …

[160] First O'Leary Affidavit [5].
[161] ts 52.
[162] Affidavit of Christopher Clegg sworn 2 September 2016 (Clegg Affidavit) [6].
[163] Clegg Affidavit [7].

> Third parties checking for expenditure compliance will normally search the tenement register (and notice board) to ascertain expenditure claimed and/or exemption applied for by the end of the 60 day period. It is usual that any decision to object to the exemption application and take plaint action is based on the status of the tenement after the 60 day period. However some plaints are also lodged within the 60 day period.
>
> There are instances where an exemption application is lodged after a plaint has been received however there is no mechanism to advise the plaintiff of the exemption application.
>
> In the absence of an objection the exemption application is usually granted, which has a detrimental effect on the outcome of any plaint action. In these circumstances it is reasonable that plaintiffs be notified of the existence of the exemption application so that they have the opportunity to lodge an objection, if they wish to do so.
>
> **Procedure**
>
> In all cases where an exemption application is received after a plaint has been lodged a letter is to be sent to the plaintiff advising the presence of the exemption application and providing the plaintiff an opportunity to lodge an objection against the application. In the case of an exemption application received after the 60 day period, the notice is to be sent immediately following a Warden's order accepting the late lodgement.

122 Mr Clegg did not give evidence as to whether the notification practice referred to in MTD51was still observed by the Department, or by mining registrars, in 2015.

## *The admissibility of the challenged affidavits*

123 The only other evidence bearing on the existence of the notification practice was set out in the challenged affidavits. Counsel for Siberia objected to the admission of the challenged affidavits on the basis that the existence of the notification practice had not been fully elaborated upon in the affidavits originally filed by the Applicants;[164] that the challenged affidavits had been filed very late in the day, and notwithstanding that Siberia's denial of the existence of the notification practice was apparent from Mr O'Leary's affidavit of 29 July 2016;[165] and because Siberia was prejudiced by the late provision of the challenged affidavits, in that it was denied the opportunity to put on further evidence disputing the existence of the notification practice.[166]

[164] ts 46 - 47.
[165] ts 46 - 47.
[166] ts 47.

124 Other than for Mr Clegg's affidavit, which I concluded was admissible, I indicated that I would deal with the objections to the remainder of the challenged affidavits in these reasons.

125 In my view, the other challenged affidavits are admissible. They deal with an issue touched upon in other affidavits which were read without objection. They concern the content of the alleged duty of procedural fairness. (Although I have concluded that no such duty existed, had I formed a different view it would have been necessary to determine the content, and alleged breach, of that duty, and the challenged affidavits would have assisted in that respect.) I do not accept that the challenged affidavits contain material which is so vague as to not be useful, or conclusions the basis for which is not stated, so as to render the contents inadmissible.

126 Turning then to the challenged affidavits, Mr McMahon has been a tenement manager since 1995, and deposed that he was 'aware of a practice which has been followed for many years in the various Mining Registries around the State to advise plaintiffs of the filing of an exemption application, if such an application were filed subsequent to the filing of the application for forfeiture'.[167] Mr McMahon's understanding was that he believed that this notification was carried out pursuant to a policy of the Department. He did not give any specific evidence as to whether the policy continued to be observed as at 2015, but merely deposed that he was 'not aware' that the notification practice had been discontinued.[168]

127 Mr Collins was the Mining Registrar in Kalgoorlie from 1981 until 2012, and during that period, it was his 'practice to notify Applicants for Forfeiture in circumstances when an Application for Exemption was lodged after the lodgement of an Application for Forfeiture'.[169] The reason for doing so was that that would give the applicant for forfeiture the opportunity to object to the exemption application if they wished to do so. Mr Collins deposed that the practice he followed was set out in MTD51.

128 Finally, Mr Bullen, who is the General Manager of the Tenure and Native Title Branch of the Department, and who has worked for the Department (and its predecessors) since 1982, deposed that:[170]

[167] Affidavit of Shannon Terence McMahon affirmed 18 October 2016 (McMahon Affidavit) [6].
[168] McMahon Affidavit [10].
[169] Affidavit of Ross William Collins sworn 19 October 2016 (Collins Affidavit) [7].
[170] Affidavit of Anthony Thomas Bullen sworn 20 October 2016 (Bullen Affidavit) [5].

> In the situation where an Application for an Exemption is lodged after an Application for Forfeiture has been filed in respect to a particular tenement, the Mining Registrar is required to notify the Applicant for Forfeiture of the lodgement of the Application for an Exemption. I am aware from my own experience that this procedure has been followed on prior occasions.

129 Mr Bullen's evidence was that he had reviewed the directives issued by the Department to Mining Registrars and confirmed that 'Directive 51' (which appears to be a reference to MTD51) deals specifically with this practice. That supports the inference that MTD51 remains current, and was operative in 2015.

130 In my view, the evidence of Mr Lawton, Mr Clegg, Mr McMahon, Mr Collins and Mr Bullen supports the conclusion that for many years there has been a practice within the Department, which continued to be observed as at 2015, whereby Mining Registrars would notify an applicant for forfeiture if an application for an exemption certificate was subsequently lodged by the holder of the mining tenement.

131 Although the challenged affidavits did not contain direct evidence that the notification practice was, in fact, observed by the Mining Registrar at Kalgoorlie (which Registry covers the Broad Arrow Mineral Field) in 2015, there was other evidence which supported that conclusion. On 31 March 2016, the Mining Registrar at Kalgoorlie (the Third Respondent) sent an email to the Applicants' solicitor to advise that 'an oversight was made and that it is unfortunate that the [Applicants were] not advised prior to the Application for Extension of Time being considered by the Warden'.[171]

132 Accordingly, I am satisfied that the evidence establishes that it is more likely than not that there existed a notification practice, consistent with the procedure set out in MTD51, which was followed by the Mining Registry at Kalgoorlie, in 2015. That practice was that applicants for forfeiture were advised if an application was subsequently made by a tenement holder for an exemption certificate in respect of that tenement, or if an application was made for an extension of time to lodge an application for an exemption certificate in respect of that tenement.

133 As I have concluded that no duty of procedural fairness was owed to the Applicants by the Warden or the Delegate in this case, it is unnecessary to consider how the evidence as to the notification practice

[171] First Lawton Affidavit [36]; GHL18, 75.

may have assisted the Applicants to establish the content of any such duty or the breach of that duty.

134 I turn, next, to consider ground 3 of the grounds of review.

## 7. Ground 3: Whether the Delegate made a jurisdictional error in determining to grant exemption certificates in respect of leases M24/846 and M24/848.

135 In this section of my reasons, I deal with the following matters:

(a) The legislative basis for the grant of the exemption certificates in this case;

(b) How the Delegate reached the Delegate's Decision;

(c) The Applicants' contentions as to why the Delegate erred in her application of s 102(2)(h) of the Act;

(d) Why the Applicants' contentions cannot be accepted.

### (a) The legislative basis for the grant of the exemption certificates in this case

136 The Delegate determined that Siberia Mining satisfied the requirements of s 102(2)(h) of the Act for the grant of an exemption certificate in respect of each of leases M24/846 and M24/848. That section provides that one of the reasons for which an exemption certificate may be granted is:

> (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.

137 The term 'aggregate exploration expenditure' in s 102(2)(h) is defined in s 102(2a) in the following way:

> (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.

138 Regulation 58A of the Regulations deals with how the aggregate exploration expenditure is to be worked out. That regulation provides:

> (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.

139 The proper construction of these provisions is at the heart of ground 3 of the grounds of review. Before turning to consider the construction of those provisions, it is necessary to set out how the Delegate reached the Delegate's Decision.

## (b) How the Delegate reached the Delegate's Decision

140 In her affidavit, the Delegate set out the process by which she approached the decision whether to grant the exemption certificates, and in particular, the process by which she calculated whether Siberia Mining had reached its minimum expenditure requirement in respect of the Mining Leases.

141 The Delegate deposed that information from the Form 5 operations reports submitted in respect of each tenement in a combined reporting group is aggregated, by the Department's computer system, into a single report, called an Aggregate Expenditure Report.[172] That Report lists each tenement in a combined reporting group, together with its minimum expenditure commitment, the total expenditure for the tenement, the 'aggregate expenditure' and the 'mineral exploration expenditure', for the relevant reporting year. The Aggregate Expenditure Report then records

[172] Pintabona Affidavit [11], AP4.

the total of all of the minimum expenditure commitment amounts, the total expenditure amounts, the aggregate expenditure amounts and the total mineral exploration expenditure amounts, across all of the tenements in the combined reporting group.

142 The 'aggregate expenditure' represents the total expenditure reported in the relevant operations report for each tenement, *excluding* monies declared for 'Mining Activities'.[173] The Delegate deposed that the 'aggregate expenditure' for each tenement is calculated in accordance with policy guidelines produced by the Department, namely the 'Policy Guidelines for Exemption from Expenditure Condition' (the Policy Guidelines).[174] The Policy Guidelines provide, relevantly:[175]

> Aggregate exploration expenditure is calculated by adding the total expenditures reported on the relevant operation reports (Form 5) submitted for all tenements in the group excluding any monies claimed under 'Mining Activities' in those operations reports. Expenditure on tenements that have expired, been forfeited or surrendered during the period will be included in the calculation.
>
> To assist in the determination of an application under this subsection an applicant is encouraged to provide a schedule showing the aggregate expenditure for the project in the relevant period as against the project's expenditure requirement. The information in the schedule should include:
>
> - the combined reporting number (as issued by the Geological Survey Division); and
>
> - a list of the project's tenements stating against each tenement its annual expenditure commitment, its relevant reported Form 5 expenditure (ie, excluding any monies claimed under 'Mining Activities') and the total/aggregate amount expended on the project.

143 The Delegate deposed that she identified that Siberia Mining sought the exemption certificates under s 102(2)(h) of the Act,[176] considered the statutory declarations lodged by Siberia Mining in support of the Exemption Applications,[177] and confirmed that M24/846 and M24/848 were part of a combined reporting group under s 115A(4) of the Act.[178] In order to determine whether s 102(2)(h) was applicable, the Delegate considered the Aggregate Expenditure Reports, in respect of combined

[173] Pintabona Affidavit [11](f)(ii).
[174] Pintabona Affidavit [11](f)(ii).
[175] Pintabona Affidavit [11](f); AP3, 62.
[176] Pintabona Affidavit [11](a).
[177] Pintabona Affidavit [11](b); AP2, 15 - 57.
[178] Pintabona Affidavit [11](c).

reporting group C83/2008.[179] Those Aggregate Expenditure Reports indicated that as at 24 May 2015, the total minimum expenditure commitment for all of the 'live' tenements in combined reporting group 83/2008 for the 2015 year was $720,713, while the 'aggregate expenditure' across the tenements in the group was $920,229, of which $547,922 was for 'Mineral Exploration Expenditure'.[180]

144 The Delegate deposed that in accordance with the Policy Guidelines, she determined that because the total amount shown for 'aggregate expenditure' in the Aggregate Expenditure Reports exceeded the total amount shown for the minimum expenditure 'commitment' across all of the tenements, she considered that the requirements of s 102(2)(h) were met.[181] Accordingly, the Delegate decided to grant the exemption certificates sought by Siberia Mining.[182]

## (c) The Applicants' contentions as to why the Delegate erred in her application of s 102(2)(h) of the Act

145 In an application for a writ of certiorari, the court may quash a decision made by a decision-maker in the exercise of a statutory power if there is an error of law on the face of the record, or if it is established that the decision-maker made a jurisdictional error.[183] An error of law in the construction of the statutory provision which is the source of the decision-maker's power may give rise to a jurisdictional error if that construction causes the decision-maker to identify a wrong issue, to ask themselves a wrong question, to ignore relevant material, to rely on irrelevant material, or to make an erroneous finding or to reach a mistaken conclusion.[184]

146 The Applicants' case is that the Delegate fell into jurisdictional error because in applying s 102(2)(h) of the Act, she asked the wrong question (in relation to what expenditure could be taken into account), took into account an irrelevant consideration (namely expenditure for items other than exploration), or, alternatively erred in law, by calculating the total of all expenditure reported by Siberia Mining in its exploration reports, rather than just expenditure for exploration.

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[179] Pintabona Affidavit [11](d); AP4, 65 - 68.
[180] Pintabona Affidavit [11](f); AP4.
[181] Pintabona Affidavit [11](g).
[182] Pintabona Affidavit [11](h).
[183] ***Kirk v Industrial Court of New South Wales*** [2010] HCA 1; (2010) 239 CLR 531 [56] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).
[184] ***Kirk v Industrial Court of New South Wales*** [2010] HCA 1; (2010) 239 CLR 531 [67] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ); ***Craig v The State of South Australia*** [1995] HCA 58; (1995) 184 CLR 163, 179 (the Court).

147 The Applicants' case is that in determining whether to grant a certificate of exemption under s 102(2)(h), r 58A(2) required that the Delegate add together the 'total exploration expenditure' shown in each relevant operations report for the tenements in the combined reporting group.[185] He submitted that the words 'total exploration expenditure' in r 58A(2) referred only to expenditure reported on a Form 5 operations report at part A of Attachment 1, under the heading 'Mineral-Exploration Activities' (which figure is then included on the front page of the operations report under the heading 'A. Mineral Exploration Activities').[186]

148 Counsel for the Applicants submitted that that conclusion followed from the ordinary meaning of the words used in s 102(2)(h) and 102(2a) of the Act, and in particular to the fact that the definition of 'aggregate exploration expenditure' referred to expenditure which is both 'on or in connection with exploration', and 'worked out in the manner specified in the regulations' (namely r 58A).[187] He submitted that the construction of s 102(2)(h) ought to dictate the construction of r 58A of the Regulations in relation to the expenditure which is to be taken into account for the purpose of calculating the aggregate exploration expenditure.[188] Counsel for the Applicants submitted that in so far as the Delegate approached her task in conformity with the Policy Guidelines, the application of those Guidelines led her into error.[189]

149 Counsel for the Applicants submitted that the legislative context supported the construction for which he contended. In particular, he submitted that there was a connection between s 102(2)(h) and s 115A of the Act, and the purpose behind s 102(2)(h). He submitted that the underlying purpose was to encourage expenditure specifically on mineral exploration, recognising that when a tenement holder holds multiple tenements that it may be appropriate for the tenement holder to focus their efforts on particular tenements within the group at particular times, and thus to spend more than the minimum requirement on exploration on some tenements, at the expense of others in the group. He submitted that the exemption in s 102(2)(h) sought to give the tenement holder the benefit of that overall expenditure on exploration, by permitting them to rely on the aggregate of that expenditure on exploration, spread across each of the tenements in the group. He contended that if the total amount

[185] Applicants' Submissions [99] - [101].
[186] ts 63.
[187] Applicants' Submissions [97].
[188] ts 97.
[189] ts 108.

spent on exploration, divided amongst the number of tenements in the group, resulted in a figure exceeding the minimum expenditure condition for the tenement the subject of the exemption application, the exemption certificate could be granted.[190]

150 Counsel for the Applicants submitted there was no disharmony between the construction of s 102(2)(h) for which he contended, on the one hand, and r 96C, on the other hand, because 102(2)(h) focused solely on expenditure for exploration, rather than on expenditure in connection with mining.[191]

151 Counsel for the Applicants also submitted that the construction he advanced would be more workable for decision-makers under the Act. That is because it would be necessary for the decision-maker to take into account only that expenditure which was solely attributable to exploration, rather than expenditure which might have been made in connection with exploration or with mining, (in which case a value judgment might need to be made as to whether the expenditure was for exploration).[192]

152 Consequently, the Applicants contend that in calculating the 'aggregate exploration expenditure', the Delegate wrongly took into account Siberia Mining's expenditure on items other than 'Mineral-Exploration Activities',[193] including expenditure on rents, rates, administration and overheads which were reported in each of the relevant Form 5 operations reports for tenements in combined reporting group C38/2008.

153 The Applicants contend that the Delegate should have concluded that because the amount shown in the 'Mineral Exploration Expenditure' column of the aggregate expenditure reports, apportioned across all the tenements, was less than the minimum expenditure condition for leases M24/846 and M24/848, Siberia Mining should have been refused an exemption certificate in respect of those leases.

154 Before considering the merit of these contentions, it is appropriate to emphasise the very narrow question raised by this case, namely whether 'aggregate exploration expenditure,' for the purpose of s 102(2)(h) of the Act, is only the total of that expenditure which is attributed to 'Mining - Exploration Activities' in the Form 5 operations reports

[190] ts 95.
[191] ts 104.
[192] ts 103.
[193] Applicants' Submissions [94] - [95].

submitted for each of the tenements in a combined reporting group. That question falls to be answered in this case in a context where none of the tenements in combined reporting group C38/2008 reported any expenditure on mining activities during the relevant year.[194] Accordingly, in order to determine whether ground 3 is made out, it is not necessary to consider how the Minister or his or her delegate might ascertain the 'total exploration expenditure' in a case where both mining and exploration has been undertaken either on a particular tenement, or across different tenements within a combined reporting group.

## (d) Why the Applicants' contentions cannot be accepted

155 The principles governing the construction of a statute are well established. The task of statutory construction begins and ends with the words used, but those words must be considered within their context, which includes the legislative history, and the general purpose and policy of the provision.[195] Having considered all of those matters in respect of s 102(2)(h) and 102(2)(2a) of the Act and r 58A of the Regulations, I am unable to accept the construction advanced by the Applicants, for the following reasons.

### *The ordinary meaning of the words used in s 102(2)(h) and s 102(2a) of the Act and r 58A of the Regulations*

*Section 102(2)(h)*

156 The starting point in the application of s 102(2)(h) is that the tenement for which the exemption certificate is sought is one which is part of a combined reporting group (under s 102(2)(h)(i)). A combined reporting group is a group of tenements which are the subject of arrangements approved under s 115A(4) for the filing of combined mineral exploration reports. Ordinarily, the holder of a mining tenement is required to file a mineral exploration report in conjunction with an operations report for that tenement.[196] (A mineral exploration report is a report containing records of the progress and results of specified activities carried out in the search for minerals, namely programmes involving the application of the geological sciences, drilling programmes, and activities involving the collection and assaying of soil, rock, groundwater and

[194] See Supplementary Lawton Affidavit Annexures GHL24 - GHL46.

[195] ***Thiess v Collector of Customs*** [2014] HCA 12; (2014) 250 CLR 664 [22] (French CJ, Hayne, Kiefel, Gageler & Keane JJ); ***Federal Commissioner of Taxation v Consolidated Media Holdings Ltd*** [2012] HCA 55; (2012) 250 CLR 503 [39] (French CJ, Hayne, Crennan, Bell & Gageler JJ); ***Saeed v Minister for Immigration and Citizenship*** [2010] HCA 23; (2010) 241 CLR 252 [31] (French CJ, Gummow, Hayne, Crennan & Kiefel JJ); ***CIC Insurance Ltd v Bankstown Football Club Ltd*** [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ).

[196] *Mining Act 1978* (WA) s 115A(2)(a).

mineral samples.[197]) However, s 115A(4) permits the Minister to approve arrangements to enable a tenement holder to file a single combined mineral exploration report for two or more mining tenements. That combined mineral exploration report for those tenements can then be filed notwithstanding the ordinary requirement that such a report be filed, in conjunction with the operations report, for each tenement.

157 That the exemption under s 102(2)(h) applies only to tenements within a combined reporting group of this kind reflects an appreciation that mineral tenements held by one tenement holder will be managed together, and that decisions will be made about expenditure across the group of tenements, depending upon the outcome of particular exploration or mining activities within that tenement group.

158 I turn, next, to s 102(2)(h)(ii). That provision contains a number of specific terms, some of which are defined and some not: 'aggregate exploration expenditure' (defined in s 102(2a)), 'combined reporting tenements' (defined in s 102(2)(h)(i)), 'expenditure requirements' (not defined) and 'apportioned' (not defined). The term 'expenditure requirements' appears to be a shorthand reference to the 'expenditure conditions' which attach to each tenement. The term 'expenditure conditions' means:[198]

> 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.

159 The word 'apportioned' is a derivative of the word 'apportion' which means 'to divide and assign in just proportion or according to some rule; distribute or allocate proportionally'[199] and 'to assign in proper portions or shares; to divide and assign proportionally; to portion out, to share'.[200]

160 Accordingly, on its ordinary meaning, s 102(2)(h) means that the aggregate exploration expenditure defined in s 102(2a) for the combined reporting tenements (that is, for all the tenements in the combined reporting group) would have been such as to satisfy the 'expenditure requirements' (that is, expenditure conditions) for the mining tenement for which the exemption is sought, had that aggregate exploration expenditure been assigned or shared between the combined reporting tenements. (In so far as the apportionment is concerned, it cannot be assumed that that

[197] *Mining Act 1978* (WA) s 115A(1).
[198] *Mining Act 1978* (WA) s 8.
[199] *Macquarie Dictionary Online.*
[200] *Oxford English Dictionary Online.*

means an equal division of the expenditure across the number of tenements in the combined reporting group. To do so would be to ignore that different minimum expenditure requirements may (and in this case, did) apply to the various tenements in the combined reporting group. That being the case, the question necessarily must be whether the aggregate exploration expenditure would be sufficient to meet the minimum expenditure requirements applicable to each tenement in the combined reporting group, were that expenditure distributed across the group. The answer to that question would most conveniently be reached by considering whether the total aggregate exploration expenditure exceeded the total of the minimum expenditure condition amounts for each tenement in the combined reporting group. Subject to the manner in which she calculated the aggregated exploration expenditure, that was the calculation undertaken by the Delegate in this case.)

*Section 102(2a): the meaning of 'aggregate exploration expenditure'*

161 The meaning of the term 'aggregate exploration expenditure' is set out in s 102(2a) of the Act. It has two components: the definition itself (in s 102(2a)(a)), followed by the instruction as to how the calculation of that amount is to be carried out (s 102(2a)(b)).

162 The meaning of 'aggregated exploration expenditure' is thus encapsulated by the words in s 102(2a)(a): 'expenditure - on, or in connection with, exploration for minerals on the combined reporting tenements'. The word 'connection' has a variety of meanings, including 'the condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in, another'.[201] It is well recognised that the phrase 'in connection with' has a wide meaning. Subject to the context in which the phrase is used, it is 'capable of describing a spectrum of relationships ranging from the direct and immediate to the tenuous and remote'.[202]

163 Where it is used in the Act, the phrase 'in connection with' has also been held to have a broad meaning. In ***Re Heaney; Ex parte Flint***, which concerned an application for the forfeiture of an exploration licence, on the ground that the tenement holder had failed to meet a minimum expenditure requirement 'on or in connection with mining', the phrase was held to 'readily extend' to expenditure on matters 'leading up to mining'.[203]

[201] *Oxford English Dictionary Online.*
[202] ***Collector of Customs v Pozzolanic Enterprises Pty Ltd*** [1993] FCA 322; (1993) 43 FCR 280, 288.
[203] ***Re Heaney; Ex parte Flint*** (Unreported, WASC, Library No 970065) 4 (Kennedy J, Malcolm CJ & Pidgeon J agreeing).

***Flint*** was a case in which it was accepted that no work had been 'done on the ground'.[204] However, expenditure referred to in the Form 5 operations report as expenditure on 'printing / data processing, drill core storage, tenement administration and consultant geologist' was held to be capable of being expenditure 'in connection with mining'.[205] So, too, were the legal costs of negotiations with private property holders which were accepted as 'clearly a prerequisite to mining' and thus properly regarded as 'expenditure in connection with mining'.[206] Finally, expenditure on salaries, wages, administration and overheads had been included in the Form 5 operations report in connection with exploration. The Court held that the mining warden in that case was not required to infer that that expenditure was not expenditure in connection with mining.[207] (In other words, the Court recognised that there may be an overlap between mining activities and exploration activities.)

164 Similarly, in ***Re Warden Calder; Ex parte Lee*** the Court of Appeal held that the phrase 'in connection with mining' could 'readily extend to expenditure on matters subsequent to and consequential upon the specified thing (in this case, mining operations)'.[208] McLure JA, with whom Pullin JA and Buss JA agreed, held that expenditure for the purpose of managing the consequences of a mining operation following the cessation of mining operations, and in the absence of any intention to conduct future mining operations, was nevertheless expenditure 'in connection with mining' under the Act. Her Honour saw 'no basis in the language or purpose of the Act and Regulations to read down the expression "in connection with" to exclude such matters'.[209]

165 The words 'or in connection with' therefore confirm that the expenditure which can be taken into account for the purpose of s 102(2)(h) need not be expenditure on activities which themselves constitute 'exploration' for minerals. Rather, the expenditure encompasses all expenditure on activities which are, in some way, connected with, or related to, exploration for minerals.

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[204] ***Re Heaney; Ex parte Flint*** (Unreported, WASC, Library No 970065) 8 (Kennedy J, Malcolm CJ & Pidgeon J agreeing).
[205] ***Re Heaney; Ex parte Flint*** (Unreported, WASC, Library No 970065) 8 (Kennedy J, Malcolm CJ & Pidgeon J agreeing).
[206] ***Re Heaney; Ex parte Flint*** (Unreported, WASC, Library No 970065) 9 (Kennedy J, Malcolm CJ & Pidgeon J agreeing).
[207] ***Re Heaney; Ex parte Flint*** (Unreported, WASC, Library No 970065) 9 (Kennedy J, Malcolm CJ & Pidgeon J agreeing).
[208] ***Re Warden Calder; Ex parte Lee*** [2007] WASCA 161; (2007) 34 WAR 289, 299 [45] (McLure JA, Pullin & Buss JJA agreeing).
[209] ***Re Warden Calder; Ex parte Lee*** [2007] WASCA 161; (2007) 34 WAR 289, 299 [45] (McLure JA, Pullin & Buss JJA agreeing).

*How the aggregate exploration expenditure is calculated*

166 As I have observed, the second part of the definition of 'aggregate exploration expenditure' in s 102(2a)(b) is, in fact, an instruction as to the manner in which the aggregate (in other words, the combined total) of the 'exploration expenditure' is to be calculated. The manner in which that calculation is to be done is set out in r 58A(2) of the Regulations. It provides that the aggregate exploration expenditure 'is to be worked out by adding together the total exploration expenditure shown in each relevant operations report'. What is contemplated is thus a sum of amounts of expenditure drawn from each relevant Form 5 operations report.

167 As r 58A(1) makes clear, the 'relevant operations report' is the Form 5 operations report which is required to be filed for each kind of tenement within the combined reporting tenement, for the particular year in which the exemption is sought. The first thing to note about r 58A(2), therefore, is that it directs attention to the *source* of the information from which the aggregate exploration expenditure is to be calculated. The source material is confined to the Form 5 operations reports which are required to be filed, pursuant to s 82(1)(e) in respect of each mining lease in the combined reporting group.

168 The Form 5 operations report is set out in Schedule 1 to the Regulations. It is described as an 'Operations Report - Expenditure on Mining Tenement'. That form has two alternative parts. The first is for 'Mineral-Exploration and/or Mining Activities' and the second is for 'Prospecting and/or Small Scale Mining Activities'. The form is also required to be accompanied by an attachment in one of two forms. Attachment 1 is a 'Summary of Mineral Exploration and/or Mining Activities'. Attachment 2 is a 'Summary of Prospecting and/or Small Scale Mining Activities'. Each attachment requires the tenement holder to insert information about activities undertaken, under various headings. So, for example, Attachment 1 requires the submission of information about 'A. Mineral-Exploration Activities', 'B. Mining Activities (Development and Production), 'C. Aboriginal Heritage Surveys', 'D. Annual Tenement Rent and Rates', 'E. Administration and Overheads' and 'F. Land Access/Native Title'. The Form 5 operations report then requires that the amounts spent on each of those activities be listed, and then added up to reach a 'Total Expenditure' figure.

169 I note that nowhere in the Form 5 is there a field or heading for 'total exploration expenditure'. That is not entirely surprising. The Form 5

operations report was prescribed in Schedule 1 to the Act before the introduction of r 58A. It thus appears that when r58A was inserted into the Regulations for the purpose of prescribing the method of calculating 'aggregate exploration expenditure', the use of the existing Form 5 operations reports was identified as a convenient existing source of information in relation to expenditure on all aspects of mining on a tenement, including exploration. The significant point for present purposes in relation to r 58A is that if the intention was that only that expenditure attributed to 'Mineral - Exploration Activities' in the Form 5 operations report would constitute 'exploration expenditure' (as the Applicants contend), that could have been specified in r 58A itself. That it was not so specified militates against acceptance of the Applicants' submissions as to what constitutes 'aggregate exploration expenditure'.

170 Returning to r 58A(2), it is clear that the phrase 'total exploration expenditure shown in each relevant operations report' does not refer to a particular field or heading within the Form 5 operations report. Consequently, it is necessary to give the words in that phrase their ordinary meaning. When used as an adjective, the word 'total' means 'constituting or comprising the whole; entire; whole: the total expenditure'.[210] The word 'shown' is the past participle of the word show which means, amongst other things, 'to cause or allow to be seen; exhibit; display; present', to 'make clear; make known; explain' and to 'prove; demonstrate'.[211] Accordingly, the phrase 'total exploration expenditure shown in each relevant operations report' refers to the total (that is, the sum) of the various kinds of exploration expenditure which are shown (that is, displayed or made known) in the operations report. Finally, the 'aggregate exploration expenditure' is then worked out, in accordance with r 58A(2), by 'adding together' the various amounts of 'total exploration expenditure' drawn from each operations report.

171 The Applicants' contention that only the amount attributed to 'Mineral-Exploration Activities' in the Form 5 operations report may be used to calculate total exploration expenditure would leave the word 'total' in the phrase 'total exploration expenditure' with no work to do. That outcome would be contrary to the fundamental principle of statutory construction that a statute should be construed so as to give meaning and effect to all of the words used.[212] That principle has been described as all

[210] *Macquarie Dictionary Online.*
[211] *Macquarie Dictionary Online.*
[212] ***Commonwealth v Baume*** [1905] HCA 11; (1905) 2 CLR 405, 414 (Griffith CJ); ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [71] (McHugh, Gummow, Kirby & Hayne JJ).

the more compelling if the word or phrase in question has been added by an amendment. That was the case here: r 58A(2) was inserted into the Regulations in 2006,[213] following the amendment of the Act to include s 102(2)(h) in its current form, and s 102(2a). That the Applicants' construction would be contrary to these fundamental principles strongly militates against the correctness of that construction.

172 The phrase 'exploration expenditure' in the composite phrase 'total exploration expenditure' in r 58A(2) is not defined. However, four considerations suggest that that phrase should be construed consistently with s 102(2a)(a) of the Act. First, s 102(2a) defines the meaning of 'aggregate exploration expenditure', or in other words the aggregate (or total) of the 'exploration expenditure' across the combined reporting tenements. There can be no doubt that the reference in s 102(2a) to expenditure 'on, or in connection with, exploration for minerals' is what is encapsulated by the words 'exploration expenditure'. Secondly, as r 58A makes clear, the 'aggregate exploration expenditure' is the sum of the individual totals of 'exploration expenditure' drawn from each operations report. Thirdly, words used in delegated legislation should be given the same meaning as they have in the primary Act itself.[214] Fourthly, it is difficult to envisage any explanation for why a different meaning for 'exploration expenditure' in r 58A(2) would have been intended. None is apparent on the face of the provisions, or in light of the legislative history (which is discussed below).

173 In order to determine the 'total exploration expenditure' in each Form 5 operations report it will therefore be necessary to consider the expenditure information provided in the report, and (having regard to the description of the activities in the attachment to that report) to determine whether each item of expenditure was expenditure 'on or in connection with exploration for minerals' on the tenement in question. Nothing in the legislative provisions to which I have referred provides any support for the Applicants' contention that that phrase should be given a narrow ambit. Having regard to the kinds of expenditure which the Court in ***Flint*** accepted could be regarded as expenditure 'in connection with mining', and to the heads of expenditure in the Form 5 operations report, in my view the words expenditure 'in connection with' exploration for minerals are clearly capable of including expenses such as rent and rates for the tenement, and preparatory work relevant to exploration for minerals (such as the cost of obtaining expert reports or native title authorisation).

[213] *Mining Amendment Regulations (No 2) 2006* (WA) cl 24.
[214] *Interpretation Act 1984* (WA) s 44(1).

174 Each amount of 'exploration expenditure' must then be added together to reach a 'total exploration expenditure' for that tenement. Finally, the 'aggregated exploration expenditure' is calculated by adding all of the 'total exploration expenditure' amounts drawn from each operations report.

*The legislative context*

175 In my view, the wider statutory context supports the conclusion that under the Act and Regulations, a broad approach is taken to expenditure in connection with exploration for minerals. Three aspects, in particular, of the legislative context support the conclusion that expenditure 'on, or in connection with exploration' in s 102(2a) should not construed as confined to expenditure on exploration activities per se (that is, those which may be attributed to expenditure on 'Mining - Exploration Activities' in the Form 5 operations report).

176 First, s 68(3) of the Act requires the holder of an exploration licence to file a report of all work done and money expended 'in connection with exploration' in the area covered by the exploration licence. The report which must be filed for that purpose is a Form 5 operations report.[215] The fact that the same Form 5 operations report is used to report on work done in connection with exploration on land the subject of an exploration licence, and for work done in connection with exploration on land which is the subject of a mining lease, supports the conclusion that expenditure on a wide range of activities in addition to exploration per se will constitute expenditure in connection with exploration for minerals. In particular, the requirement that the Form 5 operations report be used suggests that all of the activities described in the headings or fields in the Form 5 operations report - such as expenditure on rent, or rates, or aboriginal surveys or administration costs - is capable of being incurred in connection with exploration for minerals.

177 Secondly, the holder of an exploration licence is required to comply with the prescribed expenditure conditions which attach to that licence.[216] Those expenditure conditions are that the holder of the licence must expend, or cause to be expended, the prescribed amount 'in *mining* on or in connection with *mining* on the licence during each year'.[217] In other words, the prescribed minimum expenditure for the purposes of an exploration licence is not limited to expenditure on activities constituting

[215] *Mining Act 1978* (WA) s 68(3).
[216] *Mining Act 1978* (WA) s 62(1).
[217] *Mining Regulations 1981* (WA) r 21(1).

exploration, but encompasses expenditure on all activities in connection with 'mining' (as defined). In that sense, the Act and Regulations recognise a considerable overlap between what is capable of constituting expenditure 'on or in connection with mining', and expenditure 'on or in connection with exploration'. (Indeed, perhaps the only expenditure which is, arguably, not capable of constituting expenditure in connection with exploration may well be expenditure on mining operations themselves (as defined in s8 of the Act). However, it is not necessary to decide that question for present purposes.) That there should be such an overlap between expenditure 'in connection with exploration', and expenditure 'in connection with mining', is not surprising. After all, the term 'mining' (as defined in the Act), is not confined to 'mining operations' but includes fossicking, prospecting and exploring for minerals.[218]

178 Thirdly, regulation 96C deals with particular kinds of expenditure that may (or may not) be taken into account for the purpose of calculating expenditure 'on or in connection with mining' in relation to an exploration licence.[219] Expenditure which may be taken into account in that calculation includes, for example, the cost of aboriginal heritage surveys, tenement rent and local government rates, administration and land access costs (within limits) and the cost of aerial surveys.[220] (Activities of the kind referred to in r 96C (other than r 96C(4) which sets out non-allowable expenditure) are specifically referred to in the Form 5 operations report.)

179 Viewed against the background of this legislative context, I am unable to discern any rationale for adopting a narrow construction of 'expenditure on or in connection with exploration for minerals' in s 102(2a)(a), so as to warrant the conclusion that 'aggregate exploration expenditure' is confined to expenditure on mining exploration per se, on tenements in a combined reporting group.

*The legislative history and the purpose behind s 102(2a) of the Act*

180 I turn, finally, to consider the legislative history and purpose behind the amendment of the Act to include s 102(2)(h) (in its current form) and s 102(2a). In my view, that legislative history confirms the construction of those provisions which I have set out above, and militates against acceptance of the construction advanced by the Applicants.[221]

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[218] *Mining Act 1978* (WA) s8(1) (definition of 'mining').
[219] *Mining Regulations 1981* (WA) r 21(1e).
[220] *Mining Regulations 1981* (WA) r 96C(1), (1a), (2a), (3), (3b).
[221] Cf *Interpretation Act 1984* (WA) s 19(1).

181 Counsel for the Attorney General helpfully outlined the history of s 102(2a) of the Act, and r 58A of the Regulations. Prior to 2004, s 102(2)(h) provided that one of the reasons for which a certificate of exemption may be granted was where:

> (h) the mining tenement is comprised within a project involving more than one tenement, and that expenditure on a tenement or tenements comprised in that project would have been such as to satisfy the expenditure requirements in relation to the tenement concerned had that aggregate expenditure been apportioned in respect of the various tenements comprised in the project.

182 Counsel noted that the policy guidelines which applied to s 102(2)(h) at that time drew a distinction between expenditure on 'mineral exploration / prospecting' and expenditure on 'mineral development / production'. The policy provided that the intention of s 102(2)(h) as it then stood was to 'allow provision for flexibility of exploration expenditure over a group of contiguous tenements. It is not reasonable to include the huge costs of mining development and production (often considerably greater than the level of exploration costs) in any exploration project, because this could then enable large areas of exploration / prospecting tenements to remain unworked with no effective exploration over long periods'. Those guidelines also provided that 'the policy is to ensure that individual tenements in large tenement groups are not left unworked for several years because of exemption under 102(2)(h)'.[222]

183 The operation of s 102(2)(h) as it then stood was considered by the Full Court of this Court in ***Re Calder; Ex parte St Barbara Mines Ltd***. In that case the mining warden dealt with an application for an exemption. The warden did not accept that s 102(2)(h) should be construed in the way set out in the guidelines, and concluded that it was not the legislative intention 'that any distinction be drawn between the type of expenditure or the type of tenement upon which the expenditure was expended for the purposes of assessing aggregate expenditure'. He relied on the fact that the Regulations in relation to mining leases included r 31(1), which stated that expenditure should be 'in mining or in connection with mining' on the lease. The mining warden took the view that if it were not permissible to aggregate expenditure on 'mining operations' together with expenditure on 'prospecting' or 'exploration', the effect could potentially negate the intended purpose of s 102(2)(h). He pointed to the example where the

[222] Quoted in ***Re Calder; Ex parte St Barbara Mines Ltd*** [1999] WASCA 25 [19] - [20] (Malcolm CJ, Pidgeon & Ipp JJ agreeing).

tenement holder held only two or three tenements, one of which was being mined extensively and upon which large sums of money were being spent, in circumstances where the tenement holder may have a bona fide reason for spending no money on the other two tenements, but may have genuine and reasonable plans to prospect or explore the other two tenements in the near future. He took the view that that would appear to be the sort of situation at which s 102(2)(h) was aimed.[223]

184 Malcolm CJ, with whom Pidgeon J and Ipp J agreed, considered that the warden's approach was 'entirely correct'.[224] The Chief Justice went on to say:

> In my opinion, the evident purpose of s 102(2)(h) is to enable a mining entity to invest substantial capital in mining or exploration of one or more of a group of mining tenements incorporated within a project without risk of forfeiture of other tenements in the project for non-compliance with the individual expenditure conditions otherwise applicable.[225]

185 Accordingly, the Full Court agreed with the mining warden's conclusion that the guidelines were not consistent with s 102(2)(h) of the Act in so far as they did not permit the aggregation of expenditure on mining operations together with expenditure on prospecting or exploration.

186 Counsel for the Attorney General explained that in response to ***Re Calder*** the Parliament then amended the Act to insert s 102(2)(h), in its current form, and s 102(2a).[226] That much is confirmed by the second reading speech for the *Mining Amendment Bill 2004* (WA). The Parliamentary Secretary introducing the Bill indicated that the amendment:[227]

> will provide for only legitimate exploration expenditure to be considered as an acceptable aggregate expenditure on the project. This will correct the undesirable situation that has existed since a Supreme Court decision in 1999, under which expenditure on productive mining on one or two tenements in a project could be included as part of the aggregate expenditure on all the tenements in that project. That resulted in ground continuing to be held for long periods under licences in the project area, effectively without being explored.

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[223] The warden's reasoning was outlined in ***Re Calder; Ex parte St Barbara Mines Ltd*** [1999] WASCA 25 [26].
[224] ***Re Calder; Ex parte St Barbara Mines Ltd*** [1999] WASCA 25 [27] (Malcolm CJ, Pidgeon J & Ipp J agreeing).
[225] ***Re Calder; Ex parte St Barbara Mines Ltd*** [1999] WASCA 25 [33] (Malcolm CJ, Pidgeon J & Ipp J agreeing).
[226] Attorney General's Submissions [43].
[227] Parliamentary Debates 22 October 2004, 7184 (Hon Ken Travers MLC).

187 Counsel for the Attorney General submitted that the purpose of avoiding that approach was achieved 'by specifically requiring approved arrangements under s115A(4) (s 102(2)(h)(i)) and restricting the expenditure which may be aggregated to expenditure "on, or in connection with, exploration for minerals" (s 102(2a)(a))'.[228]

188 The legislative history, in my view, makes clear that s 102(2)(h) (in its current form) and s 102(2a) were inserted into the Act so as to make clear that the purpose of the exemption in s 102(2)(h) was to ensure that the minimum expenditure amount was spend on or in connection with exploration for minerals (as opposed to 'mining', which includes not only exploration but also 'mining operations') across the tenements in a combined reporting group. However, having regard to the potential overlap between activities undertaken in connection with exploration and activities in connection with mining, it is apparent that what was intended to be excluded from the calculation of expenditure for the purposes of qualification for an exemption in s 102(2)(h) was expenditure in connection with mining operations.

189 Accordingly, in my view, nothing in the legislative history or purpose provides any support for the Applicants' contention that the 'aggregate exploration expenditure' under s 102(2)(h), calculated by reference to s 102(2a) and r 58A(2), refers only to expenditure attributed to 'Mineral - Exploration Activities' in the Form 5 operations reports.[229]

*Conclusion in relation to ground 3*

190 The approach taken by the Delegate in determining whether to grant the exemption certificates for M24/846 and M24/848 did not involve any error in the construction of s 102 and s 102(2a) of the Act (or r 58A of the Regulations), or any misunderstanding about what the application of those provisions required. The Delegate's Decision was therefore not infected by jurisdictional error. No basis has been shown for the grant of a writ of certiorari or declaratory relief in respect of the Delegate's Decision.

## Conclusion

191 Neither the Warden's Decision nor the Delegate's Decision was infected by jurisdictional error. Consequently, the application for judicial review should be dismissed.

[228] Attorney General's Submissions [43].
[229] ts 140.

192 For the sake of completeness, I should mention the question of standing. In other cases,[230] I have set out my view that it is not necessary for an applicant for a writ of certiorari to demonstrate standing to seek that relief. For that reason, it was not necessary to consider whether the Applicants had standing to bring this application for judicial review. However, had the Applicants succeeded in demonstrating a jurisdictional error, it would have been necessary, in the course of considering whether to grant relief, to consider whether the Applicants had an interest in the Warden's Decision and the Delegate's Decision, and if not, whether relief should be withheld on that basis, in the exercise of the Court's discretion.

[230] See, eg, ***Abraham v Hon Peter Charles Collier MLC, Minister for Aboriginal Affairs*** [2016] WASC 269.