[2023] WAMW 5

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	REGIS RESOURCES LIMITED v RICHMOND [2023] WAMW 5
CORAM	**:**	WARDEN CLEARY
HEARD	**:**	23 May 2022
DELIVERED	**:**	8 March 2023
FILE NO/S	**:**	Applications for exemption: 587663, 592259, 596109, 589806, 619899, 622359, 627320 Objections: 587735, 592364, 616320, 590424, 620024, 622554, 627346 Interlocutory Application lodged 2 February 2022
TENEMENT NO/S	**:**	E 38/2004, E 38/2868, E 38/2955, E 38/3136-3138, P38/4124, P 38/4147, P 38/4471
BETWEEN	**:**	Regis Resources Limited (Applicant) AND William Robert Richmond (Objector)

Catchwords: Application for exemption from expenditure under s 102(2)(h); s 102(2)(h) reason conceded; objection based on 'warehousing'; whether mandatory factors under s 102(4) inclusive or exhaustive; onus under s 102(4); no evidence on mandatory factors in s 102(4).

Legislation:

- *Mining Act 1978* (WA) Section 45(2), 69, 102(2)(h), 102(3), 102(4)
- *Mining Regulations 1981* (WA) Regulation 154
- *Offenders Community Correction Act (1963)* (WA) Section 40D(2a).

Result: The interlocutory application is dismissed

Recommendation to the Minister to refuse the applications for exemption from expenditure conditions

Representation:

Counsel:

Applicant	:	B Dalitz
Objector	:	G Cobby SC and T Kavenagh

Solicitors:

Applicant	:	DLA Piper Australia
Objector	:	Kavenagh Legal

Cases referred to:

Ashwin & Ors v Regis Resources Limited [2014] NNTTA 39.
Ridge v Baldwin [1964] AC 40.
Baxter v Serpentine-Jarrahdale (unreported) Perth Wardens Court, 8 July 1999.
Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1.
Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others [2008] WAMW 9.
Commercial Properties v Italo Nominees [1988] WASC 428.
Craig v Spargos Exploration NL, unreported, Kalgoorlie Warden's Court, 22 December 1986, noted in (1986) 6 AMPLA Bull 73.
Diamond Rose NL v Hawks unreported, Perth Warden's Court, 26 May 2000.
Ex parte Devant Pty Ltd and the Minister for Mines Supreme Court of WA, Full Court (unreported) Library No 960722.
Extension Hill Pty Ltd v Crimson Metals Pty Ltd [2017] WAMW 22.
FMG Chichester Pty Ltd v Rinehart [2010] WAMW 7.
Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106.
Finesky Holdings Pty Ltd v Australian Speleological Federation Inc [2001] WAMW 1.
Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum [2017] WASCA 153; (2017) 51 WAR 425.
Great Boulder Mines Ltd v Bailey [2000] WAMW 6.

Haoma Mining NL v Tunza Holdings Pty Ltd & Anor [2006] WASCA 19; (2006) 31 WAR 270.
Hesse Blind Roller Co Pty Ltd v Hamitovski [2006] VSCA 121.
Ho v Powell [2001] NSWCA 168; (2001) 51 NSWLR 572.
Iluka v Serpentine-Jarrahdale (unreported) Perth Wardens Court, 23 December 1999.
Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298.
Kioa v West [1985] HCA 81; (1985) 159 CLR 550.
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; (2011) 243 CLR 361.
Mineralogy Pty Ltd v Blackfin Pty Ltd [2013] WAMW 19.
Mitchell v R [1996] HCA 45; (1996) 184 CLR 333.
Nova Resources NL v French (1995) 12 WAR 50.
O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210.
Pangolin Resources Pty ltd v The Honourable Norman Moore MLC [2012] WASC 343.
Plaintiff M64/2015 v Minister for Immigration and Border Protection [2015] HCA 50; (2015) 258 CLR 173.
R v Anderson; Ex parte Ipec – Air Pty Ltd (1965) 113 CLR 177.
R v Hunt, Ex parte Sean Investments Pty Ltd [1979] HCA 32; (1979) 180 CLR 322; (1979) 25 ALR 497.
Re His Worship Mr Calder SM; ex parte Gardner [1999] WASCA 28.
Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd [2007] WASCA 175.
Re Roberts SM; ex parte Burge [2003] WASCA 2.
Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd (1998) 20 WAR 343.
Re Warden French; Ex parte Serpentine Jarrahdale Ratepayers and Residents Association (1994) 11 WAR 315.
Ronchi v Portland Smelter Services Ltd [2005] VSCA 83.
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18; (2000) 200 CLR 121.
Siberia Mining Corporation Pty Ltd v O'Sullivan [2020] WASC 214.
Thompson v Siberia Mining Corporation Pty Ltd [2021] WASCA 115.
Tortola Pty Ltd v Saladar Pty Ltd and Holloway [1985] WAR 195.
Westside Mines Pty Ltd v Tortola Pty Ltd [1985] WAR 345.
Yarri Mining Pty Ltd v Forrest & Forrest Pty Ltd [2012] WAMW 37.

1 Regis Resources Limited hold the Duketon Gold Project and Moolart Well, comprising approximately 200 tenements, hosting three gold mines and 11 satellite deposits. The Duketon Gold Project and Moolart Well tenements are combined reporting tenements under s 115A(4) of the *Mining Act 1978* (WA). Regis under expended on some tenements and has applied for a certificate of exemption from expenditure conditions on those tenements for the relevant tenement years under s 102(2)(h) of the *Mining Act*.

2 The parties agree that Regis has satisfied s 102(2)(h), that is, that the aggregate exploration expenditure for the combined reporting tenements would satisfy the expenditure requirements for the relevant tenements had that aggregate exploration expenditure been apportioned between the combined reporting tenements.

3 Nevertheless, Mr Richmond objects to certificates of exemption being granted. He says that Regis is, and has been before the tenements were granted to it, involved in ‘warehousing’ the tenements, that is, it has engaged in a succession of acquisitions, surrenders, under expenditure and engineered applications by others which enables him to retain the tenements without mining them. Richmond says that ‘warehousing’ is contrary to the principles of the Act and is a relevant factor the Minister can have regard to when considering whether to grant certificates of exemption under s 102 of the *Mining Act*, and in this case, it weighs against a certificate being granted.

4 Regis, denying ‘warehousing,’ says that ‘warehousing’ is not a factor that can be taken into account in an application under s 102(2), or, if it is, it does not have such weight in this matter that it results in a recommendation for refusal.

WHAT MUST BE DETERMINED IN THIS CASE?

5 The applicant firstly says that the mandatory relevant factors named in s 102(4) of the *Mining Act 1978* (WA), being the current grounds upon which exemptions have been granted and work done and money spent on the tenement by the holder, are exhaustive, and therefore evidence on any matter that concerns Regis’ interest in or activities on the land the subject of each tenement before the Minister granted the tenement is not admissible. To that end, Regis brought an interlocutory application asking the warden to decline to hear the objector regarding the applicant’s interest in or activities on the land before the Minister granted the tenements. These reasons incorporate my determination on the interlocutory application.

6 In ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor***,[1] President Steylter said:

> …the fact that s 102(4) requires that consideration must be given to the current grounds upon which the exemptions have previously been granted (and, importantly, also to work done and money spent on the tenement by its holder), does not mean that the decision-maker *may* not have regard to other matters, including previous failures to meet prescribed expenditure which were the subject of certificates of exemption granted upon different grounds to those raised in the current application. If the previous failures are reasonably considered to be relevant to the question whether a further certificate of exemption should issue, there is, as I read the section, nothing in it which prevents them from being taken into account.

7 The applicant says that that statement is not determinative of whether s102(4) is not exhaustive. As 102 conveys a power leading to a duty, the scope of factors relevant to the Minister's discretion in the present case is exhaustive and does not include evidence not identified in s 102(4). President Steytler's finding does not apply to s 102(4) as it is read with s 102(2) because, according to the applicant:

a. President Steytler was addressing s 102(4) as it is read with s 102(3). Section 102(3) imparts a wider discretion to the Minister than s 102(2), and his Honour's finding must be read that his Honour was referring to the operation of s 102(3) and the use of factors other than those listed in s 102(4) to determine whether a recommendation to grant could be made under s 102(3), not the application itself of s 102(4). That is, s 102(4) does not limit what can be considered when assessing the reasons given in an application under s 102(3).

b. In any event, s 102 imparts a power to grant, with a duty to grant if certain conditions are satisfied. Therefore, the two mandatory considerations in s 102(4) set the limits of what the Minister can consider over and above the reasons put forward by the applicant in s 102(2) and 102(3).

8 The applicant says that if s 102(4) is not exhaustive, the warden should nevertheless not have regard to the evidence sought to be lead by the objector because:

a. the evidence to be lead goes to an allegation of warehousing, which is not a relevant factor in the present case; or

[1] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270 [61].

b. If the warden considers it a relevant factor where some weight may be given against the applicant, the applicant will have been denied procedural fairness, because:

   i. the factor was raised late in the proceedings, and

   ii. the factor exceeds the scope of the original objection, being that a valid reason for the exemption does not exist, although more specifically the applicant complains that the expansion, late or otherwise, of such an objection should not be heard, as while objections are not pleadings, they inform the other party as to the 'perimeter within which a party must frame its case' and to proceed outside that perimeter, without leave, would be unfair, or

c. the evidence is such that it is not able to satisfy the warden that there has been warehousing, or that it weighs against the application for exemption being granted.

9 The matter is made more complex by the fact that in the present case neither party sought to adduce evidence relevant to the mandatory factors, there being an agreed set of facts regarding only the reason in s 102(2). The lack of evidence is relevant to how a warden considers, or 'has regard to' the mandatory relevant factors. Accordingly, the following issues arise:

a. Does a lack of evidence on a mandatory factor in s 102(4) render either of the application or objection invalid, because without evidence, the factor cannot be considered? This issue raises two questions:

   i. Are the factors in s 102(4) jurisdictional facts, that is, are they a pre-condition to the exercise of the Minister's power, such that without evidence on them the warden does not have the jurisdiction to exercise the power, or duty, imposed by s 102 to make a recommendation to grant or refuse?

   ii. If one or the other is invalid, which is it? Each party pointed to the others' 'originating process' – being either the applications for exemption or the objections. The answer to this question lies with the answer to the next question regarding the onus.

b. Where does the onus lie in relation to the mandatory factors in s 102(4)? It is a general, uncontroversial statement to say that it is the party applying for the exemption that bears the onus of establishing that proper reasons exist for recommending to the Minister that each application should be granted.[2] However, the parties in the present case dispute where the onus lies, once the reasons in either s102(2) or 102(3) are satisfied, as to the mandatory considerations in s102(4). In other words:

    i. Is a finding that an applicant for exemption satisfies the reasons set out in s 102(2)(h) favourable towards the applicant in the exercise of the discretion to grant the exemption, or neutral?

    ii. Is it then for the objector to satisfy the Minister, through the warden, that there is a good reason why an exemption should not be made, or, in other words, refused? If the objector fails to, or does not, do so, must the exemption then be granted?

    iii. Alternatively, if there is no evidence of a mandatory factor, and the application is not invalid, is the result that as there is no evidence that allows a finding in favour of the applicant, the application cannot result in a recommendation to grant the exemption?

    iv. These questions raise subsidiary issues:

    - What does "have regard to" mean? and
    - Does "have regard to" include, where there is no evidence, a negative inference being drawn on the party not calling evidence that might well be in its possession? That is, can it be used to support an inference that the evidence would weigh against them, which in turn supports weight against that party in relation to that factor?

[2] ***Mineralogy Pty Ltd v Blackfin Pty Ltd*** [2013] WAMW 19 [19]; ***Extension Hill Pty Ltd v Crimson Metals Pty Ltd*** [2017] WAMW 22 [21].

THE LEGISLATIVE SCHEME

10 Because some of the issues raised in this matter relate to the construction of the *Mining Act 1978* it is necessary to set out some of the provisions of the Act and the policies underlying the regime that are relevant to the submissions of both parties, and then to make some observations about the role of the warden in administrative proceedings.

The legislation

11 Sections 50(1) and 62(1) of the *Mining Act 1978* provide in similar terms that the holder of a prospecting or exploration licence shall comply with the prescribed expenditure conditions applicable to such land unless total or partial exemption therefrom is granted. Failure to comply with the expenditure condition may result in the forfeiture of the lease on an application for forfeiture under s 96 regarding prospecting licences and s 98 regarding exploration licences.

12 The expression 'expenditure conditions' is defined in s 8 as follows:

> ***expenditure conditions*** in relation to a mining tenement means the prescribed conditions applicable to a mining tenement that require the expenditure of money on or in connection with the mining tenement or the mining operations carried out thereon or proposed to be so carried out[.]

The expenditure condition for a prospecting licence is prescribed by reg 15 of the *Mining Regulations 1981* (WA) and for an exploration licence, reg 21.

13 Section 102 of the Act concerns applications for exemption from the prescribed expenditure conditions. Under s 103 the effect of an exemption is that the holder of the mining tenement is deemed to be relieved, to the extent and subject to the conditions specified in the exemption certificate, from their obligations under the prescribed expenditure conditions for the tenement the subject of the exemption for the specified time period.

14 Pursuant to s 102(5)(a) of the Act, the warden has jurisdiction to hear an application for an exemption, once an objection has been lodged, in a manner consistent with the requirements of the Act. There is no specific section of the Act or regulation creating the power to object to applications for exemption. Section 102(5) assumes that an objection may be made.

15 Section 102(6) of the Act provides that the hearing conducted by the warden is to result in a recommendation to the Minister, with the warden, after the hearing, transmitting to the Minister the notes of evidence and any maps and documents referred to, together with a report containing the recommendation to grant or refuse, with reasons.

16 A certificate of exemption may be granted for any of the reasons set out in s102(2) or, under s 102(3), for any reason which in the opinion of the Minister is sufficient to justify an exemption.

17 Section 102(4) requires regard to be had to 2 factors when consideration is given to an application for exemption, being the current grounds upon which exemptions have been granted and the work done and the money spent on the mining tenement by the holder. [3]

18 It is the Minister, not the warden, who determines whether to grant an application for exemption no matter what the type of lease. The Minister is required to consider the warden's report but is not bound to follow or accept it,[4] and when making the decision to grant or refuse an application for exemption the Minister must exercise any accompanying discretions consistently with the scope and objects of the Act.[5]

The policies and principles of the regime and how they apply to section 102

19 As was explained in ***Nova Resources NL v French***,[6] a principal object of the Act and regime is:

> [To] ensure as far as practicable that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration. It is made available subject to reasonably stringent conditions and if these, including expenditure conditions, show that the purposes of the grant are not being advanced, then the Act and regulations make provision for others who have an interest in those purposes on that land to apply for forfeiture so they may exploit the area.

[3] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [72].
[4] ***Pangolin Resources Pty Ltd v The Honourable Norman Moore MLC*** [2012] WASC 343 [10].
[5] ***O'Sullivan v Farrer*** [1989] HCA 61; (1989) 168 CLR 210; 216-217; ***Pangolin Resources Pty Ltd v The Honourable Norman Moore MLC*** [2012] WASC 343 [10].
[6] ***Nova Resources NL v French*** (1995) 12 WAR 50, 57-58.

20 As was observed in ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum***,[7] that is not the only object of the Act. Other objects or purposes that have been identified include:

a. identifying circumstances in which a tenement holder will be allowed to hold a mining tenement without mining or giving it up for others who may wish to actively mine the land.

b. protecting tenement holders who have defaulted in compliance with the Act in some minor respect, or because of some circumstances beyond the control of the tenement holder, against loss of the tenement.

c. providing that, in general, the holder of a mining tenement should carry out the relevant mining activity on the tenement.

21 Under the Act mining licences are finite in their terms. A prospecting licence is for 4 years, renewable for a period of 4 years under s 45(1) and (1a) if certain conditions exist. Generally, under r 16A, the reasons sought for an extension are that factors have occurred which were out of the holder's control leading to a lack of ability to prospect, or that work already done justifies the extension. Therefore, it is not as of right that there is an extension granted. Similar provisions exist in relation to exploration licences, which run for a term of 5 years.

22 Under s 49(1) the holder of the prospecting licence, and under s 67 the holder of an exploration licence, may be granted a mining or general purpose lease over the same ground. While it has been said that that conversion to mining lease is virtually as of right, the presence of s 75(8), 75(9) and some policy-based circumstances under s 111A[8] suggest that the Minister nevertheless has a right of veto to that conversion, at least in some circumstances. To ensure that ground is either converted to a mining lease or surrendered, the terms of leases are short, and finite, and the holder of the tenement, once

[7] ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 425 [96].

[8] See for example ***Baxter v Serpentine-Jarrahdale*** (unreported) Perth Wardens Court, 8 July 1999; ***Iluka v Serpentine-Jarrahdale*** (unreported) Perth Wardens Court, 23 December 1999; ***Finesky Holdings Pty Ltd v Australian Speleological Federation Inc*** [2001] WAMW 1; ***FMG Chichester Pty Ltd v Rinehart*** [2010] WAMW 7 and ***Yarri Mining Pty Ltd v Forrest & Forrest Pty Ltd*** [2012] WAMW 37.

surrendered, is precluded from reapplying for either a prospecting or exploration licence within 3 months of surrender, forfeiture or expiration under s 45(2) for prospecting licences and 69(1) for exploration licences.

23 The Act encourages exploration and mining activity and discourages a tenement holder from going to sleep on his rights and obligations.[9] A related purpose is to protect tenement holders who have defaulted in compliance with the Act in some minor way or because of circumstances beyond the control of the tenement holder.[10] Therefore, the policy of the Act is that a tenement holder unable to explore for or exploit mineral resources of a tenement should give way for some other person to do so, while recognising that security of tenure is also an important feature of the mining regime in Western Australia.

24 In ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor***,[11] in considering the factors in s102(4) President Steytler gave what appears to be his view of the purposes of, or policy behind, those factors. Firstly, a consideration of prior exemptions enables consistent decision-making.[12] Secondly, however, the warden or Minister, having reviewed the history of a particular tenement, might conclude that there had been repeated prior applications for exemption and that that was suggestive of an unwillingness or inability to explore the tenement or to mine it as the case may be. Therefore s 102(4) assists the Minister, having determined that there may be reasons to grant an exemption, to decide whether in all of the circumstances, the exemption should be granted.

25 The exemption may not be granted where the applicant has shown, in all of the circumstances, an unwillingness or inability to explore or mine the tenement within a reasonable timeframe. That "is a matter to be taken into account in considering whether or not to grant a further exemption…"[13] Those circumstances include therefore a tenement holder using exemptions to keep others from the opportunity to mine the

[9] ***Craig v Spargos Exploration NL***, unreported, Kalgoorlie Warden's Court, 22 December 1986, noted in (1986) 6 AMPLA Bull 73.
[10] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [57], citing ***Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd*** [2007] WASCA 175, per Pullin JA [21], [24].
[11] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270.
[12] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270 [60].
[13] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270 [64].

ground, in defiance of one of the principles of the Act, or where the applications for exemption signify an attempt to circumvent the Act.

26 Accordingly, s 102 is grounded by a number of competing principles: the security of tenure when expenditure may not occur because of circumstances outside a holder's control or for minor breaches, balanced with ensuring that land is open for mining when the current holder is unable or unwilling to mine within a particular timeframe. These same principles are evidenced in the finite terms of licences granted and the methods of converting licences to mining leases.

27 Later in these reasons I explain why it is my view that any discussion in ***Haoma*** about s 102(4) applies equally to s 102(2) and 102(3), and that that extends to the principles of the section and the policy behind s 102(4).

The role of the warden in these proceedings

28 The warden, where an objection has been lodged, is to hear the application, and then forward to the Minister notes of evidence and other documents and a recommendation for either refusal or grant of the exemption. It is a role of assisting the Minister for Mines in coming to the decision that Minister may make.

29 There is no distinct provision in the *Mining Act* that establishes an administrative wardens 'court.' Rather, the provisions empowering the warden to deal with applications and objections are contained within the provisions which set out the criteria for the granting, refusing and recommending each licence, or in Division 7 of Part IV, which addresses exemption from expenditure conditions.

30 Under r 154, the warden conducting Part IV proceedings must act with as little formality as possible, is not bound by the rules of evidence, but is bound by the rules of natural justice and may be informed in any way appropriate.

31 In making a recommendation, the warden does not make a final judgement or a final determination or a final decision.[14] Under s 102(6) the final decision in relation to the grant or refusal of the licence itself rests with the Minister for Mines. Therefore, in

[14] ***Re His Worship Mr Calder SM; ex parte Gardner*** [1999] WASCA 28 [15], citing and applying to all recommendatory provisions of the Act ***Westside Mines Pty Ltd v Tortola Pty Ltd*** [1985] WAR 345, 350.

recommending the grant or refusal of exemptions from expenditure conditions the warden is performing an administrative function, as a 'filter.'

32 The subject of the warden's report and recommendation to the Minister must be restricted therefore to material issues that may lawfully be considered by the Minister.[15]

33 Administrative actions by the warden involve the recognition of criteria and the application or administration of those criteria to the application, taking into account and balancing those with any objection that has been made.

34 In that regard, therefore, the warden's investigation is constrained by the objects of the *Mining Act 1978*. This regulates the way in which the warden comes to a decision, being a decision to recommend grant or refusal in this case, rather than its outcome.

35 In general, administrative decision-makers should consider and give effect to government or department policy, but are not bound by policy, each case being decided on its own merits.[16] Nevertheless, the principles of the Act guide a warden when considering an application. Although the decision itself is in the hands of the Minister, as I have identified, any recommendation must recognise and be made within the framework of policy and principles of the Act.

IS SECTION 102(4) EXHAUSTIVE?

36 If the factors the decision-maker must have regard to in s 102(4) are listed exhaustively, the alleged fact itself of warehousing is not relevant, nor is any evidence of warehousing other than what might be evidence of warehousing from the two factors expressly identified.

37 The objector submitted that President Steytler's review[17] of s 102 in ***Haoma*** shows that s 102(4) is not exhaustive, and therefore the evidence it seeks to lead is admissible and relevant. However, as I have identified, the applicant says that his Honour's review of s 102(4) is to be seen in the context of s 102(3), not s 102 generally.

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[15] ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9 [13].

[16] See, for example, ***Plaintiff M64/2015 v Minister for Immigration and Border Protection*** [2015] HCA 50; (2015) 258 CLR 173 [54] and [68].

[17] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270 [61].

38 I am of the view that President Steytler's comments were directed at the operation of s 102(4) in the context of both s 102(2) and 102(3). However, if I am wrong about that, I am also of the view that s 102 does not impose a duty on the Minister such that the factors in s 102(4) are exhaustive.

39 Section 102(4) may be exhaustive if s 102 confers a power coupled with a duty to exercise the power. That is, "may" may not only be empowering, it may indicate the circumstances in which the power must be exercised. The applicant submitted that in the case of s 102 there is such a duty, because:

a. the power benefits tenement holders,
b. The power is exercisable on stringent specified criteria,
c. The power is conditional on the Minister forming a view that the existence of the reason is sufficient to justify an exemption,
d. "may" confers a power coupled with a duty elsewhere in the *Mining Act*, and
e. Important objects of the Act are that security and certainty of title is to be promoted, and a tenement holder can expect to be able to retain a tenement until it plans to explore it so long as the holder is working towards continuous effective mineral exploration.

40 The applicant contends that the Minister must be satisfied of two matters to grant an exemption certificate under s 102(2):

a. that a reason for exemption in section 102(2) exists and
b. that the mandatory considerations in section 102(4) do not justify refusal.

In other words, according to the applicant, the Minister, once satisfied that the two matters in s 102(4) weigh in favour of the applicant, or are neutral, is bound to grant the exemption. That, it says, is the nature of the duty, and the only factors relevant to the exercise of the duty are those in s 102(4), once the reasons exist in s 102(2) or (3).

41 If such a duty exists, the applicant submits, the Minister must grant exemptions if Regis demonstrates that the reason in section 102(2)(h) existed and the objector fails to demonstrate that the mandatory considerations in s 102(4) nevertheless justify refusing the exemptions. Therefore, unless the objector demonstrates that the mandatory considerations in s102(4) justify refusing the exemptions, the Minister's discretion ceases. I will address President Steytler's comments first.

Why President Steytler's findings in *Haoma* apply in the present case

Background in **Haoma**

42 In ***Haoma*** the applicant applied for exemptions under s 102(2) and (3). The warden found there was no sufficient basis to find that the reason under s 102(2) existed. He found similarly under s 102(3), but in coming to a recommendation under s 102(3) took into account prior grants of exemption on the grounds, both for the same reason as the application before him, and granted for other reasons. A review was sought on whether the warden failed to consider, or adequately consider, that the facts gave rise to a good and sufficient reason under sections 102(2) and (3). The Court found that the warden had given proper consideration to the facts in his assessment of both s102(2) and s102(3). Secondly, review was sought to determine whether the warden had considered irrelevant considerations under s102(3), or generally under s102, having regard to section 103 of the Act.

43 The Court's view was that the warden had the power to consider the factors identified in s 102(4) and other relevant factors not identified in s 102(4).

The Court's finding

44 The Court, lead by President Steytler's decision, arrived at that finding having been asked to construe s 102(4). Three alternatives were placed before the Court, the Court favouring the construction that the phrase should read as requiring regard be had to those of the current grounds relied upon for exemptions as have previously resulted in the grant of an exemption.[18]

45 Paragraph [61] of the Court's decision is focused on the reasons why President Steytler accepts the third alternative of the reading of s 102(4). His Honour took the view that there is not a limit on what can in fact be taken into account simply because s 102(4) contains 2 mandatory considerations.

The applicant's submissions about the application of **Haoma** *in the present case*

46 The applicant in the present case urged this court to find that the Court's findings, and President Steytler's views on the application of s 102(4) must be confined to an

[18] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270 [57].

application under, and a consideration of, s 102(3), from which the Minister has a broader discretion than in s 102(2). That is, the discretion is so wide in s 102(3) that the limited factors in s 102(4) are, in the case of s 102(3) overridden by the width of that discretion in that section, and that that was the focus of the President's considerations, not s 102(4) itself.

47 The application for exemption being considered by President Steytler when making his finding being under s 102(3), therefore, the applicant submitted, it can be taken that President Steytler found that factors other than those in s 102(4) may be considered when assessing an application under s 102(3), that is, before one arrives at the mandatory factors, as part of the consideration of the reasons for the need for the exemption, under s 102(3) itself, s 102(3) having a broader discretion and scope for reasons than s 102(2).

48 The underlying contentions of the applicant's argument are that:

a. There are two 'separate' pathways to grant – through s 102(2) or s 102(3).
b. The fact of the separate pathways enables a separate application of s 102(4) to each of those pathways.
c. Therefore, President Steytler's comments that more than the 2 mandatory factors may be considered under s 102(4) can only be read as when assessing an application under s 102(3), as that was the application being considered in that ground of review.
d. Alternatively, the relevant finding in ***Haoma*** was a finding about the considerations of the reasons put forward in the application under s 102(3), and not a finding about the application of s 102(4) at all.

49 I am of the view that President Steytler is referring to the consideration required under s 102(4), not s 102(3) when saying that s 102(4) does not preclude other factors from being considered, and that that reference is to s 102 as a whole. That is because, in summary:

a. The construction of [61] of President Steytler's reasons, where the finding is made, and the Court's reasons as a whole, with the construction of s 102, can be interpreted as the President focusing on s 102(4) and its application, not s 102(3), and
b. The policy underlying s 102(4) supports a reading that the President's finding relates to the general application of s 102(4) to s 102 as a whole.

50 There are unwarranted practical ramifications to the applicant's reading that cannot have been intended by the legislation, and would render the section open to abuse, which I discuss after I have addressed the question of 'duty.'

It is the case that s 102(2) and s 102(3) are separate pathways to grant

51 His Honour Justice Tottle found in ***Siberia Mining Corporation Pty Ltd v O'Sullivan***[19] that s 102(2) and 102(3) are separate paths to grant. They are separate paths because s 102(2) sets out a set of relatively confined reasons and s 102(3) allows for any reason to be put forward by the applicant, whether that reason is a reason also under s 102(2) or not. If it is also a reason under s 102(2), the warden must, even if already having considered that reason under s 102(2), again consider that reason under s 102(3). Hence the two sub-sections are 'separate' pathways – not because they are grounded in separate policy considerations, or relate to different licence or ground types, but because there are many different reasons why a certificate of exemption may be required, some of which are not listed in s 102(2), or, those in combination with factors not listed, may be sufficient. In my view that decision goes no further, and cannot be used to suggest that therefore s 102(2) and s 102(3) must or even can be treated differently in the application of s 102(4).

The reasons in **Haoma** *and s 102*

52 While the warden in the original proceedings in ***Haoma*** made the comments he made about prior expenditure being relevant in his findings on s 102(3), his focus, and the focus of President Steytler, was on the way in which those factors result in an adverse recommendation, President Steytler commenting that those factors were of no assistance to the applicant in that case. The warden had also said in his recommendation that in his considerations pursuant to s 102(3) he had conducted enquiries about the tenements, and that "This enquiry reveals that s102(4) is of no assistance to HAOMA and in fact it is damming of the application."[20] The ground for review was that "the Warden, contrary to s 102(4), wrongly considered shortfalls in expenditure" and that the shortfall was an irrelevant consideration. That language, in my view, suggests the question to be resolved

[19] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214.
[20] Recited at [42] of ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270.

in that case was whether it is at the discretionary policy stage that those factors are relevant.

53 Section 102(4) as drafted specifically says that it is to be applied when consideration is given "to an application," making no distinction between an application under s 102(2) and 102(3). President Steytler found that previous failures to meet expenditure, on grounds other than in the current application, were reasonably relevant to the question whether a further certificate should be granted, saying he could see no reason why "the section" prevents such matters from being taken into account.[21] Given the only part of the section his Honour refers to in paragraph [61] is s 102(4), it is possible that he meant that he cannot read s102(4) as having the restricted affect, when considering factors under s 102(4), or the section as a whole.

54 At no stage in ***Haoma*** was the Court asked to consider the breadth of the actual relevant factors in s 102(3). Therefore, when looking at the warden's comments and the ground of review, in my view the focus of the Court was on the function of s 102(4) in consideration of an application under s 102, not a consideration of the function of s 102(3).

55 Further, his Honour justified his view on the breadth of s 102(4) by addressing the argument that considering factors such as shortfalls in expenditure when certificates of exemption had been granted undermined sections 103 and 96(2a) of the Act. Neither, he found, would be undermined by a reading that past reasons for exemption other than those specified in s 102(4) may be relevant and therefore considered. In my view there is nothing in his discussion on those sections that can be read as limiting his view to s 102(4) only as it applies to s 102(3).

56 I am also of the view that if the determination given by the Court in ***Haoma*** was restricted to the breadth of s 102(3), the ground of review would have been different. To have given an answer that s 102(4) does not restrict a consideration under s 102(3) when considering reasons given under s 102(3), the argument before the Court would have had to have been that the only factors that could ever be considered under s 102(3) are the mandatory factors in s 102(4). That was not the ground of review, and s 102(3) is not drafted in such a restrictive way.

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[21] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270 [61].

57 It is the case that when assessing the grounds of review relating to s 102(4), the Court's written decision places that discussion under the heading "Grounds (b) and (c) – s 102(3) read with s 102(4)." That heading was no doubt guided by the fact that the warden only appeared to have regard to past exemptions when he was discussing the application made under s 102(3). As I have described earlier, President Steytler identified the general policy behind s 102(4). That discussion is also under that heading. However, his Honour, in identifying that policy, identifies the policy as existing in s 102(4), not s 102(3). Section 102(4) does not itself differentiate between s 102(2) and 102(3). It is s 102(4) which promulgates the view that regard must be had to factors which may assist the Minister in determining a grant or refusal in the context of that policy. That is, it was a focus on the policy considerations which the legislature was of the view must form part of the Minister's deliberation on whether to grant or refuse the application, positive or negative to the applicant. Those policy considerations form part of that overall discretion, not a determination of the reasons themselves put forward by the applicant.

The policy supporting s 102(4)

58 His Honour identifies the policy behind the ability to take into account activity on the tenement and prior exemptions in [64]. In that paragraph he is addressing the submission that the effect of section 103 is undermined by the Minister's ability to consider the factors in s 102(4), including factors wider than those narrowly drafted factors. His Honour first identifies that, after reviewing the history of a particular tenement, the Minister may conclude that the fact of repeated prior applications for exemptions, even if successful, is suggestive of an unwillingness or inability to explore or mine the tenement, and that that is a matter to be taken into account in considering whether or not to grant a further exemption. He concludes that the effect of s 103, that is, previous exemptions, is not undermined by the Minister's ability to consider the previous exemptions. Those exemptions, he says, can be looked at "in the context of a fresh application for exemption." In so saying, his Honour does not confine his findings to exemptions made under s 102(3), and neither can it be read that he infers it. Neither are there any policy reasons why those factors identified by the President should be relevant to s 102(3) and not s 102(2), when the policy behind seeking exemptions is the same, whether the reason falls under s 102(2) or s 102(3).

59 For the reasons President Steytler sets out, which are largely policy and procedural reasons, having regard to matters other than those specifically identified in s 102(4) in an application under s 102(2) does not undermine either of those two sections either. Therefore, again I see no distinction in his Honour's comments that can be drawn between s 102(3) and s 102(2) when it comes to the application of s 102(4).

60 Therefore, in accordance with President Steytler's view:

a. The two factors identified in s 102(4) cannot be ignored in the exercise of the discretion to grant or refuse an exemption;

b. One policy behind those factors is an assessment of whether there is any reason to suggest that the applicant is using the exemption process to thwart the principle that land should be mined or open for mining such that it outweighs the principle that a tenement holder should have security of tenure;

c. Those factors, and that policy, apply equally to an application under s 102(3) as to s 102(2), and

d. In view of that policy, and the practical application of it, any general comments about the application of s 102(4) by President Steytler in relation to s 102(3) are applicable to an application under s102(2), and the two factors identified by s 102(4) are not exhaustive in the application of s 102(4) to an application under s 102(2).

Does s 102 convey a power or a duty?

61 If I am wrong about the application of President Steytler's findings on s 102(4) as it applies generally, or to s 102(2) specifically, in any event, it is my view that the construction of s 102 does not promote a reading that the section conveys a limited power in specific circumstances such that s 102(4) is exhaustive or restrictive.

62 It is an accepted proposition that the use of the word "may" on occasions and in particular circumstances is not only empowering, but indicates circumstances in which the power *is* to be exercised. That is, when these events are satisfied "may" becomes "must."[22] The parties disagree as to whether that proposition applies to s 102.

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[22] ***Finance Facilities Pty Ltd v Federal Commissioner of Taxation*** (1971) 127 CLR 106, 134 – 135.

63 The applicant also relies on the agreed proposition in ***R v Anderson; Ex parte Ipec – Air Pty Ltd***[23] that the repository of a power must exercise it if there is no good reason remaining not to do so. The question in this case is whether the two factors in s 102(4) are the only factors which may eventuate in a determination that there is "no good reason" for not granting.

64 To determine whether the power in s 102 conveys a duty, it is convenient to start by identifying in which subsection the power arises.

<u>What is the source of the power to grant a certificate of exemption?</u>

65 Section 102(1) provides that "on an application made… the holder may be granted a certificate of exemption…" Sections 102(2) and (3) then proscribe reasons for which such a certificate, once an application is made, may be granted. Section 102(2) is for specific reasons. Section 102(3) is for any other reason which may be prescribed or for which the Minister has formed the opinion is sufficient to justify the exemption. In my view, given the first mention of the ability to grant is identified in s 102(1), s 102(1) contains the power, and ss 102(2) and (3) provide the reasons for exercising that power in the affirmative.

<u>Once a reason in s 102(2) or (3) are found, is it imperative that the warden recommends grant?</u>

66 There is no differentiation, in my view, between s 102(2) and 102(3) in the outcome of the warden's inquiry. While s102(3) contains the words "sufficient to justify such exemption" and s102(2) does not, the effect of the reasons in either is the same, that is, in either circumstance the Minister must be satisfied that there is adequate justification offered for the need for a certificate of exemption from meeting the relevant conditions before such a certificate can be granted.

67 If that is the case, s 102(4) applies in the same way to either an exemption application made for a reason under s 102(2) or s 102(3).

68 Sections 102(2) and (3) both use the word "may" as follows:

[23] ***R v Anderson; Ex parte Ipec – Air Pty Ltd*** (1965) 113 CLR 177, 187 – 8.

(2) A certificate of exemption may be granted for any of the following reasons…

(3) … a certificate of exemption may also be granted for any other reason…

69 Subsections (2) and (3) are a set of reasons which, if found, enliven the Minister's discretion to grant an exemption, that is, to exercise the power granted to the Minister pursuant to s 102(1). The use of the word "may," seen in the context of the section as a whole, and in the context of other sections of the Act, allows for that construction.

70 In my view, the remainder of the section results in a reading that in the case of this section, 'may' does not amount to 'must.'

71 Section 102 does not end with subsections (2) and (3). Relevant to this argument are the parts of s 102 which prescribe the process which both the warden and Minister are to undertake in relation to an application for exemption. These are subsections (4), (5), (6) and (7).

72 Subsection (5), (6) and (7) relate to the discretion of the Minister. Subsection (4) relates to the mandatory factors.

The presence of section 102(5), (6) and (7)

73 It is not for the warden to grant a certificate of exemption. Section 102(5) makes it clear that the warden hears the application for exemption where there is an objection, but, under s 102(5)(b) it is the Minister who determines the application.

74 Under s 102(6) the warden must transmit certain things relating to the hearing of the application and the warden's report recommending the granting or refusal of the application. The necessity for a recommendation, and only a recommendation, leaves open the prospect that the Minister will disagree with the recommendation and find otherwise. Therefore, the Minister has a discretion, not being bound by the warden's recommendation, although is bound to make the decision to grant or refuse an application for exemption consistently with the scope and objects of the Act.[24]

75 In the present case the parties disagreed with the use to which (7) could be put in the issues to be resolved. Under s 102(1)(a) when a certificate of exemption is granted in relation to

[24] ***O'Sullivan v Farrer*** (1989) 168 CLR 210; 216-217; ***Pangolin Resources Pty ltd v The Honourable Norman Moore MLC*** [2012] WASC 343 [10].

a licence that has yearly expenditure conditions, it exempts the expenditure required in any one year.

76 When a certificate of exemption is granted for a mining lease, which has a 5 year expenditure period condition:

a. Under 102(1)(b) the applicant is exempted from the expenditure required in a 5 year period, and

b. Under s 102(7) the 5 year exemption commences from the commencement of the tenement year to which the application relates.

77 Therefore, s 102(7) clarifies the commencement date of an exemption for a mining lease. However, s 102(7) sets out the steps which a warden or a Minister will have already taken reaching the point of grant. That is, that the warden has found that the reasons given by the holder of the mining lease are sufficient to justify the granting of a certificate of exemption and has so recommended. The Minister is then satisfied that a recommendation to grant should be followed or a recommendation to refuse should be rejected. It is only once those matters have been satisfied that the certificate of exemption is to be granted.

78 However, s 102(7) does not modify the process of coming to that determination for mining leases, it simply replicates what has already occurred in relation to an exemption on any type of lease, but clarifies the time period within which the exemption operates in accordance with the time period of a mining lease.

79 Therefore, s 102(7) does not add nor detract from the argument that s 102(4) is exhaustive, but does confirm that the Minister has a discretion, regardless of the recommendation. Therefore, it is clear that a discretion is involved and the grant is not automatic once the reasons are satisfied.

The presence of section 102(4) – a distinct step in the process of assessing an application for exemption

80 The process of assessing an application with reasons given as set out in s 102(2)(h) requires the warden to be satisfied that the tenements the subject of an application under s 102(2)(h) are combined reporting tenements and of the aggregate exploration expenditure for the relevant year.

81 The warden must then be satisfied that an aggregate exploration expenditure apportioned between the combined reporting tenements is equal to or more than the expenditure required on the tenement the subject of the application. That is a mathematical process

which has little to do with the exercise of any discretion or evaluation within that process. Further, the existence or otherwise of previous grants of exemption or the work done and money spent on the tenements at any time other than what has been spent in the relevant year in the aggregate expenditure do not assist in making those factual findings.

82 That construction leads to 2 matters:

a. Particularly in determining whether the reason in s 102(2)(h) exists, the full effect of the mandatory factors in s 102(4) cannot be considered. That is because:

    i. the reasons in s 102(2) [25] (and (3)[26]) must be found to exist at the time the application for exemption is made, that is, within 60 days of the end of the relevant tenement year.[27] In other words, the reasons in s 102(2) are confined to particular tenement years, either the current or just completed one, or prospectively. The factors in s 102(4) relate to a broader time frame than merely the relevant expenditure year,[28] and

    ii. in any event, in relation to s 102(2)(h), the fact of previous grants of exemption, and money spent or work done on the tenement do not effect the mathematical calculation required by that reason or the finding that the combined reporting tenement arrangement exists. Those are matters of fact to a finding of which each of those factors is unhelpful. Similarly, neither can work done and money spent outside the time frame of the relevant expenditure year have any bearing on those assessments.

b. However, as has been established, s 102(4) contains mandatory considerations. There is nothing in the wording of s 102(2) or 102(4) that suggests that allowances can be made by altering the time frames of when work was done or money spent, or not having regard to previous exemptions, when assessing a reason in s 102(2)(h) or any other of the reasons in s 102(2) where those factors are not relevant to the reasons themselves.

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[25] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [62] – [63].
[26] ***Thompson v Siberia Mining Corporation Pty Ltd*** [2021] WASCA 115 [118].
[27] Reg 54(1a) of the Mining Regulations.
[28] ***Thompson v Siberia Mining Corporation Pty Ltd*** [2021] WASCA 115 [115] regarding ‘work done and money spent’ and ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [74] regarding previous exemptions.

83 Therefore, in relation to s 102(2)(h), s 102(4) stands alone, that is, it is a distinct step in the process of granting an exemption, once the Minister is satisfied that the reason in 102(2)(h) exists. In my view that confirms that the legislature was of the view that no matter what the reason put forward, the mandatory factors are important policy-driven factors that must be applied as such. Although the factors in s 102(4) may be relevant to the determination of a reason itself, the fact that s 102(4) is a separate sub-section, and shows no distinction between any of the reasons in s 102(2) and 102(3) confirms that the legislature intended those policy considerations, informed by at least the factors identified, to form an essential part of the Minister's discretion.

84 Therefore:

a. The power to grant an exemption is enlivened in s 102(1).

b. Exemptions may be granted for one of the reasons in s 102(2) or, if the Minister is satisfied that any other reason justifies exemption, by s 102(3). Sections 102(2) and 102(3) are simply a combination of reasons, and are not the power itself.

c. Before a grant can be made, the mandatory factors in s 102(4) must be considered.

d. The mandatory considerations contained in s 102(4) are not reasons for granting an exemption, and nor therefore are they the source of the power. An exemption cannot be granted where the tenement holder has been granted, for example 6 previous exemptions from expenditure on the same ground, simply because of those 6 previous grants of exemption. That is because 'previous grants of exemption' is not a reason set out in s 102(2), and neither may it be, I would have thought, without more, a satisfactory reason under s 102(3). Further, when considered, the mandatory factors may in fact result in an application being refused. However they fall, they form part of the consideration that the Minister must make before the application is to be determined.[29]

85 The reasons required in sections 102(2) and (3) relate generally to the tenement year for which the exemption is sought. The consideration of work done and money spent under s 102(4) can be after that year and up to the time when the application is being considered.[30] In other words:

[29] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [72].
[30] ***Thompson v Siberia Mining Corporation Pty Ltd*** [2021] WASCA 115 [104].

a. the Minister decides whether to grant the exemption for a reason which arose during the expenditure year;

b. if no such reason is established, no exemption may be granted;

c. if one or more reasons are demonstrated, in exercising the discretion whether to grant an exemption, the Minister must have regard to the two factors in s 102(4). That is, the Minister cannot "ignore" those factors.[31]

86 Section 102(4) therefore enables the Minister to refuse an exemption having regard to those considerations despite the existence of a specified or other reason. In other words, s 102(4) creates a discretion that, despite the positive existence of a reason from s 102(2) or (3), there is nevertheless the power to refuse the granting of the certificate envisaged in s 102(1).

87 Consequently, it is my view that the general application of s 102(4) to all reasons in s 102 is that at some time in the consideration, regard must be had by the Minister to the current grounds upon which exemptions have been granted and to work done and money spent on the tenement by the holder, with a view to understanding whether the applicant is using the exemption process to set aside its expenditure obligations because of an unwillingness or inability to explore or mine the tenement within a reasonable timeframe, as is its obligation, weighed with other policy considerations.

88 Accordingly, the consideration of those factors is in addition to a consideration of the reasons themselves. It is a consideration of the more broad policy aspects and principles underlying the mining regime which will guide the Minister in determining whether, even with the factual satisfaction of a reason for exemption, policy implications would suggest that the exemption should not be granted.

89 Seen in that context, in my view the use of the word "may" in s 102(1), 102(2) and 102(3) indicate the conferral of a power without the conferral of a duty, and the addition of subsections (4), (5), (6) and (7) confirm a wide policy-based discretion, of course fettered by the requirement that a decision be made within the principles and policies of the Act.

90 Therefore, s 102(4) denotes a discretion, in that even if the reasons are satisfied the Minister is not bound to find in favour of the applicant. The question remains, however, whether

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[31] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19; (2006) 31 WAR 270 [66].

the factors in s 102(4) are the only factors the Minister may resort to in exercising that discretion.

Section 102(4) is not exhaustive

91 In asserting that s 102(4) is exhaustive, that is, the factors identified are the only 2 factors the Minister may have regard to in exercising the discretion, the applicant points to the progression from s 102(2)(h) to s 102(4): absent s 102(4), the only factors to be considered are those in s 102(2)(h). Section 102(4) provides two more. No further factors could be read into the exercise of the power if only 102(2(h) existed, and therefore the mere existence of s 102(4) cannot enliven other, not specified factors, which would not have existed in any event.

92 It is the case that one of the principles underlying the grant of a certificate of exemption is that a tenement holder who has defaulted in compliance with the Act may be protected where that default occurred because of some circumstances beyond the control of the tenement holder or where the circumstance put forward by the applicant can be identified as a circumstance where the tenement holder should be allowed to hold the tenement without mining it or giving it up for others. If that is the case, that factor weighs in favour of the grant.

93 A finding that a tenement holder is attempting to thwart the principle that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration or be mined or explored weighs against a grant of the exemption. In the present case the objector objected on that very point, that is, he says that the applicant is warehousing its tenements, showing an unwillingness to explore or prospect on its tenements within a reasonable timeframe. He says that the warden may find that, and the Minister can be satisfied of that, by looking at a series of transactions prior to the applicant acquiring these tenements. Albeit that is a different mechanism than envisaged by s 102(4), it fulfils one of the underlying purposes of s102(4).

94 It seems against the principles of management of mining tenements under the Act that a warden or the Minister, with material, not being previous similar exemptions or evidence of money spent or work done on the tenements, but nevertheless strongly suggesting that the applicant is unwilling or unable to explore or mine the tenements within a reasonable timeframe, would nevertheless have to reject that material and consequently not weigh

against the applicant the strong suggestion that they have fallen foul of one of the significant principles of the Act.

95 In identifying that s 102(4) requiring consideration of current grounds upon which exemptions have been granted on the tenement in question does not mean that a decisionmaker may not have regard to 'other matters,' President Steytler in ***Haoma***[32] gave as an example of 'other matters,' previous failures to meet prescribed expenditure which were the subject of certificates of exemption granted upon different grounds to those raised in the current application. He says that if the previous failures are reasonably considered to be relevant to the question whether a further certificate of exemption should issue there is nothing in that section which prevents those failures from being taken into account. This in my view is an example of a type of information that fulfils that identified principle underlying s 102(4), that is, that evidence might cast doubt on the ability or willingness of the tenement holder to satisfy the prescribed conditions attaching to the grant of the tenement, such that that evidence weighs against the granting of the exemption, despite the applicant satisfying the Minister that it fulfills a reason under s 102(2) or (3).

96 Therefore, the application of s 102(4) being a distinct step in the process under s 102, the policy and principles underpinning the Act and mining regime favour a reading that s 102(4) is not exhaustive.

Comparison with other provisions

97 The applicant drew the attention of the court to other provisions in support of its argument that s 102 can be read as creating a duty. Practically speaking, decision-makers will often have a discretion in relation to the weighting of factors being considered to reach a particular point. For example, in the case of ***Mitchell v R***,[33] upon a particular sentence being passed for wilful murder, the sentencing judge's discretion was enlivened to determine whether a particular order was to be made such that parole could not ever be considered. That is, the judge had the power to make such an order, however, only if, having weighed all of the relevant factors, the judge came to the view that such an order was "appropriate."

[32] ***Haoma Mining NL v Tunza Holdings Pty Ltd*** [2006] WASCA 19; (2006) 31 WAR 270 [61].
[33] ***Mitchell v R*** [1996] HCA 45; (1996) 184 CLR 333.

Once the order was found to be appropriate, however, the order must be made.[34] The applicant argues that s 102 creates a similar position.

98 The provision in the case of ***Mitchell v R***[35] provided:

> 40D(2a) Where a court imposes a sentence of strict security life imprisonment on a person the court may, if it considers that the making of an order under this subsection is appropriate, order that the person is not to be eligible for parole.

99 The reviewing court was of the view that once there is a finding that the order is appropriate, there is no further discretion. In other words, the discretion comes in the finding that the order is appropriate, not making the order after that finding.

100 In comparison, combined, sections 102(1), (2) and (3) read as follows:

> A certificate of exemption may be granted on an application from a tenement holder (1) for a specific reason (2) or for any other reason sufficient to justify a certificate (3).

101 At that point, and if that was the completion of the provision, if the Minister is satisfied that s 102(2) or (3) have been satisfied, a grant should be made. I agree that if there was nothing further in the section, once s 102(2) is satisfied, or the Minister is satisfied under s 102(3), the power under s 102(1) becomes a duty, similar to the duty which arose in ***Mitchell***. However, that is not the end of s 102. The matter must then be forwarded to the Minister for determination (s 102(5(b)) and the warden makes a recommendation rather than a determination in relation to any type of license, creating for the Minister a discretion. Further, the factors in s 102(4) must not be ignored. As I have identified, they relate to policy reasons why, even where s 102(2) or (3) are satisfied the exemption may not be granted. Therefore, unlike the judge in ***Mitchell***, the Minister has an overriding discretion to not make the order, on policy reasons, even once the pre-conditions are satisfied. Therefore, the construction of s 102 is different to the legislation in ***Mitchell***. The difference in fact points to a real discretion existing in s 102(4) rather than a duty.

102 The applicant points to sections 40 and 42 of the *Mining Act* and the case of ***Tortola Pty Ltd v Saladar Pty Ltd and Holloway***[36] as an example of the mining regime proscribing duties using the word "may" rather than "must" and says that therefore the mining regime uses such language, and that makes it easier to accept that s 102 is also drafted in that way.

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[34] ***Mitchell v R*** [1996] HCA 45; (1996) 184 CLR 333, 345.
[35] Section 40D(2a) of the *Offenders Community Correction Act (1963)* (WA).
[36] ***Tortola Pty Ltd v Saladar Pty Ltd and Holloway*** [1985] WAR 195.

According to ***Tortola Pty Ltd v Saladar Pty Ltd and Holloway***[37] sections 40 and 42 must be read that once satisfied of compliance of form in relation to the application for a prospecting licence, a licence must be granted. In other words, there is no discretion in making the grant, once there is satisfaction that the requisite form has been filed within time and that the marking out requirements are satisfied.

103 I reject the applicant's comparison of and reliance on those sections in the present case for several reasons. Firstly, there is some doubt now as to whether ***Tortola*** is to be followed in relation to that proposition.[38]

104 Secondly, even if that case is still applicable law, his Honour Justice Brinsden's reasons that the grant of the prospecting licence by the warden is mandatory once there is a satisfaction as to compliance with form are based on the hierarchy of licences in the *Mining Act*. Each of the licenses has its own separate division in Part IV of the Act. The most basic of licences, the prospecting licence, enables the successful applicant to do little over the ground and over only a small area, for a limited amount of time. Progressively, licences grant more extensive interference with the land for longer and with greater expenditure or work expectations. His Honour was of the view that where the grant involves the more extensive interference over the longer time and with greater expenditure expectations, it was appropriate that the Minister retain the power to grant or refuse the licence, having the ability to consider not just factors relating to form but also the weight of policy considerations. In comparison, the grant of a prospecting licence requires little balancing of public policy factors and merely a conclusion that the applicant has complied with the requirements of the Act, a function which the warden can, and should, easily perform once compliance has been satisfied and with limited if any discretion.

105 In comparison, s 102 does not so recognise the hierarchy identified by Justice Brinsden and the Act. Unlike the separate divisions governing the granting of licences in Part IV of the Act, s 102 does not differentiate between the different types of licenses. Therefore, the same analysis cannot be used to determine whether s102 contains a power coupled with a duty once the decision-maker is satisfied of the factors in 102 (2) or (3).

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[37] ***Tortola Pty Ltd v Saladar Pty Ltd and Holloway*** [1985] WAR 195, 202-204.
[38] See, for example, ***Re Warden French; Ex parte Serpentine Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 317 per Kennedy J and ***Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343, 365 per Steytler J.

106 Thirdly, while it may be that other divisions of Part IV contain powers coupled with duties, that does not mean that the legislature intended that to be the case in s 102.

The practical outcome if s 102(4) is exhaustive

107 There are some practical outcomes of s 102(4) being exhaustive that weigh against that being the correct reading of s 102.

108 Based on my view of President Steytler's determination in ***Haoma***, a restrictive reading of s 102(4) would result in, generally, one of the policies behind s 102(4) – that the exemption should not be granted to a tenement holder who is unwilling or unable to explore or mine the tenement, being of limited application, and only applicable if there are previous exemptions for the same reasons. Applicants may be encouraged to apply under different subsections of s 102(2) from time to time, if they can, so as to avoid the warden or Minister considering past exemptions. There is nothing in the Act or the principles of the Act that suggest the section could be legitimately open to such abuse.

109 Further, the applicant's contention may result in an impractical outcome. It is the applicant who applies and selects which reason it relies on. In selecting a reason, the applicant no doubt puts forward positive evidence, that is, it is unlikely that an applicant would rely on factors where there is a risk or inevitability of weight being placed on a factor against the grant. The factors in ***Haoma*** were previous exemptions, both under the current reasons, and for other reasons. It is not the applicant who chooses those factors as being relevant – the warden, in the filtering role, does. Yet, it is the applicant's application, wanting the grant. In ***Haoma*** the warden took into account factors which were negative to the applicant. It cannot be said that the breadth of the discretion in s 102(3) compared to 102(2) is the reason those negative factors are relevant under s 102(3) but not s 102(2), as not granting the application is not the focus of either subsection.

110 Further, it may be that there are factors in favour of the applicant which would provide equal or more weight against a submission that the applicant, by work done and money spent and previous similar grounds of exemption, may be unwilling or unable to comply. If there are relevant factors which work in its favour, it would be unusual for legislature to say that positive relevant factors, not particularised under s 102(2) or s 102(4) are not relevant, or that the applicant could not counter an unfavourable factor with a favourable one when it comes to the exercise of the Minister's discretion. However, if the applicant's argument is successful, the applicant could not so counter.

111 I am therefore of the view that the Minister in the exercise of the discretion as I have found it to be under s 102(4) and (5) can and should have regard to a consideration that is not specifically listed in s 102(4) where it is relevant, that is, where that factor materially affects the exercise of the discretion to grant or refuse the certificate of exemption.

112 The warden having a filtering role for the Minister, the warden may take such evidence.

S 102(4) BEING INCLUSIVE AND NOT EXHAUSTIVE, SHOULD THE WARDEN HEAR THE EVIDENCE?

Is the allegation of warehousing relevant to an application under s 102(2)(h)?

'Warehousing' is generally relevant

113 I have found that in the exercise of the discretion the Minister may have regard to factors not identified in s 102(4) if relevant to the particular case. In my view, and from my adoption of President Steytler's view on the policy behind the mandatory factors in s 102(4), an applicant maintaining tenements without working them by undertaking a series of steps through a succession of acquisitions, surrenders and under expenditure, and having others ensuring that during times within which it could not or was not willing to apply for the tenements, no one else had the opportunity of doing so either, is relevant to the Minister's consideration under s 102(4).

114 Therefore, such evidence can be admitted under s 102(4). The question is now whether the factors raised by the objector are relevant in the present case, that is, do they bear some weight on the discretion to grant or refuse the exemption.

Is the evidence relevant in the present case?

What is the evidence and what is the standard to which I must be satisfied?

115 It is convenient at this point to summarise the evidence.

116 A Statement of Agreed Facts was filed. The objector relied on 4 affidavits of Shane Bradley Nicholson dated 31 August 2021, 24 November 2021, 16 March 2022 and 20 May 2022. Mr Nicholson undertook searches of the register maintained under the *Mining Act* and Tengraph maps and summarised the dealings the objector says are relevant to the allegation. An 'aid memoire' summarising the findings of Mr Nicholson became MFI 1, and the applicant did not object to the information in that document, other than, of course, its overall objection to the evidence.

117 That was the extent of the evidence tendered. Regis did not to produce evidence which countered the warehousing allegations made by Richmond, or in relation to the mandatory factors in s 102(4).

118 In relation to the objection, I am being asked to infer from the course of dealings on each tenement and the relationship between those who performed the dealings that Regis has been involved in 'warehousing' the tenements. To make such a finding I must be satisfied that the arrangements which are in contravention of the principles of the Act are, from the circumstances raised, a more probable inference in favour of what is alleged.[39] I accept that because the applicant stands to lose tenements under a forfeiture application if the exemptions are not granted, I must be satisfied to a high standard of the objector's allegations.

119 An inference is simply a logical deduction from a set of facts which have been found to be proven. Circumstantial evidence is evidence of the surrounding circumstances relating to an event or occurrence. It can be contrasted with direct evidence; that is evidence of that event or occurrence as observed by a witness or recorded by some device or records.

120 Circumstantial evidence is not necessarily any less reliable than direct evidence, however, inferential reasoning is not speculation. Inferential reasoning is the drawing of a logical deduction from the proven facts. When drawing inferences the evidence should not be looked at in a piecemeal way to see what conclusions can be drawn from each part of the evidence when viewed in isolation. Rather the whole of the evidence should be considered together to see what inferences can be drawn. A question or doubt that may arise where one piece of evidence is looked at in isolation may be resolved when the whole of the evidence is considered. A circumstance should not be rejected because, considered alone, no inference against the applicant can be drawn from it. Further a number of pieces of evidence that would not lead to an inference against the applicant when taken separately may satisfy me of, to the requisite standard, the objector's allegation when taken together.

121 On the other hand, in some cases deficiencies in individual aspects of the evidence will not be resolved by other aspects of the evidence and those deficiencies may be sufficient to create doubt, either alone or when considered cumulatively.

[39] ***Bradshaw v McEwans Pty Ltd*** (1951) 217 ALR 1, 5.

A summary of the evidence

122 It is an agreed fact (10) that Duketon Mining Pty Ltd is a wholly owned subsidiary of Regis.

123 A summary of Mr Nicholson's evidence follows.

124 Relevant to many of the tenements, it appears that Regis Resources was once known as Johnson's Well Mining NL, notifying a name change to the Department of Mines, for example, on E 38/1111 on 28 September 2004.[40] Further, both Aurora Gold (WA) Pty Ltd and Delta Gold NL's address on the register of tenements has been recorded as "care of Regis Resources Ltd."[41]

125 Mr Nicholson produced 3 documents in his affidavit affirmed 20 May 2022 which the objector says show a connection between Golden Pig Enterprises Pty Ltd and the applicant. Annexure SBN1 of the affidavit is an ASIC search of Golden Pig, dated 16 May 2022, showing Victor Miasi has been the sole director of Golden Pig since 3 January 2008. He is also the 100% shareholder.

126 Annexure SBN2 to that affidavit is a native title determination, ***Ashwin & Ors v Regis Resources Limited*** [2014] NNTTA 39. According to the reasons for the determination, Mr Miasi was the "Representative of the grantee party" being Regis Resources Limited,[42] Regis Resources being the grantee of proposed E 38/2830.

127 Annexure SBN3 to the affidavit is a copy of a page, which I accept from [5] of the affidavit is a page from LinkedIn downloaded on 20 May 2022 which appears to be the page of a Victor Miasi, and shows his position as "Tenement Consultant at Regis Resources" although that position is not dated in any way.

128 The applicant says that these documents being produced effectively 1 day prior to the hearing, it did not have an opportunity to tender its own evidence in relation to the inferences the objector wishes me to draw from that evidence, and accordingly the applicant cannot be the subject of adverse comment as a result of that failure. I agree that this is not

[40] Affidavit of Shane Bradley Nicholson sworn 31 August 2021 Table E 38/3136 Affidavit p 30.
[41] See, for example, the summary and Maps relating to E 38/3136 and E 38/2004.
[42] ***Ashwin & Ors v Regis Resources Limited*** [2014] NNTTA 39, 2.

a situation in relation to this evidence that an adverse comment in the form of a '***Jones v Dunkel***'[43] comment can be made, however, as I discuss later, I am of the view that I can accept that evidence and draw inferences from it.

129 Mr Nicholson also produced tables and maps setting out the history of dealings with the relevant tenements and tenements surrounding or transecting the relevant tenements, which are annexed to Mr Nicholson's first, second and third affidavits and references in the following summaries to Map numbers are references to the maps attached to the tables outlining the history of each tenement in those affidavits, and as numbered in those affidavits.

P 38/4471

It appears Regis first had dealings regarding the same ground when it applied for forfeiture against the then holder, Mr Hawtin in 2009. Mr Hawtin surrendered the tenement and both Regis and Mr Richmond lodged applications, Mr Richmond's covering the same ground as Regis'. The tenement (P38/3879) was granted to Regis in June 2010 and Mr Richmond withdrew his application.

On 15 June 2018 the applicant surrendered P38/3879 after holding it for 7 years, 11 months and 19 days. Therefore, it was surrendered very shortly before its term was to expire, an extension having been previously granted under s 45(1a) of the *Mining Act*.

Golden Pig Enterprises Pty Ltd, marked out the same ground the subject of that prospecting licence just over 5 hours after the surrender, and applied for P 38/4456 less than 4 days later. 4 months and 3 days later, Regis marked out the ground, and applied for the current prospecting licence 1 day later. 1 and a half months after Regis' application Golden Pig withdrew its application, and on 7 August 2019 Regis was granted the current licence, covering the same ground as their original licence P38/3879 and the same ground as the application by Golden Pig.[44]

The objector says that therefore Regis has been the beneficial holder of the land since June 2010, and the temporary nature of the hiatus which occurred between 15 June 2018 and 7

[43] ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298.
[44] Affidavit of Shane Bradley Nicholson sworn 31 August 2021 Maps 3, 8 and 9 for P 38/3223 to P 38/4471.

August 2019 was enabled by Golden Pig's application and eventual withdrawal over the same ground. The inference can be drawn that Golden Pig was acting in concert with Regis to afford Regis the ability to effectively retain the licence from:

- Miasi being common to Regis and Golden Pig,
- The surrender of the tenement early, but very close to the expiration date, being one week, which would be unexpected,
- The ability of Golden Pig to mark out the ground within 5 hours of the surrender, suggesting it was aware of the time of the upcoming surrender,
- The re-application by Regis 1 month and 3 days beyond, and therefore relatively close to, the 3-month embargo under s 45(2) of the same ground,
- The eventual withdrawal of Golden Pig's application 6 months after it marked out the ground and 2 months after Regis' application, and
- There being no evidence before me of any work having been done on or in connection with the tenement.

P 38/4124

Regis first had named dealings regarding the tenement when it marked out the ground the subject of this tenement on 25 March 2014 at 12.48pm. However, the ground is the same as that held by Duketon Mining Ltd by P 38/4035, which was surrendered on 24 March 2014 at 11.3am.[45] An extension of the term was granted to Regis in 2018.

The objector contends that given Regis has been the beneficial holder of P 38/4124 since at least 15 October 2014 when its application was granted, with no evidence before me of any work having been done on the tenement, I can infer that the application for an exemption is, perhaps in these circumstances like an application for an extension of term, another mechanism by which this tenement is being warehoused. It is also, the objector says, an example among many of Regis using associated entities to ensure it has access to surrendered tenements.

[45] Affidavit of Shane Bradley Nicholson sworn 31 August 2021 Maps 6 and 7 for P38/4124.

E 38/3136

It is noted before I describe the dealings in this application that not all applications in the history of E 38/3136 are over precisely the same ground. The relevant and surrounding blocks appear to have been the subject of dealings over several distinct areas. As granted, E 38/3136 covers almost a rectangular form, with a corner cut off on the north eastern boundary, over a little more than half of the southern end of the block, with a corridor from that rectangle stretching to the northern boundary on the western side (Map 19).

Tenement area 1

Johnson's Well held E 38/789 with Aurora Gold (WA) Pty Ltd from 14 December 1995. The tenement sits south of what eventually became E 38/3136 however the southern border of E 38/3136 sits below the northern border of E 38/789, there being therefore a small strip of commonality (Map 1). E 38/789 was forfeited in August 2000. Johnson's Well applied for precisely the same ground as E 38/789 on its own in April 1995 however withdrew that application in February 1996. Another entity held that area as part of a larger tenement briefly between 2000 and 2001.

On 13 November 2006 Regis lodged application P 38/3377 (Map 10) in the shape of the common ground as I have described it in this area, being granted on 31 December 2007 and extended to 30 December 2015, on which date it expired. Regis applied for E 38/3136, which included the ground that was P 38/3377, in May 2016.

Tenement area 2

Johnson's Well lodged an application for P38/2688 on 29 June 1995 which was granted on 19 January 1996. This tenement is in the form of a wedge with its eastern boundary sitting across the width of the 'corridor' I have described in E 38/3136 but only approximately half way up that corridor (Map 3). Johnson's Well then marked out M 38/795 in the same shape as P 38/2688, and therefore over part of the land comprising E 38/3136. On 17 November 1999 Johnson's Well lodged application M 38/795 and then on 2 January 2003 surrendered P38/2688. Title over the ground in M 38/795 was granted, but not until 23 October 2008, after an application for amalgamation with the later lodged application P 38/3472. As a result of the amalgamation, the application for M 38/795 lapsed.

On 25 January 2007 Regis marked out P 38/3472 being in the same shape as P 38/2688 and M 38/795. On 23 October 2008 P 38/3472 was granted to Regis and the term of that license

was extended to 22 October 2016. On 31 May 2016 Regis applied for E 38/3136 and surrendered P 38/3472 on 17 October 2016 at 10:33 am, five days prior to expiry.

Golden Pig marked out this particular shaped tenement on 17 October 2016 at 3:50 pm as P 38/4299. Regis was granted E 38/3136 on 21 December 2016, excluding common ground covered by P 38/3472 and therefore ground covered by P 38/4299. The portion of common ground covered by those two tenements was amalgamated with E 38/3136 on 29 August 2017.

What this shows is that the small portion of the northern corridor covered by these tenements that is now E 38/3136 was held by Regis or the associated company Johnson's Well from January 1996 to 17 October 2016, although it is accepted that that ground was only held under application for M 38/795 between November 1995 and October 2008. Accordingly, Regis' interest in the ground commenced with a prospecting license, over which it applied for but was not granted a mining lease and then has now reverted to an exploration licence as a result of some amalgamations. It does not appear anyone else had an interest in that ground during the application period for the mining lease, however it also appears that the mining lease was held only under application, lapsing upon the grant of a further prospecting license.

Tenement area 3

On 19 May 1998 Johnson's Well marked out P 38/2932. The shape of this application is rectangular. It is on an angle and its southern boundary runs along the boundary of tenements such as P 38/3472 but extends beyond that boundary across the block containing now E 38/3136 (Map 5). In addition, it extends northwards along the corridor as I have described it towards and extending beyond the uppermost boundary of the tenement now known as E 38/3136. Therefore, there is a small common area with what is now E 38/3136 at the top most past of that corridor.

On 7 August 2000 P 38/2932 was granted to Johnson's Well and surrendered on 15 October 2002. On 21 October 2002 Deng Lik Assets Ltd marked out P 38/3111 in respect of a portion of E38/2932 (Map 9), however that and another application were withdrawn on 15 May 2003. On 13 November 2006 Regis applied for P 38/3378 which partially covered the same ground as the concurrent ground between E 38/3136 and E 38/3111, that is, the upper end of the corridor of what is now E 38/3136. P 38/3378 was granted to Regis on 31

December 2007 and extended to 30 December 2015, when it expired. The common portion now forms part of E 38/3136.

Tenement area 4

On 20 January 2007 Aurora Gold (WA) Pty Ltd marked out P 38/3471 (Map 11), giving its address as being care of Regis Resources Limited, PO Box 810, West Perth Western Australia. The shape of this application is the same as what is now E 38/3136, but for:

- Not then including the corridor to the northern boundary of the block,
- Not then including the ground known as P 38/3377, being at the bottom of the relevant block and overlapping with E 38/791 and
- Slightly extending into two further blocks to the west.

The tenement was granted on 10 November 2008 and then extended to 9 November 2016. On 15 July 2010 Aurora lodged an application to amend its address to care of Regis Resources Limited but now at a Subiaco post office box number.

On 2 November 2016 at 10:57 am Aurora surrendered P 38/3471, seven days prior to expiry. At 3:26 pm on the same day Regis marked out P 38/4309, bearing a significant resemblance to the shape of P 38/3471 but for the intrusions into the blocks to the west, south-west and south of P 38/3471 and but for the northern corridor and the ground already covered by P 38/3377, and also bearing a significant resemblance to E 38/3136. On 21 December 2016 Regis applied for E 38/3136. On 6 July 2017 P 38/4309 was granted to Regis, with M 38/1247, P 38/3471 and P 38/3472 excluded, and on the next day Regis applied to amalgamate a portion of P 38/4309 with E 38/3136. The application to amalgamate was granted on 24 January 2018. Therefore, the objector contends that that part of the land that was amalgamated with E 38/3136 had been beneficially held by Regis since 10 November 2008.

It is noted that Regis were in a position to mark out very similar ground to Aurora on the same day that Aurora surrendered the tenement, which was seven days prior to expected expiry and therefore not an expected event, and that Regis acts at least as a post box for Aurora Gold.

As I have identified, on 17 October 2016 Regis surrendered P 38/3472 at 10:33 am, the wedge shaped tenement which has also been identified as the same ground as E 38/2688,

previously held by Johnson's Well and M 38/795, applied for by Johnson's Well. On the same day at 3:50 pm Golden Pig marked out this land and applied for P 30/4299. On 2 November 2016 Aurora surrendered P 38/3471, which covered a large portion of the same ground as what is now E 38/3136, and ground in a very similar shape was marked out by Regis as P 38/4309 within 6 hours.

On 21 December 2016 E 38/3136 was granted to Regis. On 2 March 2017 at 9:18 am Golden Pig withdrew its application for P 38/4299 enabling, on the same day, just over two hours later, Regis to apply to amalgamate with E 38/313 6the portion of P 38/3472 which had been surrendered by Regis on 17 October 2016. That application was granted on 29 August 2017.

Similarly, the actions of Aurora Gold have enabled Regis to apply for and amalgamate a significant portion of land it may have had some connection with through its association with Aurora Gold.

The objector says that in the circumstances, what appears to have occurred is that through a series of applications by Regis and others, portions of the ground now making up E 38/3136 were held from time to time, and over a long period of time such that no one else had the opportunity to lodge an application, and to have the opportunity to explore the land or prospect upon it. It appears that this has occurred without Regis ever properly fully committing to mine the land, as evidenced by the many prospecting and exploration licenses applied for over time. Effectively, what has occurred, it appears, is that the whole of the ground has become locked to anyone else who may wish to apply to have access to the resources on the ground, enabling Regis to eventually obtain the ground it does. This has been facilitated by Golden Pig in locking up some of the ground by a timely application and then a timely withdrawal of that application, and a timely and slightly early surrender of a significant portion of the ground by Aurora, eventually enabling the full amalgamation of previous parts of that ground.

The objector says that therefore Regis has been the beneficial holder of portions of the land since December 1995 as Johnson's Well, and the temporary nature of any hiatus which occurred was enabled by Golden Pig's application and eventual withdrawal over some of ground, or by Aurora Gold's holding and then surrender of tenements over some of the ground. The inference can be drawn that Golden Pig and Aurora Gold were acting in concert with Regis to afford Regis the ability to effectively retain the licence from:

- Miasi being common to Regis and Golden Pig at the time of Golden Pig's actions,
- Aurora Gold having not only the same post address, but being "care of" Regis,
- The surrender of P 38/3472 held by Regis early, but very close to the expiration date, being one week, which would be unexpected,
- The ability of Golden Pig to mark out the same ground as P 38/3472 within just over 5 hours of the surrender, suggesting it was aware of the time of the upcoming surrender,
- The eventual withdrawal of Golden Pig's application 4 and a half months after it marked out the ground,
- The application by Regis just over 2 hours after that withdrawal to amalgamate their then granted tenement E 38/3136 with P 38/3472, suggesting Regis knew of the intended withdrawal,
- The surrender by Aurora of P 38/3471 being on 2 November 2016 at 10:57 am seven days prior to expiry, the ability of Regis to mark out P 38/4309 4 and a half hours later, P 38/4309 bearing a significant resemblance to the shape of P 38/3471, and also bearing a significant resemblance to E 38/3136 which ultimately, as a result of a series of amalgamations, was granted in its current form.
- There being no evidence before me of any work having been done on or in connection with the tenement.

E 38/3137

The ground the subject of E 38/3137 has been the subject of numerous applications, conversions, amalgamations, joint ventures and surrenders. Regis appears to have first become connected to that ground when Johnson's Well marked out a small portion of what is now E 38/3137 on 14 October 1996, being P 38/2812 (Map 5) over which a caveat was then lodged by virtue of a heads of agreement between Johnson's Well, Aurora Gold (WA) Pty Ltd and Delta Gold NL.

Johnson's Well then applied for E 38/1184 (Map 6) which covers another, larger portion of what is now E 38/3137 on 9 September 1998 and then on 24 November 1998 purchased a portion of shares in E 38/648 which also covers some of the same ground as is now E

38/3137 (Map 7). E 38/1184 was granted on 26 April 2000. On 9 June 2000 Aurora Gold transferred to Johnson's Well E 38/380, a tenement which covered the ground of what is now E 38/3137. E 38/648 expired on 20 December 2002. Regis together with Newmont Duketon Pty Ltd then registered a joint venture agreement over E 38/1184 in September 2003.

Johnson's Well and Duketon then lodged application P 38/3276 (Map 9) which partially lies within what is now E 38/3137 which was granted on 11 August 2006. In the meantime Regis and Duketon also marked out M 38/1096 (Map 10) on 22 March 2005, which was the subject of an application to amalgamate with E 38/1184, but which was discontinued when E 38/1184 expired. Consequently M 38/1096 was granted in November 2009. In April 2009 Duketon and Regis applied for E 38/2269 (Map 12) which covered the entire block over which E 38/3137 now is registered. M 38/1096 was granted on 24 November 2009.

E 38/2269 was withdrawn by Regis and Duketon on 10 December 2009 and P 38/3276 expired on 10 August 2010 at 11.59pm. At 2.59am on 11 August 2010 Golden Pig marked out P 38/3925 (Map 14), being the same ground as P 38/3276 which Johnson's Well and Duketon had held from 11 August 2006 and which had expired the day before.

Regis Resources then took some shares, registered on 25 August 2010, from Bruce Legendre in P 38/3551 (Map 11) which covered very similar ground to what is now E 38/3137, and which was to expire 9 October 2016.

Regis marked out P 38/3944 (Map 15) which covered the same ground as P 38/3925 (marked out by Golden Pig) and therefore P 38/3276, previously held by Duketon and Regis on 15 November 2010, 3 months and 4 days after the expiration of the previous tenement and therefore 4 days after the embargo under s 69(1) of the Act. Golden Pig withdrew its application for the same ground on 29 December 2010 and the tenement was granted to Regis on 13 July 2011. That tenement expired on 12 July 2015.

On 31 May 2016 Regis applied for E 38/3137. On 29 September 2016 at 8:30 am Duketon and Regis surrendered P 38/3551, 1 month before expiry and by 5pm that afternoon Golden Pig had marked out the same ground, then applying for P 38/4284.

On 21 December 2016 E 38/3137 was granted, but for areas covered by, among others, ground also contained in P 38/3551 and M 38/1096. In relation to the latter, Duketon and

Regis then surrendered that licence, and Regis applied, within an hour of the surrender, for that ground to be amalgamated into E 38/3137. On 9 February 2017:

- At 9.24.22 am Regis and Duketon surrendered M 38/1096,
- At 9.29.04 am Golden Pig withdrew its application P 38/4284,
- At 10am Regis applied to amalgamate a portion of former P 38/3551 with E 38/3137, and
- At 10.10am Regis applied to amalgamate the whole of former M 38/1096 with E 38/3137. The effect of that amalgamation was that it captured the ground from expired M 38/1096 previously held by Regis and Duketon, marked out by them in August 2006 although which, due to connected applications for conversions, it appears, was not granted until 2009.

After grant, E 38/3137 was added to the combined reporting group C82/2011.

The objector says that therefore Regis has been the beneficial holder of the land since August 2006, and the temporary nature of the hiatus which occurred between 10 August 2010 and 13 July 2011 and 29 September 2016 and 14 August 2017 was enabled by Golden Pig's applications and eventual withdrawal over the same ground. The inference can be drawn that Golden Pig was acting in concert with Regis to afford Regis the ability to effectively retain the licence from:

- Miasi being common to Regis and Golden Pig,
- Golden Pig marking out, after P 38/3276 expired at midnight, the same ground the next afternoon (P 38/3925),
- Regis applying for that ground 3 months and 5 days after the expiry of the original tenement,
- Golden Pig withdrawing its application for P 38/3925 just over 4 months after its application, and 1 month and 7 days after Regis marked out and applied for the same ground,
- The surrender of P 38/3551 early, but very close to the expiration date, being one week, which would be unexpected,

- The ability of Golden Pig to mark out the ground within 9 hours of the surrender, suggesting it was aware of the time of the upcoming surrender,
- The withdrawal of P 38/4284 by Golden Pig 4 days and 9 months after applying,
- The withdrawal of M 38/1096 by Regis and Duketon five minutes earlier than Golden Pig's withdrawal
- Regis applying to amalgamate P 38/4284 and M 38/1096 with E 38/3137 within 45 minutes of their withdrawals, and
- There being no evidence before me of any work having been done on or in connection with the tenement.

E 38/3138

Regis appears to have first become connected to this ground when Johnson's Well marked out almost the entirety of what is now E 38/3138 on 4 November 1994, being P 38/2625 (Map 1), granted on 15 February 1995. On 12 February 1996, two days before expiry, Johnson's Well applied to convert P 38/2625 to M 38/757, being the same shape with an extra small area of land (Map 3). That application lapsed following the surrender of P 38/2625 on 2 January 2003.

On 1 February 2000 a tenement (P 38/2700) held by others expired, leaving available a very small portion of land at the bottom of the block in which P 38/2625 was positioned (Map 2), which was marked out then by Sub-Sahara Resources as M 38/868, but which application was withdrawn subsequently.

Regis then marked out P 38/3441 under s 120AA of the Act in relation to M 38/757 on 24 January 2007, and M 38/757 was then converted to P 38/3441 on 18 November 2008, being the same ground as P 38/2625 with the additional area under M 38/757, originally held by Johnson's Well, the term of the licence extending to 17 November 2016.

On 31 May 2016 Regis applied for the 1 Graticule left available by the expiry of P 38/2700, which had not been held since 2000, as E 38/3138 (Map 7).

In the meantime, P 38/3441, due to expire on 17 November 2016, was surrendered by Regis on 4 November 2016 at 8.30am. Golden Pig marked out the same ground at 2.41pm on that day, as P 38/4314 (Map 5), lodging their application on 7 November 2016. E 38/3138 was granted to Regis on 21 December 2016 and Golden Pig withdrew their application for

P 38/4314 on 31 March 2017 at 12 noon. At 3.26pm that day, Regis applied to amalgamate P 38/3441 and E 38/3138. That title as it is now (Map 9) after amalgamation was added to C 95/2016 Combined Reporting Group.

The objector contends that as a result Regis has held part of the land that became E 38/3138 since February 1995, and the temporary nature of the hiatus which occurred between 4 November 2016 and 21 December 2016, for part of the land, and 31 March 2017 for the remainder, was enabled by Golden Pig's application and eventual withdrawal over the same ground. The inference can be drawn that Golden Pig was acting in concert with Regis to afford Regis the ability to effectively retain the licence from:

- Miasi being common to Regis and Golden Pig,
- The surrender of the tenement early, but very close to the expiration date, being 2 weeks, which would be unexpected,
- The ability of Golden Pig to mark out the ground within 7 hours of the surrender, suggesting it was aware of the time of the upcoming surrender,
- The eventual withdrawal of Golden Pig's application 4 months after it marked out the ground and 3 months after Regis was granted an associated tenement,
- Within 4 hours, Regis applying to amalgamate with its new tenement the land the subject of Golden Pig's withdrawn application, and
- There being no evidence before me of any work having been done on or in connection with the tenement.

E 38/2004

This tenement was held predominantly by Ashton Gold (WA) Ltd and Delta Gold NL as a joint venture, until Regis became involved as Johnson's Well when it lodged a caveat over E 38/378 on 23 June 1997 inferring an interest in that tenement. E 38/378 (Map 1) was considerably larger in area than E 38/2004 now is, however the E 38/2004 land is completely subsumed in the land that was E 38/378. On 2 June 1998 a heads of agreement in relation to E 38/378 was lodged between Aurora Gold (WA) Pty Ltd, Johnson's Well and Delta Gold, lapsing on 29 May 1998, with a further caveat being lodged on that day followed by another heads of agreement being registered.

On 4 December 1988 Delta Gold marked out M 38/737, 38/738 and 38/739 and thereafter applied for E 38/2004 on 17 January 2007 by way of conversion subsequent to an application of extension of term on E 38/378 which was refused. The tenements applied for were smaller in combined area than E 38/378, but covered all of the land which is now E 38/2004 (Map 3). The application for E 38/2004 was lodged by "Delta Gold Ltd C/- Regis Resources Limited" and was granted on 12 September 2008. However, by virtue of the applications for M 38/737, M 38/738 and M 38/739, where not acquired by E 38/2004, E 38/378 was kept alive (Map 5).

In July 2010 Delta Gold registered its change of address when it appears Regis Resources changed address, maintaining that it was "care of" Regis Resources.

In August 2013 an extension of term on E 38/2004 was granted and in November 2016 Delta Gold Limited registered that it had transferred E 38/2004 to Regis. A further extension of term was granted in October 2018 and then another in April 2021.

The objector says that therefore, effectively, Regis has had the ability to explore the E 38/2004 land since at least 15 July 2010, which appears to have been taken from the date of the change of address. However, given Delta originally had its address care of Regis in January 2007 it may be that that ability can be inferred from that date on that basis. It seems to me that the more important date is the heads of agreement and caveats in 1997 and 1998. It could be said, in my view, that given E 38/2004 is a smaller portion of, but was always encapsulated by E 38/378 and then M 38/737, M 38/738 and M 38/739, Regis has had an interest in the ground that is now E 38/2004 since the time of those heads of agreement, and the land has been locked to others since that time.

E 38/2868

Regis first had a presence on this tenement as Johnson's Well when some shares were transferred from Duketon Goldfields to Johnson's well on 15 April 1996 to M 38/262, lying partially within what is now E 38/2868. Further shares were transferred to Johnson's Well from, formally Duketon Goldfields, but at that point, Genetic Technologies Ltd, in M 38/262 on 21 August 2003 (Map 1) and 22 June 2009. On 21 August 2003 Johnson's Well also transferred shares to Newmont Duketon in M 38/262 (Map 2).

On 20 June 2006 E 38/1133 was granted, excluding land subject of M 38/262 but nevertheless covering the ground now known as E 38/2868. On 5 August 2010 A1 Minerals was granted P 38/3874 on ground which later became part of E 38/2868. The term of E 38/1133 was extended on several occasions, and Regis sought an extension on 13 June 2013, with the tenement due to expire on 19 June 2013. However, despite the application to extend keeping the tenement alive, Regis surrendered E 38/1133 on 18 July 2013 at 1.50pm. At 2.11pm on that day, Golden Pig applied for E 38/2868 being the same block which is now E 38/2868 as granted (Map 5).

The title was granted to Golden Pig on 12 February 2014 and one month later Golden Pig applied to transfer the tenement to Regis. Being within 1 year of the grant of the tenement, and not apparently falling within one of the exceptions in s 67 of the Act, the transfer was rejected.[46]

On 4 August 2014 P 38/3874 expired and on 5 August 2014 Golden Pig applied for the land the subject of P 38/3874 to be amalgamated into E 38/2826, which was granted on 2 February 2015. On 19 March 2021 a transfer was registered transferring E 38/2868 from Golden Pig to Regis.

The objector says that Regis has been the applicant for most of the ground covered by E 38/2868 since 29 July 1998 and has been the beneficial owner or holder of most of that land since 20 June 2006. In addition, the dealings by Golden Pig, which has a common entity between Regis and it, have facilitated that continuous holding.

The inference can be drawn that Golden Pig was acting in concert with Regis to afford Regis the ability to effectively retain the licence from:

- Miasi being common to Regis and Golden Pig,
- The surrender of the tenement despite an application to extend its term,
- The ability of Golden Pig to apply for an exploration licence over the same ground within 20 minutes of the surrender, suggesting it was aware of the time of the upcoming surrender, and that a surrender was to occur despite the application to extend the term,

[46] Affidavit of Shane Bradley Nicholson affirmed 24 November 2021, SN1 p 8.

- The attempted transfer to Regis of Golden Pig's then granted exploration licence to Regis,
- The then transfer by Golden Pig of its tenement and another by amalgamation to Regis, and
- There being no evidence before me of any work having been done on or in connection with the tenement.

E 38/3188

E 38/961 was lodged by Aurora Gold (WA) Pty Ltd, whose address was care of Regis Resources Limited, PO Box 810, West Perth on 4 December 1996. The ground covers all but a small portion of what is now E 38/3188. According to the objector[47] E 38/961 is 88.14% of the ground E 38/3188 is now. A comparison of Maps 1 and 2 suggests that that figure is correct.

Almost 11 years later that tenement was granted.

In 2010 when Regis Resources Limited changed its address, so did Aurora Gold on this tenement, remaining as care of Regis Resources. On 21 June 2012 P 38/3984, covering all but a slim border on 2 sides of the rectangular E 38/3188, was granted to South Boulder Mines Ltd, but was transferred to Duketon Mining Limited in June 2013. After an extension of term, P 38/3984 was to expire on 20 June 2020.

E 38/961 was to expire in November 2016 however 3 weeks prior to expiry Aurora Gold surrendered the tenement, on 14 October 2016 at 2.20 pm. At 2.26 pm on the same day Regis lodged its application for E 38/3188. On 4 May 2017 E 38/3188 was granted to Regis other than the land the subject of P 38/3984. That tenement being surrendered by Aurora Gold on 2 September 2019 at 1.09 pm, therefore just under a year before its expiry, Regis applied to amalgamate E 38/3188 and P 38/3984 at 1.16 pm on 2 September 2019, thus obtaining the ground it is now.

The objector says that, given Aurora's address, the inference is that Aurora Gold and Regis are connected and therefore effectively Regis has been the beneficial owner of a large portion of what is now E 38/3188 since the change of address, although it seems to me that

[47] Particulars of Objection dated 25 January 2022 [36].

that argument could be equally applied to the commencement of Aurora's holding of the tenement, given even in 2007 Aurora's address was Regis'. The objector says that the inference that that is the case is strengthened by the 'pattern' that emerges when comparing the dealings in these tenements such that, in the case of E 38/3188, the time intervals between entities surrendering and applying for, or applying to amalgamate tenements is so minimal.

Further, that Aurora Gold and Regis have acted in concert to circumvent the principles of the Act can be inferred from:

- Both entities operated from the same address, and that one was specifically "care of" the other, suggesting Regis had some oversight of Aurora Gold,
- The surrender of Aurora Gold's tenement early, but very close to the expiration date, being 3 weeks, which would be unexpected,
- The ability of Regis to apply over almost exactly the same ground within 6 minutes of the surrender suggesting it was aware of the time of the upcoming surrender, and
- There being no evidence before me of any work having been done on or in connection with the tenement.

E 38/2955

In August 1995 a heads of agreement between Hot Holdings Pty Ltd and Johnson's Well was registered regarding E 38/565 (Map 1) and a caveat was then lodged by Johnson's Well in September 1995. Johnson's Well became part owner of E 38/565 on 14 March 1997. In March 1998 Johnson's Well lodged a further caveat against another part owner of E 38/565.

Johnson's Well also marked out with Hot Holdings M 38/708 and M 38/709, both over similar ground granted to E 38/565 on 10 August 1998. On the same day, a partial compulsory surrender was lodged against E 38/565 and the surrendered area was released on 29 September 1998. Some extensions of term for the remaining area of E 38/565 were subsequently granted, however ultimately refused in February 2003. On 22 June 2003 Johnson's Well and Hot Holdings marked out M 38/969, covering a portion at the lower end of E 38/565, and an application for conversion with E 38/565 was lodged on the same day as the application for M 38/969.

In November 2005 Regis transferred its shares in E 38/565 to Newmont Duketon (later Duketon Resources) and Hot Holdings, supported by a joint-venture agreement, the latter being between Johnson's Well and Duketon Newmont. M 38/969 was then applied for under conversion, which was granted on the commencement of term E 38/2002, being 12 September 2008, an application lodged by Hot Holdings and Duketon Resources on 17 January 2007 (Map 3). A series of tenements were then marked out by Duketon Resources and Hot Holdings, all of which covered some of the ground of M 38/969 and some covering what is now E 38/2955, with subsequent conversions lodged and granted regarding M 38/969. On 20 August 2008 an application was lodged to amend the address for notices on M 38/9692 to care of Regis Resources Limited, PO Box 810 West Perth.

Further caveats were lodged in late 2008 by Johnson's Well, on P 38/3427, P 38/3429 and P 38/3430, alleging the caveat lodged against E 38/565 as now being effective against those tenements. In the meantime, on 23 October 2008 Genetic Technologies Limited was granted title to P 38/3544, whose ground is entirely covered by what is now E 38/2955. On 22 June 2009 Genetic Technologies transferred 80 of its 100 shares in P 38/35442 to Duketon Resources and the remaining 20 to Regis.

The caveat on E 38/2002 was withdrawn, allowing a voluntary partial surrender to be lodged on E 38/2002 on 10 July, with a further caveat lodged by Regis on 12 July 2013, after Regis had marked out M 38/1263, (Map 6), which transverses across what is now E 38/2955. The subsequent caveat was withdrawn on 20 February 2014 at 10.15am and E 38/2002 was surrendered by Hot Holdings and Duketon at 10.20am that same day. At 10.25am on that day Golden Pig lodged an application E 38/2195 which is exactly the same ground as E 38/2955 is now, and therefore covers much of the ground of the previously set out tenements.

On 27 June 2014 Regis and Hot Holdings applied for E 38/2955, 4 months and 1 week after the surrender of E 38/2002. On 14 August 2014 Golden Pig withdrew it's application E 38/2915 and on 19 March 2015 Regis and Hot Holdings were granted E 38/2955.

P 38/3544, also now held by Regis and Duketon and sitting above E 38/2955 as granted, was due to expire on 22 October 2016. P 38/3544 was surrendered at 12 noon on 21 October 2016, one day prior to expiry, and at precisely the same time Regis applied to amalgamate E 38/2955 with P 38/3544. On 1 November 2016 it was registered that Hot Holdings had transferred its shares in E 38/2955 to Regis.

The objector says that therefore Regis has been the beneficial holder of the land since September 1995, and the temporary nature of the hiatus which occurred between 20 February 2014 and 19 March 2015 was enabled by Golden Pig's application and eventual withdrawal over the same ground. The inference can be drawn that Golden Pig was acting in concert with Regis to afford Regis the ability to effectively retain the licence from:

- Miasi being common to Regis and Golden Pig,
- The surrender of the tenement 5 minutes after the withdrawal of a caveat over the land and Golden Pig's application over the same ground 5 minutes after that surrender, which suggests Golden Pig had knowledge of the impending caveat removal and surrender,
- The re-application by Regis 1 month and 1 week beyond, and therefore relatively close to, the 3-month embargo under s 45(2) of the same ground,
- The eventual withdrawal of Golden Pig's application 6 months after it applied for the ground and 6 weeks after Regis' application, and
- There being no evidence before me of any work having been done on or in connection with the tenement.

P 38/4147

It appears that the objector's contention regarding this tenement is upon the basis that it is soon to expire, having been originally granted on 18 March 2015 with its term extended in 2019 for 4 years, without any evidence being before me that work has been done on the tenement.

Is the relevant evidence in this case insufficient to have a bearing, or any significant bearing, on the application or the Minister's discretion?

The application of **Ex parte Devant Pty Ltd and the Minister for Mines** *and the policy of s 102(4)*

130 The circumstances of the present case are similar to the circumstances in ***Ex parte Devant Pty Ltd and the Minister for Mines***.[48] In that case, Mr Chitty was the sole director and shareholder of Devant, however he held prospecting licences under his own name. Thirty minutes after Chitty surrendered those licences, Devant marked out the ground and subsequently applied for prospecting licences over the same ground. An objector, Bell, urged the Minister to refuse the prospecting licences under s 111A of the Act. Chitty conceded Devant knew about the surrenders by his directorship of Devant. He maintained, however that that did not breach s 45(2) of the *Mining Act*, given he and Devant were separate entities.

131 The Minister refused the applications, finding that while Chitty and Devant's actions were not in breach of s 45(2), they were designed to circumvent it, and that it was not in the public interest for an applicant to circumvent the principles behind s 45(2). Devant sought review in the Full Court of the Supreme Court.

132 To find that Chitty and Devant's actions circumvented, not s 45(2) itself, but nevertheless the principles and policies behind s 45(2), the Minister was heavily influenced by the 30 minute time frame from surrender to marking out, combined with the relationship between Chitty and Devant. The Minister based the finding of 'collusion' that came from those two factors on the principle of s 45(2) being that when a prospecting licence is surrendered, forfeited or expires, someone other than the holder of that prospecting licence should have the opportunity of applying for a prospecting licence or an exploration licence in respect of the land the subject thereof. His Honour Justice Steytler agreed that that was the underlying purpose of that section. He also found, the other two judges agreeing with him, that the collusion as found by the Minister comprised no more than that Devant knowing that Chitty was to surrender the tenements at a particular time and being therefore able, itself, to apply

[48] ***Ex parte Devant Pty Ltd and the Minister for Mines*** Supreme Court of WA, Full Court (unreported) Library No 960722.

for the tenements immediately thereafter,[49] and that those two factors alone constituted ample evidence to support the Minister's conclusion that there had been collusion, also concluding that the policy consideration identified by the Minister in refusing the grants was entirely reasonable.[50]

133 While the facts of the present case are slightly different to the matter of ***Devant***, I am of the view that the circumstances in relation to both matters are sufficiently similar to gain significant guidance from the actions of the Minister in ***Devant***.

134 While ***Devant*** was an objection to a grant of tenement, in my view the statements of public policy and principles of the Act in that case are equally applicable to the present case. I have found that one of the policies behind s 102(4) is that an exemption should not be granted if the exemption process is being used to either circumvent the policy or that it signifies that the policy is being circumvented that those who hold tenements must be willing and able to explore or mine that tenement within a reasonable time frame, or release the tenement so that another has that opportunity. This gives an objector in an application for exemption an opportunity to object on the basis that the applicant is not willing or able to explore or mine the tenement within a reasonable time.

135 While it seems more likely that such an objection would be raised in an application for forfeiture for under expenditure, if an exemption from expenditure is granted, an application for forfeiture falls away for the relevant tenement in the relevant year, and the objector is precluded from bringing to the attention of the Minister the contention that the applicant has not been willing or able to explore or mine the tenement within a reasonable time. Therefore, in my view, such an objection is valid against an application for exemption, even if the reason for the exemption under s 102(2) or (3), as is the case in the present case, has been satisfied. Whether it is therefore that the applicant for exemption is using the exemption process itself to circumvent the principles of the Act, or that the need for an exemption is a symptom of its unwillingness to explore or mine the ground within a certain timeframe, an objection under s 102(4) amounts to the same thing.

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[49] ***Ex parte Devant Pty Ltd and the Minister for Mines*** Supreme Court of WA, Full Court (unreported) Library No 960722, 13.
[50] ***Ex parte Devant Pty Ltd and the Minister for Mines*** Supreme Court of WA, Full Court (unreported) Library No 960722, 15.

136 Therefore I am satisfied that the evidence sought to be lead by the objector is relevant, and that that evidence should be heard. Accordingly, the applicant's interlocutory application is dismissed.

Being relevant, would it nevertheless be unfair to hear the evidence of warehousing?

Was the warehousing allegation raised late and does the objection exceed the scope of the original objection?

137 The original objections as filed object on the basis that there is no valid reason why the exemption should be granted. In my view that statement incorporates an objection to the issues raised under s 102(2) or s 102(3), as the case may be, and the factors contained in s 102(4). As is usual in matters such as the present case, each party filed particulars. The objector filed particulars on 28 May 2021 regarding applications for exemption for P 38/4471, P 38/4124, E 38/3136, E 38/3137 and E 38/3138. The objectors Particulars covered two separate aspects: that there was no evidence of work being done on the relevant tenements, and that Regis had engaged in "warehousing" of those tenements, with details setting out the timelines of dealings in relation to each of those tenements. Amended Particulars were filed on 21 July 2021. These added particulars of the objection to the application for exemption for E 38/2004, which was in the same guise as those already set out regarding the other tenements, and disagreements with the timelines set out by the applicant in their Particulars.

138 On 14 October 2021 Particulars of Objection were filed for the application regarding E 38/2868 and followed the course of the previous Particulars, specifically addressing the allegation of "Warehousing of tenure."

139 Finally, Particulars of Objection regarding applications in relation to E 38/2955, P 38/4147 and E 38/3188 were filed on 25 January 2022. Again, these particulars set out differences in timelines, noted that there was no evidence of work being done on the tenements and addressed in relation to E 38/2955 and E 38/3188 "Warehousing of tenure" with P 38/4147 being noted as expiring soon.

140 With that background, Regis particularly complains that the evidence of the connection, and the facts upon which I am being asked to rely to draw that inference, only came to Regis shortly before the hearing.

141 In Part IV proceedings the wardens Court is not a 'court' as is traditionally understood. It does not exercise judicial functions. The warden obtains power to hear and determine

or make recommendations on matters from each section of the Act addressing the method by which applications and objections are to be administratively dealt with, including 'heard' where there is an objection. As I have identified the warden's process is guided by a set of principles set out in reg 154(1). What natural justice is in a particular tribunal depends on the tribunal, and the statute governing it. In general, according natural justice requires a duty to act fairly, according to the particular case. Where a person's interests are likely to be effected by an exercise of power that person should be given an opportunity to deal with relevant matters adverse to that interest where the decision-maker intends to rely on those relevant matters.[51]

142 There are two aspects of fairness that arise in this case in relation to the 'warehousing' allegation:

a. the applicant should know, prior to the hearing, the case it must meet as to why the objector says the exemption should not be granted, and
b. the applicant should have the opportunity of responding to the relevant information if the warden intends to report to the minister that the Minister should rely on it to make a decision.

143 The objector was clear in my view that in each of the objections and particularly the Particulars, "warehousing of tenure" was a live issue in this case. As the matter progressed procedurally, the applicant sought by interlocutory application to have the warden decline to hear the objector on warehousing.

144 Therefore, the question, in my view, is not whether the objector has departed from its objection particulars as originally drafted, but whether the applicant is now prejudiced by my finding that the evidence of warehousing is relevant and admissible, having not put on evidence at the substantive hearing to counter that allegation, particularly given the objector relies on the evidence regarding Mr Miasi, as I have summarised, which came extremely late.

[51] ***Kioa v West*** [1985] HCA 81; (1985) 159 CLR 550, 628, Brennan J citing ***Ridge v Baldwin*** [1964] AC 40.

All the evidence tendered by the objector is relevant and admissible without the need for any further hearing

145 While I accept that additional evidence about Mr Miasi was produced very late, there are two reasons why in my view the 'lateness' does not afford a reason for me not to take that evidence into account:

a. As I have summarised, the objector's Particulars set out the involvement of Golden Pig in the tenements. Golden Pig, and some form of knowledge gained by Golden Pig therefore, was always to be an inference the objector wanted the warden to draw. The applicant may not have done anything different in preparation of its case if it had had the 'late' information earlier. Clearly Mr Miasi was known to Regis, and was given some authority, given in 2014 he was Regis' representative in the Federal Court. It was always open to Regis to make its own enquiries as to the connection, and given the information about its employees, and searches of corporations, are freely available to Regis, it would have discovered that information, or that that information is incorrect, on its own, had they not already known it, and been prepared to counter it, if it could.

b. One 'cure' prejudice caused by late evidence is an application for an adjournment. No such application was made.

146 In relation to the entirety of Mr Nicholson's evidence, the parties appear to have assumed and prepared for the interlocutory application being dealt with at the same time as the substantive hearing. It appears from the Trial Book prepared by the parties that while the interlocutory application was filed with the Department on 2 February 2022, the Department did not provide the application with a record number, as usually occurs when items are lodged. Neither does the administrative record sheet prepared by the Department for the warden for the substantive hearing note the interlocutory application, presumably because it has not been given any lodgement number.

147 On 20 April 2022 Warden McPhee made orders by consent concerning the filing of evidence and submissions in relation to the interlocutory application. I have been unable to locate on the court file any record of orders regarding the hearing of the interlocutory application.

148 However, given the written submissions prepared by the applicant in preparation for the hearing addressed that interlocutory application, the parties having included the application in the Trial Book, and addressing the court at the substantive hearing on it, I

am satisfied that the applicant was on notice that the interlocutory application was to be heard at the substantive hearing, and therefore, there was a real possibility that the issue of warehousing may be relevant to the warden's final determination of the applications. The time for presenting any counter to the allegation was at the substantive hearing, in readiness for the potential for the interlocutory application being dismissed, as the objector was so ready. The applicant made a forensic choice, in my view, to not have evidence available at the hearing to counter the allegation of warehousing which it clearly knew the particulars of, if not the identity of the alleged connection.

149 The applicant has been afforded procedural fairness.

150 The evidence being relevant, and admissible, without any further hearing needed, I am of the view that the Minister can consider it, without the warden constituting a further hearing.

151 Before summarising my view of the weight to be given to that evidence, I will address the question of the mandatory factors.

THE MANDATORY FACTORS IN S 102(4)

Is either the application or objection invalid for lack of evidence supporting the mandatory considerations?

152 For the application for exemption or the objections to be invalid, the mandatory factors in s 102(4) must be conditions precedent to an exercise of the warden's power to make a recommendation to the Minister. To determine whether that is the case, I have considered:

a. whether it is clear from the drafting of the section that the legislature intended the mandatory factors to be jurisdictional facts, such that the absence of those facts results in the absence of power to report, and

b. whether, as a whole, the *Mining Act* and regime reveal a statutory purpose that the failure to provide evidence on these two mandatory factors vitiates the Minister's power to grant the application and therefore the warden's power to make a recommendation.

153 I am not satisfied that on either consideration, the absence of evidence leads to a lack of power. As I have set out, s 102(4) comes after the legislature has set out the power (s 102(1)) and the reasons for exercising that power (s 102(2) and (3)). As I have also

discussed, the policy behind s 102(4) is for weight to be given to the question of whether, from the two factors nominated, at least, the Minister can be satisfied that in all of the circumstances a grant is appropriate, whatever the circumstances are that a review of those two factors, at least, may suggest.

154 Accordingly, the imposition is on the warden to include in the report to the Minister the regard that the warden has had to those factors and therefore this is not a precondition on the parties as the inclusion of a particular report or information is to an application for a tenement, without which, the application cannot be assessed, or an objector cannot adequately object to the grant. Neither the application nor objection is invalid for the parties choosing not to call evidence on the two mandatory factors.

155 Therefore, the application and objection still being 'live' what occurs when one or both parties choose not to put forward evidence of the mandatory factors? Analysis of this question is facilitated by analysis of another argument put before me – the question of 'onus.'

Where does the onus lie in s 102(4)?

156 The question has arisen as to where the onus lies in relation to s102(4) factors. In my view it lies with the party who seeks to convince the decision-maker that the factor either has a positive or negative impact on the decision-maker's task.

157 The objector disputes the submission that the Minister should exercise the discretion by viewing s 102(4) as obligating grant if those factors do not justify refusal once reasons have been established. While practically exemptions may be granted if there are no factors justifying refusal, the objector complains that describing the discretion in that manner imposes an unjustified onus on the objector to justify refusal. That is so, the objector says, when it is the applicant who is seeking to satisfy the warden, in making a recommendation, and in the Minister, in making a determination, in favour of a grant, that there are factors which enable it to do so, or there are factors which, while they may appear to weigh against grant, are of such little importance or weight, or both, or, when weighed with other factors, do not outweigh those positive factors, that nevertheless grant is justified.

158 There are two practical paths to the Minister under s 102. The first is where there is no objector. In that case, under s 102(5)(b), it is the Department which forwards to the

Minister the application for consideration under s 102(6). The second is where there is an objection lodged. Under s 102(5)(a) the warden first hears evidence the parties seek to put on, and prepares a report and recommendation, for consideration under s 102(6). The application of the mandatory factors in s 102(4) does not depend on which course is taken. Therefore, even if there is no objection, the Minister must still have regard to the factors in s 102(4). In that case, there is no objector to prove to the Minister that there is good reason why the exemption should not be granted. The legislature cannot therefore be read that that is an objector's task; the presence of an objector does not change that practice, given the construction of section 102(5).

159 Accordingly, it is not for the objector to rebut an assumption that the exemption will be granted unless there is good reason not to do so. However, once an objector chooses to put forward a reason to convince the Minister that there are, under s 102(4), from the mandatory factors or otherwise, considerations as to why the exemption should not be granted, it is for the objector to so convince the Minister, or, to "make good" the assertion raised by the objection.[52] Assuming the applicant does not wish to have the Minister find that there are policy reasons why the exemption should not be granted, the applicant will call evidence or make submissions on the objector's contentions.

160 It follows from that course that the Minister would not as a matter of course grant an exemption once the reasons have been satisfied under s 102(2) or (3). Therefore, the finding that there is a reason is, in my view, neutral to the determination of the discretion under the mandatory factors, although it may have some relevance to the ultimate determination under other factors that may be taken into account.

161 The Minister does not, then, in the present case, have any evidence from Regis to consider on the mandatory factors.

What then practically occurs where there is no evidence on a mandatory factor?

Can the warden make their own enquiries?

162 Reg 154(1)(d) entitles the warden to be informed in any way the warden considers appropriate. This may mean that the warden may make enquiries, say, of the Department of Mines, where the parties have not produced evidence that the warden believes may be

[52] ***Re Roberts SM; ex parte Burge*** [2003] WASCA 2 [29].

relevant, provided the parties are given an opportunity to comment on what the warden finds, if the warden intends to rely on it. Alternatively, it may simply mean that, following on from r 154(1)(c), as the warden is not bound by the rules of evidence, evidence can be produced by the parties in any way the warden deems appropriate. In other words, it is not that the warden may go and make their own enquiries separate to the parties, but that, not being bound by the rules of evidence, and acting with as little formality as possible, the warden may receive evidence from the parties in any way the warden believes is appropriate for the case being heard.

163 Warden Calder has determined that r 154 may enable a warden to view items from the Department file, saying that where it is necessary to do so in order to properly carry out the warden's role, reference may be had to material that has been placed on the Department file in relation to the matter before the Warden.[53] However, as a general rule, the Warden should not take into account and give weight to material contained within the Departmental file without the parties having the opportunity to be heard on that material.[54]

164 In ***Diamond Rose NL v Hawks***[55] Warden Calder was considering the use of statutory declarations which were attached to the applications he was considering, and those made on the tenements in the past, however each had been formally tendered in evidence at the hearing and been the subject of submissions. The parties therefore, in that case, had had significant opportunity to be heard on the statutory declarations, which had been produced prior to the hearing and it is not clear that his Honour's views can be applied to the warden going to the file without the parties' input or knowledge after a hearing is completed.

165 If r 154 enables the warden to make their own investigations into relevant factors, that step should be taken with caution. While Part IV proceedings are administrative, where there is an objection, the 'hearing' is run in an adversarial manner, with the applicant and objector placing before the warden the evidence it believes favours its case. The Department of Mines is rarely if ever a party or contravener. Therefore, if the parties choose not to place information before the warden, and therefore the Minister, that is a

[53] ***Diamond Rose NL v Hawks*** unreported, Perth Warden's Court, 26 May 2000, 15.
[54] ***Diamond Rose NL v Hawks*** unreported, Perth Warden's Court, 26 May 2000, 15.
[55] ***Diamond Rose NL v Hawks*** unreported, Perth Warden's Court, 26 May 2000.

forensic choice the warden must respect. That does not absolve the parties, however, from unfavourable comment on that choice where it is made on material matters.

166 There is a practical reason why wardens should not make their own enquiries on an application, and that is that each warden, and each representative of the parties, and sometimes each party, have multiple matters and hearings to attend to. If, once a hearing is notionally completed, the warden makes enquiries, most likely of the Department, r 154(1)(b) may require the warden to reconvene the hearing to accord the parties natural justice. There may then be a lengthy cycle of further hearings, submissions and perhaps even further evidence.

167 Further, it may not be clear what the warden, and Minister, should have regard to when not directed by the parties or what the warden should do if they stumble across evidence that the parties were not expecting. For example, should the warden be confined to the reasons given for granting the exemption, or review the applications and any other evidence supporting the application, or objections thereto? Is the warden to be confined to the Form 5 Operation Reports, or other material lodged or referenced in relation to work done? This underpins the notion that the parties should be trusted to make their case, forensic decisions of the parties should not be second-guessed by the wardens and the wardens can be trusted not to make their own enquiries after a hearing.

168 Therefore, when no evidence on the mandatory factors is produced by a party, the only other option the Minister has is to have regard to the mandatory factors in some other way.

How does the Minister 'have regard' to factors where there is no evidence?

169 To 'have regard to' means to take that factor into account and to give weight to it as a fundamental element in making the determination,[56] although it must be remembered that the decision-maker has an ultimate discretion.[57]

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[56] ***R v Hunt, Ex parte Sean Investments Pty Ltd*** [1979] HCA 32; (1979) 180 CLR 322; (1979) 25 ALR 497, 504 per Gibbs and Mason JJ (majority).

[57] ***R v Hunt, Ex parte Sean Investments Pty Ltd*** [1979] HCA 32; (1979) 180 CLR 322; (1979) 25 ALR 497, 508 per Murphy J, who, while giving a minority judgement, has extrapolated the extent to which a factor can effect the ultimate outcome, which seems uncontroversial.

170 The question of previous exemptions and work done or money spent on the tenements are not simply factors that the warden and Minister may or may not find relevant depending on the circumstances of the case. They are mandatory considerations. However, they are, in themselves, inert factors. For example, the fact of previous exemptions may, as I have identified, mean that the warden gives them positive weight in favour of consistency in decision-making and, where there is a continuation of a factor out of the applicant's control, security of tenure. However, also as I have identified, repeated exemptions on the ground, for the same reasons, may signify an attempt to circumvent the principles of the Act relating to 'warehousing.' As a result, it is my view that if the applicant wishes the warden and Minister to consider and give positive weight to one or both of those factors it is incumbent upon the applicant to place before the warden that information.

171 If there is no evidence, the Minister, and the warden, are entitled to ask of themselves, "why not?" They are entitled to draw the assumption that if the applicant had positive evidence in that respect, it would have called it, as it is the applicant, as I have identified, who asks the Minister to exercise the discretion in its favour, and it is for the applicant to assist the Minister, through the warden, in coming to that view.

172 As a result, on that assumption, where an applicant does not provide to the Minister evidence on one or both of the mandatory factors, there is another assumption the warden and Minister are entitled to draw: that the evidence would have attracted negative or at least neutral weight in the exercise of the discretion. It is also therefore not for the objector to raise evidence that is to attract negative weight before a factor attracts negative weight. Further, it would be unlikely parliament intended an applicant to resist an objection to an application for exemption by avoiding eliciting evidence on a mandatory factor.

173 If an applicant chooses not to provide information to the warden in the assessment of the application the warden therefore can either:

a. gather it themselves, provided that the parties are afforded natural justice if that is done, or

b. apply what weight it can to the factor as it is before them.

174 I have already expressed my view of the appropriateness of the warden making their own enquiries, if in fact r 154 allows that to occur. The alternative is to revert to the principle set out in ***Jones v Dunkel***.[58]

The application of **Jones v Dunkel** *in a case such as this*

175 The unexplained failure by a party to give evidence or to call a witness or tender certain documents may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn. Generally, this rule permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party.[59]

176 Whether the failure to call a witness gives rise to any inference depends upon a number of circumstances. The significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call that evidence feared to do so. There are circumstances in which it has been recognised that such an inference is not available or, if available, is of little significance, however in the present case the evidence was well within the applicant's knowledge and ability to elicit, being business records, if there have been previous exemptions, or evidence from an officer of the applicant that there have been no exemptions, and business records showing work done on tenements.

167 I am mindful that the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion into inference.[60] However, there are occasions where, where

[58] ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298.
[59] ***Kuhl v Zurich Financial Services Australia Ltd*** [2011] HCA 11; (2011) 243 CLR 361 [63]-[64].
[60] ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298, 308, 312 and 320; ***Schellenberg v Tunnel Holdings Pty Ltd*** [2000] HCA 18; (2000) 200 CLR 121 [53].

there is a finite number of inferences available, the absence of evidence on one may inevitably lead to the drawing of the other. For example, in ***Commercial Properties v Italo Nominees***[61] the warden dealt with an application for forfeiture where it was alleged that the holder of four prospecting licences had failed to comply with expenditure conditions. There was evidence that the Mines Department Register did not show any expenditure on the tenements, and it was accepted that this was prima facie evidence that there was not any expenditure. The licensee did not adduce any evidence of expenditure or work. The warden was prepared to infer that there had been non-compliance, but found that the plaintiff had failed to show that the matter was of sufficient gravity to justify forfeiture.

168 In finding that the warden had misconstrued the onus the Court on review noted that there were three possible inferences open to the warden once the prima facie evidence was presented, namely that:

a. no compliance had in fact occurred with the expenditure conditions on each of the prospecting licences;

b. the expenditure conditions had been complied with in whole or in part but reports of such expenditure had not been filed pursuant to reg 16, or

c. the expenditure conditions had been complied with, the reports had been filed, but particulars of expenditure had not been recorded in the register after lodgement of the reports.

169 The Court found that in that case silence or non-production of information on the part of or by the tenement holder furnished sufficient evidence in the light of the available inferences to warrant a conclusion in favour of the plaintiff, that is, the first inference. Such silence or non-production either makes the drawing of the second and third inferences listed above impossible, or resulted in a situation where, on the balance of probabilities, a conclusion in terms of the first inference would result. The evidence of

[61] ***Commercial Properties v Italo Nominees*** [1988] WASC 428.

expenditure being within the knowledge of the tenement holder, very little would have been enough to displace the first inference.

170 The principle can operate against a party who bears the burden of proof or against a party who does not bear the onus[62] but it only applies where a party is 'required to explain or contradict' something.[63] What a party is required to explain or contradict depends on the issues in the case, however in the present case, as I have said, it is expected that the party who seeks the exemption would call evidence that is within its own business records if it assisted its case. In addition, in the present case, the factors to be considered are mandatory, and therefore Regis was on notice that they would be considered, and the objector made it clear, as I have found, that 'warehousing' was to be a live issue in the hearing of the applications, and the mandatory factors have relevance to the principles of the Act in that regard.

171 Given the principles of the Act, and the importance of the principle that those who do not use their tenements should give way to someone who will, the self-policing nature of the regime, the construction of s 102 and the mandatory factors, I am of the view that there must be a positive finding of the Minister that the applicant for an exemption is not circumventing the principles of the Act before the exemption can be granted. That positive finding may come from as little as there being no adverse suggestion either from the mandatory factors or other evidence or factors.

172 Needing a positive finding, a finding that evidence was not elicited in answer to the fundamental principles of the Act when it easily could have been, is a finding that that evidence did not assist the applicant's case. Such a finding, in the present circumstances, does lead to a negative finding, that is, the absence of that evidence means positive weight cannot be given to that factor, and therefore that weighs against the exemption being granted.

173 In addition, in the present case, as I have said, the allegation against the applicant is one of using other entities to continue a long-held connection with the tenements and ensure the tenements are returned to Regis after the law-imposed hiatus', despite the number of

[62] ***Ho v Powell*** [2001] NSWCA 168; (2001) 51 NSWLR 572 [16].
[63] ***Schellenberg v Tunnel Holdings*** [2000] HCA 18; (2000) 200 CLR 121 [51]; ***Ronchi v Portland Smelter Services Ltd*** [2005] VSCA 83 [81]; ***Hesse Blind Roller Co Pty Ltd v Hamitovski*** [2006] VSCA 121 [28].

sections of the Act designed to prohibit that occurring. The absence of evidence in relation to the mandatory factors, which are also designed to ensure those principles are not being circumvented, makes it easier to infer that the applicant was engaged in circumventing the principles of the Act, and adds weight to a finding against the applicant's application for exemption.

SUMMARY REGARDING THE EVIDENCE AND THE EFFECT OF THE EVIDENCE AND THE RECOMMENDATION

178 In summary:

a. Section 102(4) of the *Mining Act* enables the Minister to consider factors other than those identified in s 102(4). Broadly, the factors to be considered are policy factors regarding the principles of the Act and regime.

b. The issue of "warehousing of tenure" is a relevant factor under s 102(4) in the present case, and Regis was put on notice that it formed the basis of Richmond's objection.

c. While Part IV proceedings are administrative, they are 'heard' in the context of the parties directing the evidence it wishes to call or rely on. It can be assumed that in Part IV proceedings, a party will put before the warden evidence they have which is in their favour, or is against the other party.

d. Regis has not been denied natural justice by the dismissal of its interlocutory application seeking orders that the warden does not hear the objector. Regis chose not to elicit evidence answering the objection, despite knowing there was a possibility the interlocutory application would be dismissed, it being listed to be determined at the substantive hearing.

e. Neither has Regis been denied procedural fairness, or natural justice, because of the 'late' evidence regarding Mr Miasi.

f. A direction in legislation that the decision-maker is to have regard to a factor is not a direction that a party produce evidence of that factor. Rather, it is a direction to the decision-maker that a factor must be considered.

g. Given the direction to have regard to a mandatory consideration is to the decision-maker, neither an application nor objection is automatically invalid simply because a party has not produced evidence on that factor. The absence of evidence on a factor

will only render the application or objection invalid if the factor is essential to the existence of the power to decide. Section 102(4) is not such a precondition.

h. The fact that a factor is said to be a mandatory consideration, so nominated in s 102(4) means that the parties are on notice that that factor will be considered.

i. A lack of evidence on a mandatory factor, depending on how the other party has run its case, may attract weight against the party who has decided not to adduce evidence.

j. There is no question of a lack of procedural fairness when a mandatory consideration is to be considered– if a party decides not to illicit or produce evidence on a mandatory factor, especially where they know that the opposing party intends to adduce evidence in favour of its case, or against the party's case, they accept the risk that the factor may attract weight against them without an answer or counter.

179 Having satisfied the reason under s 102(2)(h), Regis can be given a little weight in its favour when this is combined with its general expenditure over the combined reporting groups.

180 In contrast, the relevant factors raised by the objector in the present case are:

a. Golden Pig was able on many of the tenements to mark out or apply for a tenement very shortly, sometimes within hours or minutes, of Regis surrendering that or similar ground, or that tenement expiring.

b. Regis applied over Aurora Gold's surrendered tenements within minutes or hours of it being surrendered early.

c. There was a connection between Golden Pig and Regis.

d. There was a connection between Aurora Gold, Duketon and Delta Gold and Regis, such that even though each was a separate corporate entity, the sharing of knowledge, to the exclusion of others, is an inference available.

e. Many of the tenements were obtained by Regis through a series of applications, share transfers, heads of agreement, amalgamations and conversions, all of which, it is acknowledged, are themselves legitimate methods of dealing in tenements, over tenements held by Auruora Gold, Duketon and Delta Gold.

f. On some of the tenements, the multiple applications, surrenders, amalgamations and transfers related to many different shapes, sizes and types of tenements but all in some way covering the land of the ultimate tenement.

g. The evidence shows that the interactions with Golden Pig, particularly, formed a pattern, being of applications shortly after surrender, a further application by Regis once the 3 month embargo on Regis passed, and then the withdrawal by Golden Pig, or the withdrawal by Golden Pig once another application is granted to Regis, enabling amalgamation.

h. There is no evidence before me of any work done on the relevant tenements, although I acknowledge that the tenements are part of combined reporting groups on which significant expenditure has occurred.

181 While the connection between Regis and Golden Pig, Aurora Gold, Duketon and Delta Gold were not as strong as that in ***Devant,*** where there was a clear administrative ability to direct the company by the individual who also has the tenements, there are a number of matters in the present case which nevertheless in my view infer a strong connection, and therefore knowledge being shared between the entities, particularly when those individual pieces of evidence are viewed together:

a. The timings between the applications and marking out or applications,

b. The applications being after surrenders, many surrenders being very close to the natural expiry, and therefore most likely unexpected, and being too many to be a coincidence, and

c. The withdrawals, transfers or abandonment of the applied for tenements once Regis had its tenement, or was able to apply to amalgamate.

182 The inferences available from those factors is strengthened by the evidence about Mr Miasi, and the failure of Regis to call evidence relevant to the mandatory factors under s 102(4), and I am satisfied that that inference of connection, such that knowledge is being shared, is strongly the more probable inference in this case.

183 The presence of that strong inference, and the pattern that emerges from the dealings of Golden Pig also support and strengthen the inference that Regis had similar arrangements with Duketon, Aurora Gold and Delta Gold.

184 As acknowledged, the many transfers, share arrangements, heads of agreement, conversions and amalgamations are of themselves legitimate methods of dealing in tenements and in my view those dealings alone in this matter would not have amounted to a finding that Regis has had the long-term benefit of the tenements such that it was

circumventing the principles of the Act, or attracted weight against grant. However, in conjunction with the other relevant factors I have identified, the fact that Regis has had the benefit of access to or ownership of much of the land that relates to the current tenements for many years adds weight to the inference that by the arrangements with Aurora and Golden Pig, Regis are attempting to circumvent the principles of the Act, both by its applications for exemption from expenditure and otherwise.

185 Similarly, the various shapes, sizes and types of licenses applied for and granted over the years no doubt could be seen as having practical and legal utility, however, the complex forms of some of the tenements would make, in my view, attempts to apply for that ground by other parties unattractive. By applying in varying boundaries of tenement, the applicants have nevertheless ensured that all of the areas of the tenements have effectively been bound up in the application process which would dissuade anyone else from applying and becoming involved in multiple applications on foot for various areas around, on, or transecting with, the relevant block. and the history of such applications in the present case those tenants has added weight to the inference that by the arrangements with Aurora and Golden Pig Regis are attempting to circumvent the principles of the Act and maintain the tenements without working them.

186 The applicant has not put on evidence in contradiction of that allegation. The applicant has put on no evidence that it has used in any way the tenements, other than the agreed facts that they are part of combined reporting groups where there has been adequate expenditure in total. The lack of evidence of work done on or use of the individual tenements combines with the other factors to support an inference that the applicant has been unwilling to explore or mine those tenements within the requisite, or reasonable, time frame. That in turn leads to a strong probability the inference that the applicant is using the mining regime to circumvent the principles of the Act.

187 I am therefore satisfied that that those arrangements which are in contravention of the principles of the Act are, from the circumstances raised, a far more probable inference in favour of what is alleged, and when considering the policy considerations under s 102(4) of the Act, this weighs against the applicant being granted the exemptions, despite the fact that the reasons for the exemptions have been made out under s 102(2)(h).

188 I am also satisfied from the factors I have just summarised that even where there were no such arrangements on the tenements, the need for an exemption from expenditure more

probably infers a lack of willingness to explore or mine the tenements within a reasonable timeframe and when considering the policy considerations under s 102(4) of the Act, this weighs against the applicant being granted the exemptions, despite the fact that the reasons for the exemptions have been made out under s 102(2)(h).

189 The factors that weigh against grant, or in favour of refusal, far outweigh the factors I have identified that are in favour or neutral of grant.

190 I therefore recommend that the applications for exemptions be refused.

ORDERS

191 I therefore make the following orders:

a. The Interlocutory Application filed on 2 February 2022 is dismissed;

b. The applications for certificates of exemption from expenditure on E 38/2004, E 38/2868, E 38/2955, E 38/3136-3138, P38/4124, P 38/4147 and P 38/4471 are recommended for refusal.

c. Costs of this application and the Interlocutory Application are reserved.

d. The parties have leave to request that the question of costs be listed for mention before the warden when convenient to the parties.

e. The Department of Mines is to list for mention the Applications for Forfeiture associated with these tenements brought by Mr Richmond at a time convenient to the parties.

192 I direct that on the receipt of these reasons by the Department of Mines these reasons, the notes of evidence, exhibits tendered and this report are to be transmitted forthwith to the Minister for consideration.

Warden