CASE NOTES

RE CALDER EX PARTE ST BARBARA MINES LTD[1]

Goran Galic*

Mining tenements – exemption from expenditure requirements – aggregation of expenditure on tenements within a project – s102(2)(h) *Mining Act* 1978 (WA)

The Full Court reviewed a recommendation by Warden Calder to the Minister for Mines ("the Minister") in respect of an application for exemption from expenditure requirements under s 102(2)(h) of the *Mining Act 1978* (WA) ("the Mining Act"). The Court considered three important issues:

- the circumstances in which expenditure on a mining tenement comprised within a project can be aggregated for the purpose of s 102(2)(h);
- the requirements to be met in order for a mining tenement to constitute part of a project for the purpose of s 102(2)(h); and
- whether (and if so, the circumstances in which) certiorari lies against a recommendation by the Warden to the Minister under s 102(2)(h) and 102(6).

This commentary first examines the findings of the Warden, then the Full Court's decision. It concludes by summarising the law as it now stands in relation to the above three issues. The practical implications of the decision are also noted.

BACKGROUND

The tenement in issue

St Barbara Mines Ltd and Golden Shamrock Mines Ltd ("the applicants") held a large number of mining tenements in the Meekatharra-Cue region ("the region"). The tenements comprised mining leases, exploration licences and prospecting licences and included Mining Lease M51/334, the tenement in issue in the proceedings. M51/334 was granted to the applicants on 5 October 1989, and in 1996 the annual expenditure commitment in relation to the tenement was $12,100.[2]

In 1995, the Department of Minerals and Energy ("DME") decided that a selection of mining tenements within the region should be grouped into exploration project areas to enable the tenement holders to apply for exemption [from expenditure] on a 'project' basis under s 102(2)(h) of the *Mining Act*.

One of the project areas was designated the name "Bluebird". It included 14 separate groups of mining tenements, one of which was assigned the name "Nanine/Golden Shamrock" (C61/1993). M51/334 fell within the Nanine/Golden Shamrock group of tenements.

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1 Supreme Court of Western Australia, Full Court, 22 April 1999.

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2 The expenditure commitment was imposed pursuant to r 31(1) of the *Mining Regulations* 1981 (WA).

Application for exemption

In 2 December 1996 the applicants applied for a total exemption from expenditure conditions for M51/334 by application for exemption no. 282/967. The reason for the application for exemption was stated as follows:

> "The mining tenements are comprised within a project involving more than one tenement and ... expenditure on the tenements comprised in that project would have been such as to satisfy the expenditure requirements in relation to the tenements concerned had the aggregate expenditure been apportioned in respect of the various tenements comprised in the project. Further time is required to fully evaluate the tenements. Applied for pursuant to s 102(2)(b), s 102(2)(h) and s 102(3) of the *Mining Act* 1978."

It should be noted that the applicants abandoned reliance on s 102(2)(b) on the *Mining Act* when the application came before the Warden for hearing. The general effect of s 102 of the *Mining Act* is discussed in below.

Objection to the application

Mr Michael Foley ("the objector") lodged an objection to the application for exemption. The grounds for the objection were as follows:

> "The licence [sic lease] has been active for 7 years, of which [the applicants] have applied for exemptions for 6 of those years. They should have spent a minimum of $84,700.00 compared with the $17,675.00 spent, some years ago."

At the same time, the objector also lodged plaint for forfeiture of M51/334 on the basis of non-compliance with the prescribed expenditure condition for the year ended 5 October 1996.

Relevant legislative provisions

In order to analyse the case properly and effectively (as well as to understand the background against which the decision was made), it is necessary to consider briefly the general provisions of s 102 of the *Mining Act* which deal with the exemption from expenditure conditions.

Section 102(1) provides:

> *Subject to this Act, on an application made, as prescribed, by the holder of a mining tenement (other than a retention licence) or his authorised agent prior to the end of the year to which the proposed exemption relates, or within the prescribed period after the end of that year, the holder may be granted a certificate of exemption in the prescribed form totally or partially exempting the mining tenement to which the application relates from the prescribed expenditure conditions relating thereto, in an amount not exceeding the amount required to be expended—*
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> *(a) in respect to any mining tenement other than a mining lease, in any one year; and*
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> *(b) in respect to a mining lease, subject to sub-section (7), in a period of 5 years.*

Section 102(7) provides that:

> *Where the Warden finds that the reasons given by the holder of the mining leases are sufficient to justify the granting of a certificate of exemption and so recommends, or if the Minister is satisfied whether or not a recommendation is made by the Warden, the Minister may grant a certificate of exemption in an amount not exceeding the amount required to be expended in respect of a mining lease in the period of 5 years from the commencement of the year to which the application relates.*

Section 102(2) outlines the grounds on which an exemption from expenditure can be granted. Relevantly in this instance, s 102(2)(h) provides:

> *A certificate of exemption may be granted for any of the following reasons:*
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> ...
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> *(h) that the mining tenement is comprised within a project involving more than one tenement, and that expenditure on a tenement or tenements comprised in that project would have been such as to satisfy the expenditure requirements in relation to the tenement concerned had that aggregate expenditure been apportioned in respect of the various tenements comprised in the application.*

Pursuant to s 102(5), any application for a certificate from expenditure is to be determined by the Minister, except where an objection to the application is lodged, in which case the application shall be heard by the Warden in open court.

Further, s 102(6) provides that:

> *The Warden shall as soon as practicable after the hearing of an application transmit to the Minister for his consideration the notes of evidence and any maps or other documents referred to therein and his report recommending the granting or refusal of the application and setting out his reasons for the recommendation.*

THE WARDEN'S DECISION

The application for exemption and the objection were heard by Warden Calder SM. The hearing of the plaint for forfeiture was adjourned to a date to be fixed, pending the Warden's hearing and recommendation on the application for exemption. The Warden's decision was delivered on 22 May 1998.

The evidence before the Warden

Evidence accepted by the Warden included that:

- the applicants mined gold within two group of tenements known as 'Bluebird' and 'Nanine' (which were 20 km apart), and drilled at various locations which lay between the two tenement groups (including M51/334);
- the applicants had one RAB line drilled on M51/334, but this was done in the year ending 4 October 1993 (the only year when expenditure on the tenement was reported). Subsequently, they drilled one RAB drill line about 200m south of M51/334, conducted some drilling (but not RAB lines) about 3 km north of M51/334 and found a significant gold deposit 2.5 km south of M51/334 ("the Caledonian deposit");

- the Caledonian deposit was on a granite contact line which passed through M51/334 and the applicants intended to continue to explore along the line. It was anticipated that exploration would reach M51/334 within a year;

- while no work had been done on M51/334 since 1993 due to work commitments on other tenements, the applicants had spent $38,916,898 on the 'Bluebird' project area's tenements as a whole, which greatly exceeded the collective statutory expenditure obligations.

The issues before the Warden

The main thrust of the applicants' case before the Warden was based on s 102(2)(h) of the Mining *Act*. In his findings, the Warden identified the following issues as arising from the provisions:

- whether or not M51/334 was comprised within a project involving more than one tenement and if so, what other tenements comprised the project; and

- whether:

  (i) aggregate expenditure could be made up by way of aggregation of expenditure on mining operations together with expenditure on activities which did not constitute mining operations; or

  (ii) in assessing aggregate expenditure, the legislation required that:

  - expenditure on prospecting be separately identified and aggregated only with expenditure on prospecting;

  - expenditure on exploration be separately identified and aggregated only with expenditure on exploration; and

  - expenditure on mining operations be separately identified and aggregated only with expenditure on mining operations.[3]

Aggregation of expenditure

In his reasons, the Warden referred to *Policy Guidelines* published by the DME ("the guidelines"). Under the heading "Definition of what constitutes aggregate expenditure", the guidelines provided:

> "The Policy makes a clear distinction between two different types of expenditure:
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> (a) Expenditure on mineral exploration/prospecting;
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> (b) Expenditure on mineral development/production.
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> It is necessary to separate the two in any project that consists of tenements covering an active mining

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3 The reason why the Warden considered the second issue is because in evidence before him were Policy Guidelines published by DME, which guidelines suggested that there was a distinction between expenditure on exploration/prospecting and expenditure on development/production. The guidelines suggested that there could be no aggregation of the two different types of expenditure.

> area surrounded by tenements covering an area of exploration activity... It is not reasonable to include huge costs of mining development and production (often considerably greater than the level of exploration costs) in any exploration project, because this could then enable large areas of exploration/prospecting tenements to remain unworked with no effective exploration over long periods."

The Warden did not accept that s 102(2)(h) of the *Mining Act* should be interpreted in the way suggested by the guidelines. In his view it was not the intention of the legislation to distinguish between the type of expenditure or the type of tenement upon which the expenditure was expended for the purposes of aggregated expenditure. The Warden held that it was incorrect to take the view that in no circumstances could there be aggregation of expenditure on mining operations together with expenditure on prospecting or exploration, otherwise the potential effect could be to completely negate the intended purpose of s 102(2)(h). As a result, the Warden decided that the applicants could aggregate the whole of the proved expenditure on mining operations with expenditure on exploration and prospecting.

The meaning of project and whether M51/334 was constituted within a project

While the term 'project' is not defined in the *Mining Act* or *Mining Regulations* 1981 (WA), the Warden referred to and agreed with the finding of Warden Thobaven in *Western Gulf Oil and Mining Ltd, Southern Goldfields Ltd and Cord Holdings Ltd*,[4] as to the meaning of project in that case. Warden Thobaven held that before an activity could be classed as a project, it required a quality and concept of firmly based plans. Warden Calder extended the definition further, stating that:

> "...'project' in s 102(2)(h) invokes the notion not only of a 'plan' or 'scheme'... [but also] the notion that the implementation of or the carrying out of... the plan or scheme has commenced and is... not merely an 'idea' or 'mental conception'... with nothing more."[5]

The Warden then gave the following interpretation of the evidence:

- the applicants had nothing more than an intention eventually to mine or explore M51/334, but only if and when funds became available from the active mining operations on the applicants' other productive tenements. The Warden considered that such an intention cannot for the purposes of s 102(2)(h) be said to amount to a 'plan, draft or scheme' to mine or explore or prospect the tenement;

- expenditure on the tenement would only occur if the applicants decided that no other tenement ranked higher than M51/334 in terms of the expected results to be achieved from further expenditure. The Warden ruled that such a speculative proposal could not constitute a 'plan' or 'scheme'... which may be said to amount to a 'project' for the purposes of s 102(2)(h), which project includes M51/334;

- there was no evidence generally of any real plan in relation to M51/334 - there was no evidence of a past drilling result from which it could be inferred that M51/334 had been given any priority in terms of future expenditure, nor a time frame within which the applicants intended to commit expenditure to the tenement.

It should be noted that the Warden did not take into account the fact that the Caledonian gold deposit

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4 Warden's Court, delivered at Perth, 21 June 1994.

5 Warden's report and reasons, 20.

within granite contact line which passed through M51/334 was being worked by the applicants on a tenement situated near M51/334, nor that exploration (or mining) was expected progressively to reach M51/334. In contrast, that evidence weighed significantly in the Full Court's decision on the meaning of project (discussed below).

The Warden was not satisfied on the evidence that there was a 'project' within which M51/334 was 'comprised' for the purposes of s 102(2)(h). That was not to suggest that there was not a *project* relating to some (or all) of the other tenements within the Bluebird project, but simply that M51/334 was not comprised within any such project. The Warden said that it was the absence of any true plan or scheme or design related to past or future expenditure on M51/334 which had the effect of excluding it from the concept of a project for the purposes of s 102(2)(h).

The Warden's recommendation to the Minister

The Warden's recommendation to the Minister was that the application for exemption be refused. The written reasons submitted to the Minister pursuant to s 102(6) were summarised as follows:

> "... the subject tenement is not within a 'project', in the sense that there is no real 'plan' for its future, other than to hold it for an unknown period until its 'priority' is deemed to be sufficient to justify expenditure. The total expenditure in the past on the tenement... is so small and the likelihood in the near future of there being compliance with the prescribed expenditure requirement is so little that I consider it appropriate that I recommend strongly against the holder being granted a further exemption."

Application for writ of certiorari

The applicants applied for a writ of certiorari to quash the Warden's recommendation. An order nisi for a writ of certiorari was made on 24 November 1998. The grounds were that, inter alia:

- the Warden erred in law in deciding that the term 'project' in s 102(2)(h) involves the actual implementation or carrying out of a plan or scheme in relation to each and every mining tenement comprised within the project, and such error appears on the face of the record, alternatively, is a jurisdictional error;

- the Warden should have decided that there may be a 'project' for the purposes of s 102(2)(h) in respect of specified mining tenements notwithstanding that a plan or scheme has not been or is not being actually implemented or carried out in relation to one or some of those tenements.

There were six other grounds on which the order nisi was made but these were not ultimately considered by the Full Court. The Court was unanimously of the opinion that the applicants were entitled to have the order made absolute on the basis of these two grounds alone.

THE FULL COURT'S DECISION

The Full Court, comprising Malcolm CJ, Pidgeon and Ipp JJ, considered three issues in the appeal:

- whether expenditure on mining leases could be aggregated with expenditure on other types of tenements, where all are constituted within a project;

- whether M51/334 was constituted within the relevant project; and
- whether certiorari was available from the decision of Warden Calder.

The leading judgment was delivered by Malcolm CJ, with whom Pidgeon and Ipp JJ agreed.

Could expenditure on the (various different) tenements within the project be aggregated?

The Court agreed with the Warden's approach on this issue and cited with approval, among other things, the Warden's conclusion that the intended purpose of s 102(2)(h) of the *Mining Act* could potentially be negated if it were accepted that there could never be aggregation of expenditure on 'mining operations' together with expenditure on 'prospecting' or 'exploration'. The Court noted that:

> "...if a tenement holder held only two or three tenements, one of which was being mined extensively [with] large sums of money... being spent, the holder may have a bona fide reason for spending no money on the other 2 tenements... The tenement holder may well have genuine... plans to, in the near future, prospect or explore or mine the other two tenements... If the three tenements themselves constituted a bona fide 'project' for the purposes of s 102(2)(h) then to deny the tenement holder the capacity to 'aggregate' the total expenditure and then apportion it as contemplated by para (h) would mean that such a holder would never be able to rely upon the provisions of s 102(2)(h)... even though the situation... would appear to be precisely the sort of situation at which the regulation is aimed."

Accordingly, the Warden's finding that the applicants were entitled to aggregate the whole of proved expenditure on mining operations and exploration and prospecting on tenements which (together) comprise a *project* for the purposes of s 102(2)(h) of the *Mining Act* was upheld.

Was M51/334 constituted within the project?

The Court effectively 'watered-down' the Warden's definition of the term project. Noting that the term is not defined in the *Mining Act*, the Court held that it should be given its ordinary meaning, namely a 'plan, scheme or undertaking'. The Court explained that the purpose of s 102(2)(h) is to:

> "...enable a mining entity to invest substantial capital in mining or exploration of one or more of a group of tenements incorporated within a project without risk of forfeiture of other tenements in the project for non compliance with the individual expenditure conditions otherwise applicable."

With that purpose in mind, the Full Court disagreed with the Warden's finding that the term project in s 102(2)(h) required actual implementation, carrying out or execution of a plan or scheme which had been formulated specifically in relation to each and every mining tenement comprised within the project.

Instead, the Court ruled that the term should be interpreted in a practical, commercial way so as to include a mineral exploration project which involves an existing plan, scheme or undertaking for the exploration and/or mining of two or more tenements and that the plan, scheme or undertaking may:

- be formal or informal, or amended or supplemented from time to time; and
- contemplate a gradual and co-ordinated development of the tenements, progressively or sequentially.

Was M51/334 constituted within a *project* (as defined by the Full Court)?

On the basis of the above interpretations, the Court turned its attention to the following evidence:

- the gold bearing Caledonian deposit had been discovered and worked on a tenement south of M51/334;
- the Caledonian deposit was situated within a granite contact line which passed through M51/334, and the inference was that gold deposits were also situated on that tenement; and
- exploration (and mining) of the deposits within the contact line would eventually take place on M51/334 within 12 months or so.

As noted earlier, these factors were not taken into account by the Warden. The Court concluded that the evidence above sufficiently demonstrated that M51/334 was part of the Bluebird project, notwithstanding that there was not a fixed timetable or plan which showed precisely when further exploration or mining would be carried out on the tenement.

The Court did not suggest that it is enough to plan to hold a tenement in reserve purely on the basis that it will be worked when it becomes convenient to do so in the future. But, where the relationship between the tenement in issue with the surrounding tenements logically indicated that the tenement will be worked in the future as part of a planned sequence, then that is sufficient for the purposes of s 102(2)(h) of the *Mining Act*. This reasoning is consistent with the practical and commercial approach to the definition of project, advocated by the Court.

What remedy lies against the Warden's recommendation?

The Full Court considered whether certiorari was available to the applicants to quash the Warden's recommendation.

As a general principle, certiorari lies for a jurisdictional error or an error of law on the face of the record, of an inferior court or administrative tribunal. In this instance, certiorari was sought by the applicants on the basis of both jurisdictional error and error of law.

Jurisdictional error

In *Craig v South Australia*[6] ("the Craig case"), the High Court (per Brennan CJ, Deane, Toohey, Gaudron and McHugh JJ) noted that what constitutes jurisdictional error is different for an administrative tribunal than for an inferior court.[7] The Court explained the distinction, by reference to the High Court's comments in the Craig case:

- an inferior court falls into jurisdictional error if it acts wholly outside its jurisdiction. It also commits a jurisdictional error if it ignores that a particular matter that must be taken into account as a precondition for the exercise of its authority.[8] However, it will not commit a jurisdictional error if it

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6 (1995) 184 CLR 163.
7 Ibid 176-180.
8 Ibid 177.

addresses the wrong issue or asks the wrong question. Instead, that will constitute an error of law (another ground for certiorari);

- an administrative tribunal does not have the power to deal with questions of law. So, if it asks itself the wrong question or determines the wrong issue, it will commit a jurisdictional error.

On this basis, the Court considered whether the Warden had committed jurisdictional error, either as an inferior court or as an administrative tribunal.

Jurisdictional error as an inferior court

Considering whether the Warden had committed a jurisdictional error as an inferior court, the Court said that it is an essential precondition of the existence of jurisdiction under s 102(2)(h) that the tenement is comprised within a project and the Warden's authority (as an inferior court) would be exceeded if:

> "...[he] misconstrued s 102(2)(h) and, the meaning of 'project' so that [he] misconstrued the extent of [his] powers in the circumstances of the particular case."

Further, the Court found that because the Warden had interpreted the terms of s 102(2)(h) in such a way as to deny aggregation, he denied himself the jurisdiction to grant the exemption and fell into jurisdictional error as a result:

> "...it is an essential condition of the existence of jurisdiction under s 102(2)(h) that [M51/334] "is comprised within a project involving more than one tenement" and the expenditure on another tenement or other tenements comprised in the project was such as to satisfy the requirements on the application of the balance of para (h). Alternatively, the circumstances set out in s 102(2)(h) constituted such a pre-condition of the authority to grant an exemption. In such circumstances, an error of law regarding the existence or otherwise of the pre-condition [was] a jurisdictional error."

Jurisdictional error as an administrative tribunal

The Court then considered whether the Warden had committed a jurisdictional error as an administrative tribunal. It concluded that the Warden had for (essentially) the same reasons he had as an inferior court - that is, he interpreted the terms of s 102(2)(h) in such a way as to deny aggregation. That misinterpretation also constituted an error of law, which in the case of an administrative tribunal, amounted to a jurisdictional error.

Was the Warden acting as an inferior court or administrative tribunal?

The Court noted that the jurisdiction exercised by the Warden under s 102(2)(h) was that of an administrative tribunal rather than that of an inferior court, but considered that it was not necessary to express a conclusive view, because a jurisdictional error had been established in either case:

> "...[w]hether the Warden was sitting as an inferior court or as an administrative tribunal, a jurisdictional error was established. In either case, certiorari was available."

It should be noted that the issue of whether the Warden is acting as an administrative tribunal or an

inferior court in respect of an application under s 102(2)(h) of the *Mining Act* was subsequently addressed more conclusively by the Court in *Re Calder Ex Parte Gardener.*[9] Ipp J (with whom Pidgeon J agreed) held that the Warden's power to make a recommendation under s 102(6) is administrative, and that finding was consistent with the remarks of Malcolm CJ in the *St Barbara Mines Case.*[10]

Error of law

The Court also considered briefly whether an error of law on the face of the record had been made by the Warden.

Referring to the requirement in s 102(6) of the *Mining Act* for the Warden to produce (among other things) a report to the Minister in support of his recommendations, the Court noted that if the Warden were acting as an inferior court, then it could be said that the report (or any other material) required by s 102(6) constitutes part of the record:

> "...it was arguable that because the Warden was required to prepare a report recommending the granting or refusal of the application and to set out his reasons for that recommendation and transmit them to the Minister, it might well be said that the report, at the least, constituted part of the relevant record because that it what... the Minister was required to consider."

If the report and recommendation did constitute part of the record, the Court suggested that then the error of law which it previously identified in relation to jurisdictional error is one which also appeared on the face of the record. However, the matter was not taken any further, the Full Court having already decided to grant certiorari on the basis that there had been a jurisdictional error.

The Full Court's orders

The Court ordered that:

- the order nisi be made absolute and the Warden's decision be quashed on the basis that he erred in law in deciding that the term "project" in s 102(2)(h)... involves the actual implementation of a plan or scheme in relation to each and every mining tenement comprised within the alleged project and such error was a jurisdictional error;
- the Warden should have found that there can be a *project* for the purpose of s 102(2)(h) in respect of a tenement notwithstanding that a plan or scheme has not been or is not actually being implemented or carried out in relation to one or some of those tenements;
- the application for exemption be remitted to the Warden, to be redetermined.

OBSERVATIONS ON AND IMPLICATIONS OF THE FULL COURT'S DECISION

The following are the writer's views and observations on the practical implications of the Court's decision concerning exemption from expenditure under s 102(2)(h) of the *Mining Act.*

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9 Full Court of the Supreme Court of Western Australia, 21 May 1999.

10 Ibid 7.

Aggregation of expenditure

According to the Court there can be aggregation of expenditure on mining operations (that is, development and production) together with expenditure on prospecting and exploration. The clear distinction between "expenditure on mineral exploration/prospecting [and] mineral development/production" advocated in the DME's policy guidelines is not likely to be sustained in the future by either the Warden or the Court on appeal.

That result, it is suggested, is a sensible one in view of the following:

- the reasons given by the Warden (and endorsed by the Court) that the distinction in the guidelines could potentially negate the intended purpose of s 102(2)(h) of the *Mining Act*;
- in particular, there does not appear to be any basis for such a distinction on a plain reading of s 102(2)(h). As noted by the Warden at first instance and endorsed by the Court, the section does not (expressly or impliedly) distinguish between the types of tenements which may be included in a project, nor between the types of expenditure which may be included in the aggregation of expenditure requirements;[11]
- the Warden and Court each recognised the practical difficulties caused by restricting aggregation of expenditure on different types of tenements, particularly in a project situation.

The meaning of the term project and whether a tenement is constituted within a project for the purposes of s 102(2)(h)

Prior to the Full Court's decision in the *St Barbara Mines Case*, there was general uncertainty at the Warden's Court level as to what constituted a *project* for the purpose of s 102(2)(h) of the *Mining Act*, but most of the cases suggested the need for some evidence of a plan which was being implemented.[12]

Following the Full Court's decision in the *St Barbara Mines Case*, it is now clear that the term "project" in

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11 The Warden (report and reasons, 18) said that it was significant that reg 15(1) (dealing with prospecting licences), reg 21(1) (dealing with exploration licences) and reg 31(1) (dealing with mining leases) all state that the expenditure shall be 'in mining' or 'in connection with mining' on the licence or lease. He went on to note that the term 'Mining' is defined in s 8(1) of the *Mining Act* in broad terms and includes 'prospecting and exploring for minerals, and mining operations'.

12 The following two Warden's Court decisions are examples of instances where the term 'project' has been interpreted differently at that level:

In *Western Gulf Oil and Mining Limited, Southern Goldfields Limited and Cord Holdings Ltd v Ashton Gold Mines Pty Ltd and CBM Nominees* (Warden's Court, Perth, 21 June 1991) the Warden concluded that in order for an activity to be classified as a 'project' under s 102(2)(h), it has to be demonstrated that it had the quality and concept of fairly based plans. These have to be differentiated from activities not properly planned or where money is spent on an hoc basis.

In *Staines and Nadley v Tific Pty Ltd and KNCC Western Australia Pty Ltd* (Warden's Court, Perth, 6 December 1996, briefly noted in (1997) 16 AMPLJ 16), the Warden was satisfied that the mining lease was part of a project comprised of the Jurien and Cooljarloo deposits. The project was the mining and processing of mineral sands under a State Agreement Act which specifically provided that two mining leases be granted for the purposes of the project.

s 102(2)(h) can involve a plan, scheme or undertaking which does not involve actual implementation or execution nor a timetable for its implementation or execution.

The Court's relaxation of the rule set down by the Warden at first instance does not suggest that a tenement can simply be held in reserve, to be worked if and when opportunities arise in the future. However, the tenement in question must be considered commercially and practically in the context of work being (and to be) performed on surrounding tenements. In this instance, it significant that there were gold deposits on the granite contact line which passed through several tenements (including M51/334), and that they:

- were being worked on one tenement near M51/334;
- would (in time) also be worked on the area of M51/334.

The *St Barbara Mines Case* has since been considered by the Warden in *Wiluna Gold Project.*[13] There, the Warden held that because the applicants held all the mining leases within the area concerned, it had a project for the purposes of s 102(2)(h).

In the writer's view, however, the finding that a project can be constituted simply by the applicant holding all the tenements within an area is probably too liberal an interpretation of the Full Court's decision. After all, the applicants in the *St Barbara Mines Case* also held all the tenements within the relevant project area, but the Court did not refer to that fact as a reason for declaring absolute the order nisi. As a result, it is suggested that it is still necessary, when applying for an exemption under s 102(2)(h), to produce evidence of some intention or plan, be it formal or informal, that the tenement in issue will be worked, at some point in the future, as part of the project in issue. That intention can be supported by evidence of work with respect to similar or related deposits on surrounding tenements.

Certiorari against the Warden's decision/recommendation

It now appears that in the case of a recommendation to the Minister by the Warden concerning a s 102(2)(h) application, certiorari will be available:

- on the basis of jurisdictional error where the Warden misconstrues the meaning of "project" so that he misconstrues the extent of his powers in the circumstances of a particular case - that is, his power to grant (or not grant) an exemption becomes an error of jurisdiction;
- on the basis of an error of law on the face of the record, for the same reasons as those that constitute a jurisdiction error.

It is also clear from the decision that with respect to jurisdictional error, it is not significant in the context of s 102(2)(h) whether the Warden is acting as an inferior court or as an administrative tribunal. The same circumstances may give rise to jurisdictional error in either case.

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13 Warden's Court, Perth, 28 July 1999 (see also (1989) 8 AMPLA Bulletin 101).