JURISDICTION	:	MINING WARDEN
TITLE OF COURT	:	BEFORE THE WARDEN IN CHAMBERS
LOCATION	:	PERTH
CITATION	:	IN THE MATTER OF COMPETING APPLICATIONS FOR EXPLORATION LICENCES BY GIRALIA RESOURCES P/L & ors [2012] WAMW 28
CORAM	:	WILSON M
HEARD	:	BY WRITTEN SUBMISSIONS
DELIVERED	:	22 OCTOBER 2012
FILE NO/S	:	RELEASE NUMBER 10/147
TENEMENT NO/S	:	APPLICATIONS FOR EXPLORATION LICENCES 47/2339 TO 47/2344, 47/2349 & 47/2350 & 47/2355 TO 47/2358.
BETWEEN	:	In the matter of Competing Applications for Exploration Licences by: Giralia Resources Pty Ltd (E 47/2339) & Modun Resources Ltd (E 47/2340) & ACMI (IO) Pty Ltd & Aquila Steel Pty Ltd (E 47/2341 & 47/2342) & Sheffield Resources Ltd (E 47/2343 & 47/2344) & Iron Ore Holdings Ltd (E 47/2349 & 47/2350) & Wilgus Investments Pty Ltd (E 47/2355 & 47/2356) & FMG Pilbara Pty Ltd (E 47/2357 & 47/2358) (Applicants)

Catchwords:

Application – Exploration Licence – Competing application over same ground – Initial Requirements – Compliance with s. 58(1)(b)(iv) – Financial Resources – Adequacy of Statement of Financial Resources – Ballot – Exclusion from Ballot

Legislation:

Mining Act 1978 (WA): s. 57(3), s. 58(1)(b)(iv), s. 105A(1), s. 105A(3)

Result:

Application for Exploration Licence 47/2339 by Giralia, application for Exploration Licences 47/2341 and 47/2342 by ACMI and applications for Exploration Licences 47/2349 & 47/2350 by Iron Ore complied with the initial requirements pursuant to s. 105A(3) of the Act simultaneously on lodgement at 0830 hours on 30 April 2010 and are eligible to participate in any ballot to be conducted to determine priority.

Application for Exploration Licence 47/2340 by Modun, applications for Exploration Licences 47/2343 & 47/2344 by Sheffield, applications for Exploration Licences 47/2355 & 47/2356 by Wilgus and applications for Exploration Licences 47/2357 & 47/2358 by FMG did not comply with the initial requirements pursuant to s. 105A(3) of the Act and are ineligible to participate in any ballot to determine priority.

Representation:

Modun Resources Ltd	:	Nil
Sheffield Resources Ltd	:	Gilbert & Tobin
Wilgus Investments P/L	:	Anderson's Tenement Management
FMG Pilbara P/L	:	Lawton Lawyers

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

Jackson Gold v Murchison Exploration [2002] WAMW 27

Aberfoyle Resources Limited v El Dorado Resources Limited, (unreported Supreme Court decision, delivered 19 April 1989)

Jindalee Resources Ltd v Blackham Resources Ltd [2008] WAMW 7

Hunter Resources Ltd v Melville (1988) 164 CLR 23

Re; Lawrence SM; ex parte Gold Bar Holdings Pty Ltd (1984) 11 WAR 549

Biddle and Milling v Bywood Holdings Pty Ltd (Norseman Wardens Court, Warden I Brown, 12 January 1988)

Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & ors (1996) 16 WAR 428

Hunter Resources v PJ Hayes and anor (Perth Warden's Court, Warden Rasmussen, May 1985)

Case(s) also cited:

Kioa & ors v Minister for Immigration & Ethnic Affairs & anor (1985) ALR 321

In the Matter of Competing Applications for Exploration Licences by Hamersley Iron P/L and Brockman Exploration P/L [2012] WAMW 22

In the Matter of Competing Applications for Exploration Licences by the Cazaly Iron P/L [2012] WAMW 23

Background

1. On 30 April 2010 at 0830 hours, certain land contained within Release Number 10/147 was released for mining pursuant to s. 65 of the Mining Act ("the Act").
2. Simultaneously, at 0830 hours on 30 April 2010, Giralia Resources Pty Ltd ("Giralia") lodged application for Exploration Licence 47/2339, Modun Resources Ltd ("Modun") lodged application for Exploration Licence 47/2340, ACMI (IO) Pty Ltd & ors ("ACMI") lodged applications for Exploration Licences 47/2341 & 47/2342, Sheffield Resources Ltd ("Sheffield") lodged application for Exploration Licences 47/2343 & 47/2344, Iron Ore Holdings Ltd ("Iron Ore") lodged applications for Exploration Licences 47/2349 & 47/2350, Wilgus Investments Pty Ltd ("Wilgus") lodged applications for Exploration Licences 47/2355 & 47/2356 and FMG Pilbara Pty Ltd ("FMG") lodged applications for Exploration Licences 47/2357 & 47/2358 over the same land the subject of Release Number 10/147.
3. On 4 April 2012, the Mining Registrar in Karratha, on behalf of the Warden informed Modun, Sheffield, Wilgus and FMG in writing that the Warden he had identified certain issues with the content of the statement specifying the financial resources available to them lodged in purported compliance with the provisions of s. 58(1)(b)(iv) of the Act ("the Statement") and the Warden was of the opinion the Statement lodged by each of them appeared not to satisfy the initial requirements of the Act and may be ineligible to participate in any ballot to determine priority pursuant to s. 105A of the Act. Modun was informed the Statement and the 2009 Annual Report was considered to be insufficient to comply with the provisions of s. 58(1)(b)(iv) of the Act. Sheffield was informed the Statement and the accountants letter was considered to be insufficient to comply with the provisions of s. 58(1)(b)(iv) of the Act. Wilgus was informed the Statement was considered to be insufficient to comply with the provisions of s. 58(1)(b)(iv) of the Act and it had failed to attach a copy of its Financial Statement. FMG were informed the Statement was considered to be insufficient to comply with the provisions of s. 58(1)(b)(iv) of the Act and the Annual Report was considered to be stale.
4. In the same letter the Mining Registrar at Karratha, on behalf of the Warden, invited Modun, Sheffield, Wilgus and FMG to provide written submissions on the issues raised by 27 April 2012. As a result of that letter written submissions were

received from Sheffield, Wilgus and FMG. No submissions were received from Modun.

5. The Warden considered that other simultaneously lodged competing applications for Exploration Licences by Giralia, ACMI and Iron Ore complied with the initial requirements of the Act and were eligible for inclusion in the ballot to determine priority.

6. The written submissions by Modun, Sheffield, Wilgus and FMG now come before the Warden for consideration.

Statement & Submissions by Modun regarding E's 47/2340

7. The Statement lodged by Modun at 0830 hours on 30 April 2010 states as follows:

> ***"3. Technical and Financial Resources***
>
> *3.1 The applicant is a public company listed upon the Australian Stock Exchange. The Applicant has the necessary technical and financial resources to effectively perform exploration upon the ground and acquire the resources required to develop the project further should initial exploration be successful.*
>
> *3.2 Where necessary contractors will be engaged to perform exploration where particular skills are required in the exploration programme.*
>
> *3.3 An extract of the applicant's 2009 Annual Report is attached."*

8. Attached to the Statement is a copy of parts of the Modun's 2009 Annual report including the director's page with their experience and share holdings and a copy of the Balance Sheet and Income Statement for the period ending 30 June 2009. No written submissions or other documents were lodged by Modun in response to the issues raised with Statement by the Warden.

Statement & Submissions by Sheffield regarding E's 47/2343 & 47/2344

9. The Statement lodged by Sheffield at 0830 hours on 30 April 2010 in respect to both applications for Exploration Licences states as follows:

> ***"Technical and Financial Resources***
>
> *The applicant has the necessary technical ability, financial capacity and resources to undertake the above mentioned work program. Suitably qualified personnel have and will be contracted to assist with the above mentioned program.*
>
> *The applicant has the necessary financial resources, asset backing and funds to undertake the above mentioned work programme.*
>
> *Therefore as evidence by the attached and stated above, the applicant has the necessary technical and financial resources to undertake the above work programme."*

10. Attached to be purported Statements pursuant to s. 58(1)(b)(iv) of the Act is a letter from VA Ilarda the Managing Partner of Prosperity Accountants in Leederville ("the Accountants Letter"). The content of the Accountants Letter states as follows:

"Dear Sir,

Re: Tenement Application: SM4 East

We act as accountants for Sheffield Resources Pty Ltd and confirm that to the best of our knowledge, the directors of Sheffield Resources Pty Ltd have the financial resources to meet and exceed the minimum expenditure commitment for the above mentioned Tenement Application.

If you require and further information, please do not hesitate to contact me.

Yours sincerely

VA Ilarda
Managing Partner"

11. On 10 December 2010 at 1330 hours a copy of a savings account from Sheffield Resources Ltd was lodged in respect to both applications for Exploration Licences with the Mining Registrar at Karratha.

12. In its written submissions Sheffield acknowledges the decision in ***Jackson Gold v Murchison Exploration [2002] WAMW 27*** in which it was held requirement pursuant to s. 58(1)(b)(iv) of the Act is to provide a statement specifying the financial resources available to the applicant and not provide a mere statement that in the view of an accountant the applicant has the financial capacity.

13. Sheffield submits the time of lodgement of the applications for Exploration Licences the term 'financial resources' is not defined by the Act and there was no judicial guidance in relation to the construction of s. 58(1)(b)(iv) of the Act. With respect that proposition is incorrect. There are a number of cases they deal with the requirements of s. 58(1)(b) of the Act including ***Aberfoyle Resources Limited v El Dorado Resources Limited, (unreported Supreme Court decision, delivered 19 April 1989 per Rowland J at page 11)***, ***Jindalee Resources Ltd v Blackham Resources Ltd [2008] WAMW 7***, ***Hunter Resources Ltd v Melville (1988) 164 CLR 234***, ***Re; Lawrence SM; ex parte Gold Bar Holdings Pty Ltd (1984) 11 WAR 549***, ***Biddle and Milling v Bywood Holdings Pty Ltd (Norseman Wardens Court, Warden I Brown, 12 January 1988)***, ***Ex Parte Hot Holdings Pty Ltd; Hot Holdings Pty Ltd v Creasy & ors (1996) 16 WAR 428, Hunter Resources v PJ Hayes and anor (Perth Warden's Court, Warden Rasmussen, May 1985) and Jackson Gold v Murchison Exploration (supra).***

14. Sheffield makes reference to the DMP Guideline ("2003 Guideline") issued by the Department of Mines and Petroleum on 6 August 2003 as support for the use of the Accountants Letter. It should be noted the decision in ***Jackson Gold v Murchison Exploration (supra)*** was delivered some six months prior to the issue of the 2003 Guideline. For reasons that are inexplicable the 2003 Guideline is contrary to that decision. In any event, the 2003 Guideline has no legislative or regulatory basis and was issued not as policy but as a guideline.

15. Sheffield further submits the Accountants Letter does not require the Warden to infer, deduce, imply or use any other methods of calculation to determine the

Statement when read as a whole pursuant to the requirements of s. 58(1)(b) of the Act states be financial resources of the applicant.

Statement & Submissions by Wilgus regarding E's 47/2355 & 47/2356

16. The Statements lodged by Wilgus for each of the applications for the Exploration Licences are both in identical terms and state as follows:

> *"v) Financial Resources*
>
> *Wilgus Investments Pty Ltd has the financial capabilities to adequately carry exploration, and meet minimum expenditures, in regard to this application as evidenced by the attached financial statement."*

17. The financial statements referred to by Wilgus in the Statements were not attached as stated and were not received by the Mining Registrar at Karratha until 1025 hours on 21 June 2010.

18. The Submissions by Wilgus in respect to both applications for the Exploration Licences are in identical terms. In summary Wilgus states that when one reads the proposed expenditure by Wilgus in the first year following grant it proposes to expend $27,600.00 the minimum expenditure in the first year is exceeded. Further, when read in conjunction with the Financial Statements provided by Wilgus it is demonstrated that Wilgus has the financial resources to meet the minimum expenditure.

Statement & Submissions by FMG regarding E's 47/2357 & 47/2358

19. The Statements lodged by FMG for each of the applications for the Exploration Licences are both in identical terms and state as follows:

> *"4) **Financial Resources***
>
> *FMG has the necessary funds available to conduct the exploration program outlined above. This is evidenced in FMG's 2009 annual financial report which is attached."*

20. The reference to FMG in the Statement was in fact a reference to Fortescue Metals Group Ltd the parent company of FMG Pilbara Pty Ltd. Attached to the Statement was a copy of part of the Annual Report of the Fortescue Metals Group Ltd being the Cash Flow Statements and Balance Sheets.

21. The submissions by FMG relating to both the applications for Exploration Licences are in identical terms. In summary FMG submits the financial report specifies the financial resources available to the applicant. FMG also submits that the term 'financial resources' is not defined by the Act and at the time of the applications there was no judicial guidance in relation to the construction of s. 58(1)(b)(iv) of the Act. I do not agree with that proposition and refer to the matters raised above in respect to a similar submission by Sheffield.

22. Further, FMG submits that the work programs indicated that it had necessary funds and that was supported by copies of the applicants Income Statements,

Balance Sheet and Cash Flow Statements from the 2009 Annual Report as well as an Independent Auditors Report dated 10 August 2009.

23. FMG submits the inclusion of the applicant's Annual Report is in compliance with the 2003 Guideline and it had a legitimate expectation the DMP Guidelines would be followed. FMG referred to the case of ***Kioa & ors v Minister for Immigration & Ethnic Affairs & anor (1985) ALR 321*** at 346 in which Mason J stated 'that the expectation may be based on some statement undertaking on the part of the authority that makes a relevant decision.'

24. FMG submits the 2003 Guideline are statements issued by the DMP which is the authority that makes the relevant decision and therefore falls within the above reasoning by Mason J. Accordingly, FMG submits that in the absence of any guidance to the contrary the applicant was entitled to rely on the 2003 Guideline when preparing its application and had a legitimate expectation that they would be followed.

The Law

25. The statutory law and decisions of various courts dealing with the provisions of s. 58(1)(b)(iv) and s. 105A of the Act have been considered ***In the Matter of Competing Applications for Exploration Licences by Hamersley Iron P/L and Brockman Exploration P/L [2012] WAMW 22*** and ***In the Matter of Competing Applications for Exploration Licences by Cazaly Iron P/L [2012] WAMW 23.*** It is unnecessary, in my opinion, to re-visit both the law and the decisions of the various courts relevant to these proceedings.

Findings

Application for E 47/2340 by Modun

26. Applying the principles expressed in ***In the Matter of Competing Applications for Exploration Licences by Hamersley Iron P/L and Brockman Exploration P/L (supra)*** and ***In the Matter of Competing Applications for Exploration Licences by Cazaly Iron P/L (supra),*** I find the Statement pursuant to s. 58(1)(b)(iv) of the Act by Modun is not in compliance with the requirements of the Act and is ineligible to be included in the ballot. I find the Statement by Modun is a bold conclusionary statement that does not specify the financial resources available to Modun. The provision of a copy of the 2009 Annual Financial Report requires the Warden to consider Modun's financial situation to determine if it has the financial resources available to it. It is not the role of the Warden or the Mining Registrar to trawl through financial statements to imply or infer that Modun has the financial resources available to it.

Applications for E 47/2343 & 47/2344 by Sheffield

27. Applying the principles expressed in ***In the Matter of Competing Applications for Exploration Licences by Hamersley Iron P/L and Brockman Exploration P/L (supra)*** and ***In the Matter of Competing Applications for Exploration***

Licences by Cazaly Iron P/L (supra), I find the Statement pursuant to s. 58(1)(b)(iv) of the Act lodged by Sheffield at 0830 hours on 30 April 2010 is not in compliance with the requirements of the Act and is ineligible to be included in the ballot.

28. The conclusions contained within the Accountant's Letter as to the financial resources available to Sheffield has previously been the subject of a decision in the Wardens Court in ***Jackson Gold v Murchison Exploration (supra)*** as referred to above. That decision has been commented on above in relation to the 2003 Guidelines. The 2003 Guideline issued by DMP in August 2003 is simply that, guidelines. The 2003 Guideline has no legislative or regulatory basis, nor are they DMP policy. The 2003 Guideline were issued to assist applicants in completing Statements pursuant to s. 58(1)(b)(iv) of the Act and are not, nor do they express, an interpretation of the law.

29. The various decisions of the Supreme Court and the Warden's Court referred to above are a reflection of the number of cases that in fact exist to aid in the interpretation of the requirements of the law in respect to s. 58(1)(b) of the Act that has been only slightly amended since the Act was first proclaimed.

30. The Statement pursuant to s. 58(1)(b)(iv) of the Act is a bold conclusionary statement that does not specify the financial resource available to Sheffield. No other documentation was attached to the purported Statement by Sheffield.

Applications for E 47/2355 & 47/2356 by Wilgus

31. Applying the principles expressed in ***In the Matter of Competing Applications for Exploration Licences by Hamersley Iron P/L and Brockman Exploration P/L (supra)*** and ***In the Matter of Competing Applications for Exploration Licences by Cazaly Iron P/L (supra),*** I find the Statement pursuant to s. 58(1)(b)(iv) of the Act lodged by Wilgus at 0830 hours on 30 April 2010 is not in compliance with the requirements of the Act and is ineligible to be included in the ballot.

32. The Statement is a bold conclusionary statement that does not specify the financial resources available to Wilgus. Wilgus simply states that it has the financial resources available to it without making it clear what those financial resources are as required by the provisions of s. 58(1)(b)(iv) of the Act.

Application for E47/2357 & 47/2358 by FMG

33. Applying the principles expressed in ***In the Matter of Competing Applications for Exploration Licences by Hamersley Iron P/L and Brockman Exploration P/L (supra)*** and ***In the Matter of Competing Applications for Exploration Licences by Cazaly Iron P/L (supra),*** I find the Statements lodged at 0830 hours on 30 April 2010 pursuant to s. 58(1)(b)(iv) of the Act by FMG do not comply with the initial requirements of the Act and is ineligible to be included in the ballot.

34. I find each of the Statements by FMG in respect of each of the applications for Exploration Licence lodged in purported compliance with s. 58(1)(b)(iv) of the Act are not statements of financial resource at all whether read individually or read as a whole with the other statements lodged by FMG. If FMG is to rely upon the financial resources of a parent company it should, with clarity, say so and identified that arrangement. The requirement of s. 58(1)(b)(iv) of the Act is to ascertain the financial resources available to FMG for the purposes of s. 57(3) of the Act. Further, it is not for the Warden to imply, assume or infer from the information provided by FMG that its parent company will provide the financial resources to it.

35. I repeat the comments I have previously made in respect to the standing of the 2003 Guideline. I also repeat the comments I have previously made in respect to the numerous cases that have dealt with the requirements of section 58(1)(b) of the Act. The DMP is not the authority which makes a relevant decision in respect to compliance with the initial requirements of the Act. It is the Warden who is empowered to make that decision pursuant to s. 105A of the Act. The 2003 Guideline are not binding on the Warden and is only the DMP opinion of what would be required to comply with the requirements of s. 58(1)(b) of the Act. Accordingly, there can be no expectation on the part of any applicant that compliance with the 2003 Guideline would result in their being compliance with the provisions of s. 58(1)(b)(iv) of the Act.

36. It should also be noted as previously pointed out the 2003 Guideline are erroneous in respect to the decision of ***Jackson Gold v Murchison Exploration (supra).***

37. I find the Statements by FMG pursuant to s. 58(1)(b)(iv) of the Act do not comply with the initial requirements of the Act at 0830 hours on 30 April 2010. Accordingly, I find the applications for Exploration Licences by FMG are ineligible to participate in any ballot to determine priority pursuant to s. 105A(3) of the Act.

Conclusion

38. I find application for Exploration Licence 47/2339 by Giralia, application for Exploration Licences 47/2341 and 47/2342 by ACMI and applications for Exploration Licences 47/2349 & 47/2350 by Iron Ore complied with the initial requirements simultaneously on lodgement at 0830 hours on 30 April 2010 and are eligible to participate in any ballot to be conducted to determine priority.

39. I find application for Exploration Licence 47/2340 by Modun, applications for Exploration Licences 47/2343 & 47/2344 by Sheffield, applications for Exploration Licences 47/2355 & 47/2356 by Wilgus and applications for Exploration Licences 47/2357 & 47/2358 by FMG did not comply with the initial requirements pursuant to s. 105A(3) of the Act and are ineligible to participate in any ballot to determine priority.