[2022] WAMW 21

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	COSMO GOLD LIMITED v MICHAEL JOSEPH FOLEY [2022] WAMW 21
CORAM	**:**	WARDEN CLEARY
HEARD	**:**	9 AUGUST 2022
DELIVERED	**:**	21 SEPTEMBER 2022
FILE NO/S	**:**	Application for Exemptions 629751, 632378 Objections 631675, 633668, 633667
TENEMENT NO/S	**:**	Exploration Licence E38/2274, E38/3249, E38/2774
BETWEEN	**:**	Cosmo Gold Limited (Applicant) AND Michael Joseph Foley (Objector)

Catchwords: *Application for exemption from expenditure under Sections 102(2)(g) and 102(3) of the* Mining Act*; non-compliance with expenditure; objection to exemption; McKenzie friend; turns on own facts*

Legislation:

- *Mining Act 1978* (WA): Section 102(2), 102(3), 102(4), 103.
- *Mining Regulations 1981* (WA): Regulation 146, 152, 154(1), 168A-C.

Result: Recommendation made to the Minister to grant the exemptions. Objections dismissed.

Representation:

Counsel:

Applicant	:	E Rogers
Objector	:	In person, with McKenzie friend G Peters

Solicitors:

Applicant	:	Austwide Legal
Objector	:	NA

Cases referred to:

Berkeley Resources Pty Ltd & Anor v Limelight Industries Pty Ltd [2013] WAMW 2.
Blackfin v Mineralogy [2013] WAMW 19.
Carnegie Gold Pty Ltd v Maughan [2018] WASC 366.
Condon v Pompano Pty Ltd [2013] HCA 7; (2013) 252 CLR 38.
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.
Forrest & Forrest Pty Ltd v Minister for Mines and Petroleum [2017] WASCA 153; (2017) 51 WAR 425.
Great Boulder Mines Ltd v Bailey [2000] WAMW 6.
International Finance Trust Co Ltd v New South Wales Crime Commission [2009] 49; (2009) 240 CLR 319.
Haoma Mining NL v Tunza Holdings Pty Ltd & Anor [2006] WASCA 19.
Harrington-Smith on behalf of the Wongatha People v The State of Western Australia (No 9) 2007 FCA 31.
Kioa v West [1985] HCA 81; (1985) 159 CLR 550.
McLevie v Mining Projects Management Group Pty Ltd [2022] WASC 265.
Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia [2010] FCA 595.
Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 4) [2013] FCA 413.
Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 5) [2016] FCA 413.
Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 6) [2017] FCA 703.
Nathanson v Minister for Home Affairs [2022] HCA 26. [33] citing
North v Elzac Mining P/L & Anor [2012] WAMW42.
Nova Resources NL v French (1995) 12 WAR 50.
Patrick Jebb as Trustee for the Trafalgar West Investments Trust v Superior Lawns Australia Pty Ltd [2019] WASC 121.
Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd [2007] WASCA 175.

Rural Bank (a division of Bendigo and Adelaide Bank Limited) (CAN 068 049 178) v Manolini [2019] WASC 313.
Siberia Mining Corporation Pty Ltd v O'Sullivan [2020] WASC 214.
Thompson v Siberia Mining Corporation Pty Ltd [2021 WASCA 115.
Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd [2010] WASCA 132.

BACKGROUND

1 Cosmo Gold Limited (**Cosmo Gold**) applied for exemption from expenditure conditions as follows:

i. Application 632378, relating to E38/3249 for expenditure year ending 17 July 2021 and E38/2774 for the expenditure year ending 28 July 2021, filed 15 September 2021, with a statutory declaration dated and lodged on 24 September 2021, and

ii. Application 629751, relating to E38/2274 for the expenditure year ending 9 June 2021, filed 6 August 2021, with a statutory declaration supporting the application dated 18 August 2021.

2 I refer to the years for which exemption are sought in this application as the **relevant tenement years**.

3 Mr Foley objects to Cosmo Gold being granted exemption from its expenditure conditions. Objection 633667 relating to E38/2774 and Objection 633668 relating to E38/3249 were filed on 28 September 2021 and Objection 631675 relating to E38/2274 was filed on 26 November 2021.

4 The minimum expenditure condition for the relevant tenement years is:

i. E38/3249 $20,000
ii. E38/2774 $70,000
iii. E38/2274 $126,000.

5 Cosmo Gold Limited (**Cosmo Gold**) holds the tenements. However, E38/2274 is held jointly with Mr Foley. According to the evidence of Peter Mitchell, Director of 3D Resources (**3D**), at the hearing, 3D held the tenements until they were transferred to Cosmo Gold, which was incorporated to raise capital and hold the licences in the tenements. 3D is an associated company of Cosmo Gold.[1]

6 The applications concern 3 tenements, each of which has a different history. However, what is common, and not contentious, is that each of the tenements lies completely within Use and Benefit of Aborigines Reserve 22032,[2] which shares the same boundary as the

[1] Affidavit of Peter Mitchell sworn 1 July 2022 [4] and [5].
[2] Exhibit 3.

Yilka and Edwards and Sullivan Native Title claims the subject of his Honour Justice McKerracher's determinations in ***Murray on behalf of the Yilka Native Title Claimants v State of Western Australia***.[3] Neither was it contentious that due to the tenements lying within the Reserve, permission for entry is required from the relevant Minister pursuant to the *Aboriginal Affairs Planning Authority Act 1972* (WA) and Regulations under that Act.

7 E38/2274 was granted on 10 June 2011, E38/2774 was granted on 29 July 2013 and E38/3294 was granted on 18 July 2018.[4] I also note that the three tenements the subject of these applications and objections are part of combined tenement reporting group C135/2016.[5]

JURISDICTION

8 There was no dispute as to the fact of the Warden's jurisdiction to address the applications. Pursuant to section 102(5)(a) of the *Mining Act 1978* (WA) (**the Act**), the Warden has jurisdiction to hear an application for an exemption, in a manner consistent with the requirements of the Act.

9 Section 105(6) of the Act provides that the hearing conducted by the Warden is to result in a recommendation to the Minister.

10 Under reg 54(1a) of the *Mining Regulations 1981* (WA) (**the Regulations**) an application for exemption must be lodged within 60 days of the end of the expenditure year. I am satisfied that each of the applications was lodged within the requisite time. Under reg 54(3) a statutory declaration supporting the application must be lodged within 28 days after the lodgement of the application. I am satisfied that the statutory declarations supporting the applications were lodged within time, noting there has been a view in the past that the failure to lodge a supporting statutory declaration does not render the application invalid.[6]

11 There is no specific section of the Act or regulation regarding objections to applications for exemption. Section 102(5) assumes that an objection may be made. Regulation 146(2)(b) provides for objections to be lodged within 35 days after the application being

[3] ***Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5)*** [2016] FCA 752 and ***Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 6)*** [2017] FCA 703.
[4] Exhibit 2.
[5] Mining Tenement Register Search E38/2274, annexed as PM4 to the affidavit of Peter Mitchell sworn 1 July 2022, page 10 of the register search, the pages of the affidavit not being numbered.
[6] ***Great Boulder Mines Ltd v Bailey*** [2000] WAMW 6.

objected to was lodged, and reg 146(3) provides that the objection is to be served on the applicant as soon as is practicable. Objections 633667 and 633668 were lodged within time, and they were served appropriately.

12 In relation to objection 631675, Mr Foley lodged an interlocutory application on 26 November 2021 seeking an extension of time to serve that objection on the applicant. On reviewing orders made at past mentions of this matter in the Wardens Court, I cannot locate any order made addressing the application for the extension of time. Cosmo Gold approached this hearing as if an application for the extension of time to serve the objection had been granted or at least it accepted that the objection had been served as soon as was practicable. I have considered that Mr Foley, as he has deposed in the affidavit supporting the application for extension, is legally blind, relies on others to read his mail to him, had an injury to his arm and was on pain killers at the time when the objection was lodged, that the Department mail enclosing the objection copy for service was overlooked by his carer and that service was effected on 26 October 2021. I am satisfied that in those circumstances, either service was in fact as soon as was practicable, or, alternatively, I consider that there is good reason to extend time to when he did serve the objection, and, if such an order is necessary, that order is made. Therefore, for the avoidance of doubt, I am satisfied that the objection was properly served.

13 E38/2274 is jointly owned by Mr Foley and Cosmo Gold. Therefore, Mr Foley has objected to an application for exemption from expenditure on his own tenement. Throughout the hearing on this matter and in documents supporting his objections Mr Foley complained that since taking on tenement E38/2274 Cosmo Gold has failed to keep him informed of their progress in exploration, and he does not believe that they have made all efforts to explore the ground. Given his reasons for objection, I am satisfied that he was well aware of the fact that he is objecting to the exemption for his own tenement.

14 After hearing an application for exemption, the warden must make a recommendation to the Minister for the granting or refusal of the application for exemption: s 102(6). Under s 103 the effect of an exemption is that the applicant is relieved of the minimum expenditure condition for the relevant period, and the applicant cannot be said to have under-expended on the tenement in that period. If the Minister does not grant the exemption, there will be under-expenditure, exposing the tenement holder to an application for forfeiture. Therefore, by objecting to the application for exemption, Mr Foley risks the tenement being forfeited, either on the application of the Department, or any other person. As Mr Foley is

one of the tenement holders, if forfeiture is ordered, under s 69, Mr Foley may be precluded from applying for the tenement for 3 months, or at least having priority over any other person who applies for the tenement within that time.[7] He therefore risks loss of the tenement by his current objection.

15 Despite that consequence, I can see nothing in the wording of s 102, or its effects, read with the purposes of the Act and the context in which s 102 sits, that precludes Mr Foley from objecting to an application for exemption of expenditure on his own tenement, when the application has been made by a co-tenement holder who, Mr Foley complains, was supposed to be working the tenement.

16 Mr Foley has, in the past, been represented by legal counsel in this objection. There have been submissions by way of correspondence to the court from the lawyer for Cosmo Gold, copied to Mr Foley, clearly setting out the repercussions of Mr Foley's objection on Mr Foley. I am satisfied that Mr Foley was aware of the consequences and has chosen to maintain the objection

17 Therefore, I am also satisfied that the objection should not be stayed in order to protect the interests of Mr Foley.

18 The applicant has claimed that Mr Foley's objection, if allowed under the Act, is nevertheless an abuse of process, because there is a conflict of interest in Mr Foley's objection. Alternatively, it was claimed that the objection was not genuine. Accordingly, prior to the hearing, the applicant had made two applications:

a. That the objections be dismissed as an abuse of process, or, if not

b. The matter be dealt with as a matter of urgency under reg 152(1)(k).

19 After Mr Foley had lodged his objections and applications for forfeiture, people associated with Mr Foley, such as Mr Peters, and people associated with the native title determinations

[7] ***Yarri Mining Pty Ltd v Eaglefield Holdings Pty Ltd*** [2010] WASCA 132; (2010) 41 WAR 134. It is noted that submissions were recently made to the Supreme Court of WA that, in light of ***Forrest & Forrest Pty Ltd v Wilson*** [2017] HCA 30; (2017) 262 CLR 510, ***Yarri Mining*** was wrongly decided in so far it found that an application in breach of s 69 may nevertheless be a valid application: ***McLevie v Mining Projects Management Group Pty Ltd*** [2022] WASC 265. The loss of priority also assumes that s 69 overrides the priority granted to a successful applicant for forfeiture under s 100 if in fact Mr Foley is the successful applicant (as he has also brought applications for forfeiture over these tenements, including the one held by him); this is a matter that does not need to be decided for the purposes of the application for exemption proceedings.

which feature in the applicant's application for exemption also lodged objections and applications for forfeiture, at least one misconceived as a plaint. Despite requests by the applicant and wardens, Mr Foley did not file his particulars until July 2022. I was not satisfied on the material presented at the interlocutory stage, and prior to July 2022, that I could find that the objections were an abuse of process and dismiss the matter summarily, however I had formed the opinion, not having the benefit of Mr Foley's particulars, that his objections and applications for forfeiture appeared to be vexatious, in that there was an ongoing commercial dispute and there appeared to be a group of associated people agitating for Cosmo Gold's loss of the tenements, possibly in connection with that commercial dispute. Accordingly, I ordered that the hearing of the applications for exemption be expedited.

20 Mr Foley pressed at the hearing that he was upset with the efforts made by Cosmo Gold to gain access to the tenement, and that Cosmo Gold had had sufficient exemptions from the minimum expenditure to give them time to negotiate with native title groups, to no avail.

21 The need for exemption, and the reasons for it, are facts to be found by the decision-maker. Whatever Mr Foley's view of the arrangement between Mr Foley and 3D as to how they would work the tenement, what communications and reports he would receive and his input into the process of exploration, they are not relevant to what the warden in these proceedings must determine, and that is whether the objective fact of whether an exemption is warranted exists. Subjective notions of what was expected between two parties to a commercial transaction, when each party thought the commercial transaction took place and whether each party is of the view that they have complied with their contractual obligations to each other generally have no bearing on the finding that an exemption is, or is not, warranted. Mr Foley or Cosmo Gold may eventually claim loss or some other injury because of the actions of the other party arising from the commercial transaction, which may lead to a court having to find objective facts from the circumstances of the transaction, however, that is not the purpose of the proceedings before me.

22 On the other hand, it is an objective fact that there has been under expenditure. Mr Foley has alleged there is no valid reason for the lack of work on the tenements, challenging the assertion by Cosmo Gold that they continued to be hindered by a native title claim and delay in progressing to a united prescribed body corporate by the native title claimants, alleging that there was more the applicant could have done to progress the arrangements with the native title parties leading to the required approvals. Whatever Mr Foley hoped

to achieve by the objections, particularly in relation to E38/2274, he is entitled to allege that the there was, in reality, no such hinderance.

23 The applicant pressed the claim at the hearing that the objections are an abuse of process, because they were doomed to fail. Abuse of process occurs in any circumstance in which the use of the court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. The onus of satisfying the court that there is an abuse of process is a heavy one and the power to dismiss proceedings as an abuse of process should be exercised with caution and only in the most exceptional or extreme case.[8] Having regard to the Full Court's views in ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor***,[9] it is not automatically an abuse of process to object to an application for exemption when previous exemptions, claimed for the same reasons as are being relied upon in the current application, were granted. As will be seen from my review of the evidence, I am satisfied that Mr Foley's objections may have some basis, and I am not satisfied, having now heard evidence, that Mr Foley's objections were unjustifiably oppressive to Cosmo Gold or being used for any alternative purpose such that it brings the administration of justice into disrepute.

MR FOLEY'S APPLICATION FOR ASSISTANCE IN COURT

24 The hearing for these matters was to take place on 6 July 2022. Mr Foley requested, and was granted, an adjournment of the hearing on that day for medical reasons. His application was supported by a letter from Dr Simon French. The hearing was adjourned to 9 August 2022.

25 Prior to 9 August Mr Foley requested he be permitted to have someone assist him in the hearing, based on his continuing medical conditions. Mr Foley made the requests through email correspondence with the Wardens Court, providing a further medical letter from Dr Simon French of Ashton Avenue Medical Centre dated 5 August 2022.

26 The request, made on 28 July 2022 was for Greg Peters to "not only read to me any written evidence that may be produced, but also speak for me to address the Court properly, once I have corresponded with him at close quarters" at the hearing of this matter.

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[8] ***Patrick Jebb as Trustee for the Trafalgar West Investments Trust v Superior Lawns Australia Pty Ltd*** [2019] WASC 121 [102].
[9] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19 particularly [60], [64], [66] per Steytler P.

27 In his letter of 5 August 2022, Dr French noted a complaint of "speech difficulties" and requested that "during court proceedings if [Mr Foley] is impacted by such speech problems …Greg Peters be able to speak on [his] behalf." He gave his opinion that the problems may be a somatoform type disorder relating to anxiety.

28 Mr Foley has on a number of occasions informed the court that he is legally blind. The court has not received medical evidence about that, or its effects, however it has accepted that that is the case.

29 Subsequent to Mr Foley's request Cosmo Gold filed an affidavit of Ian Hastings dated 4 August 2022. Mr Hastings deposed to telephone conversations he has had with Mr Foley between 6 July and to the date of the affidavit. The conversations related to attempts by the parties to resolve the issues between them. For example, he deposes to a conversation that occurred between he and Mr Foley for 36 minutes on 25 July 2022. Mr Hastings deposed that they discussed the terms of the Deed of Sale between them in depth and that from time to time Mr Foley interrupted Mr Hastings and corrected him on dates, gave his legal interpretation of the terms of the deed, set out in detail his view of the appropriate terms of settlement between the parties and his understanding of the dispute between them. Having known Mr Foley for several years, Mr Hastings says he saw no sign of incapacity, difficulty or problems discussing the issues.

30 Mr Hastings also deposed, annexing email chains, that Cosmo Gold's broker had also had conversations and communications with Mr Foley over the last month. The emails attached to the affidavit suggest clear and pointed conversations were had over the telephone – the subject in the emails with the broker is generally "Phone call conversation today" and while many other emails are short in length, they involve complex matters such as floats, shares and percentages in clear language. I note that some emails annexed to Mr Hasting's affidavit are from "Michael Foley" and are from an address that commences "michaeljfoley' and are headed "From the desk of Michael Foley". Others are from an email address commencing "greg9207" also headed "From the desk of Michael Foley".

31 The role of a McKenzie friend is usually limited to sitting beside the party, taking notes, quietly making suggestions and giving advice. It is rare and exceptional that a McKenzie friend is necessary, and it is a matter for the court hearing the application to determine. It

is very much a matter of practice and procedure.[10] The mining legislative regime provides for a person not legally trained to act as a representative or agent of a party in regs 168A-C.

32 At the commencement of the hearing Mr Foley told the court that he was prepared to speak on his own behalf, but that he needed Mr Peters, who is his carer, to sit beside him and assist him in reading items to him and taking notes and giving some advice. It did not appear to me that Mr Foley, by his request, was applying for Mr Peters to appear on his behalf under the regulations. I take the view that despite the presence of regs 168A-C, it is still open to a warden to consider the need for a McKenzie friend in Part IV proceedings because of the need for the court to ensure natural justice or procedural fairness for both parties; if one party cannot adequately run their case alone due to exceptional circumstances, then that party should be assisted. Such assistance goes beyond the need for an unrepresented party to receive what assistance the court can give.

33 From the letters of Dr French, he did not appear to be confronted by any significant lack of communication with Mr Foley. He makes no mention of any lack of communication in the second letter – just that any speech issue may be caused by anxiety. The emails annexed to Mr Hasting's affidavit are clear and to the point, and albeit in written form, Mr Foley clearly has a good grasp of the issues surrounding the dispute between the parties. Mr Hastings deposes to clear and lively communication between he and Mr Foley, and similar messages left on his voicemail. I accept, given Mr Hastings' deposed previous knowledge of Mr Foley that Mr Hastings was talking to Mr Foley. I accept the evidence of Mr Hastings that there was no lack of communication between them. Given he has voice mail messages which are recordings of Mr Foley, it seems unlikely Mr Hastings would say he has those, but not be telling the truth about them.

34 As to the legal blindness, as I have said, I have no evidence before me of the significance of that. It also seems the case, from the emails annexed by Mr Hastings, that Mr Foley conducts his business affairs with some clarity and precision. I therefore had nothing before me on which I could assess the significance of his blindness.

35 Court appearances can be stressful, and if there is underlying anxiety, that can be exacerbated. But that is not unusual or exceptional for many unrepresented litigants who

[10] See the summation of cases by his Honour Kenneth Martin in ***Rural Bank (a division of Bendigo and Adelaide Bank Limited) (CAN 068 049 178) v Manolini*** [2019] WASC 313 [84] – [92].

appear in the courts. In terms of advice, given what saw in the emails annexed to Mr Hastings' affidavit, it seems Mr Foley does not need any in relation to his case. However, I did have a doctor's letter noting some speech problems, and potential anxiety, and I accept, as I have said, Mr Foley is legally blind. This matter was listed for hearing in July and was adjourned.

36 The matter has both a procedural and factual complexity, a number of parties having from time to time been involved in the dispute, with the presence of 2 native title groups in the overall venture and complicated procedural steps having occurred in a regional warden's court. The length of time in which the ground has not been mined is significant. The parties and all interested groups require certainty in relation to the application for exemption. While in my view, the medical evidence alone would not amount to exceptional circumstances leading to a McKenzie friend, those factors combined with the medical issues faced by Mr Foley make this an unusual and exceptional case.

37 Mr Peters was at one stage a party to proceedings which related to the same tenements. That action was withdrawn by Mr Peters in 2021. Despite that, I allowed Mr Peters to sit with Mr Foley, read any documents handed up in court that have not been previously provided to Mr Foley, take notes and provide advice. He was not to speak on behalf of Mr Foley, and he did not. The matter proceeded on that basis.

THE LEGISLATIVE REGIME

38 Section 62(1) of the Act provides that the holder of an exploration licence shall 'comply with the prescribed expenditure conditions applicable to such land unless partial or total exemption therefrom is granted in accordance with the Act. Failure to comply with the expenditure condition may result in the forfeiture of the lease on an application for forfeiture made under s 98.

39 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 an exploration licence is prescribed by reg 21.

40 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.

41 Section 102 is in the following terms:

102. Exemption from expenditure conditions

(1) Subject to this Act, on an application (***an application for exemption***) 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 –

(a) in respect to any mining tenement other than a mining lease, in any one year; and

(b) in respect to a mining lease, subject to subsection (7), in a period of 5 years.

(1a) An application for exemption may relate to more than one mining tenement.

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

(a) that the title to the mining tenement is in dispute; or

(b) that time is required to evaluate work done on the mining tenement, to plan future exploration or mining or raise capital therefor; or

(c) that time is required to purchase and erect plant and machinery; or

(d) that the ground the subject of the mining tenement is for any sufficient reason unworkable; or

(e) that the ground the subject of the mining tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future or that at the relevant time economic or marketing problems are such as not to make the mining operations viable; or

(f) that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation; or

(g) that political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is, or subject to conditions that are, for the time being impracticable; or

(h) that –

(i) the mining tenement is one of 2 or more mining tenements (combined reporting tenements) the subject of arrangements

approved under section 115A(4) for the filing of combined mineral exploration reports; and

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

(2a) In subsection (2)(h) - aggregate exploration expenditure means expenditure –

(a) on, or in connection with, exploration for minerals on the combined reporting tenements; and

(b) worked out in a manner specified in the regulations.

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

(4) When consideration is given to an application for exemption regard shall be had to the current grounds upon which exemptions have been granted and to the work done and the money spent on the mining tenement by the holder thereof.

(5) An application for exemption –

(a) where an objection to the application is lodged, shall be heard by the warden; but

(b) otherwise, shall be forwarded to the Minister for determination by the Minister.

(6) The warden shall as soon as practicable after the hearing of the 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 that recommendation.

(7) Where the warden finds that the reasons given by the holder of the mining lease 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 the mining lease in the period of 5 years from the commencement of the year to which the application relates.

42 The above provisions reflect and reveal an object of the Act, which was explained in ***Nova Resources NL v French***,[11] as follows:

> [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

[11] ***Nova Resources NL v French*** (1995) 12 WAR 50, 57-58.

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.

43 However, as was observed in ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum***,[12] that is not the only object of the Act. Other objects or purposes that have been identified by 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.

44 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. The Act encourages exploration and mining activity and discourages a tenement holder from going to sleep on his rights and obligations.[13] 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.[14]

THE APPLICATIONS FOR EXEMPTION

45 The applicant conceded that the minimum expenditure conditions for the relevant tenement years had not been met.

[12] ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 425 [96].
[13] ***Craig v Spargos Exploration NL***, unreported, Kalgoorlie Warden's Court, 22 December 1986, noted in (1986) 6 AMPLA Bull 73.
[14] ***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].

46 The Applicant bears the onus of satisfying the warden that it has established the grounds for an exemption, and that the exemption ought to be recommended for grant.[15]

47 The applicant applied for exemptions for the following reasons, in identical terms for each tenement:

> S 102(2)(b): time has been required to evaluate work done on the licenses, to plan future exploration or mining or raise capital thereafter[.]
> S 102(2)(e): the ground the subject of the licenses contains a mineral deposit which is un-economic but which may reasonably be expected to become economic in the future or that at the relevant time economic or marketing problems are such as not to make the mining operations viable.
> S 102(2)(f): the ground the subject of the licenses contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation.
> S 102(2)(g): that political, environmental or other difficulties in obtaining requisite approvals prevent mining or restrict it in a manner that is, or subject to condition that are, for the time being impracticable.
> S 102(2)(h): the licenses are part of the Cosmo Newbury combined reporting group; and the aggregate expenditure incurred upon the combined reporting tenements is such as to satisfy the expenditure requirements of the title the subject of this exemption application had that aggregate expenditure been apportioned between the combined reporting tenements.
> S 102(3): any other reason which may be prescribed or which in the opinion of the Minister is sufficient to justify such exemption including matters relating to the facts that:
>
> - these licenses are being explored as part of a larger project, and;
> - difficulties and delays have occurred in obtaining requisite approvals associated with the licenses relating to access to the ground and Heritage clearance.

48 The applications were for the expenditure amounts of $126,000 for E38/2274, $20,000 for E38/3249 and $70,000 for E38/2774, and therefore for the full minimum expenditure amount required by the relevant conditions.

[15] ***Blackfin Pty Ltd v Mineralogy Pty Ltd*** [2013] WAMW 19 [19].

49 In its accompanying statutory declarations the applicant, in summary, provided the following details in support of its application:

a. Each licence forms part of Cosmo Gold's Cosmo Newbery project, which is a combined reporting group of eight granted tenements and one application.

b. The fact that the licence is wholly within the use and benefit of Aborigines Reserve 22032 means that an entry permit granted by the Minister for Aboriginal and Regional Affairs and a consent to mine by the Minister for Mines is required. Since the grant of each tenement Cosmo Gold has been in negotiations "with the relevant native title stakeholders to conclude an access agreement and get required government permits." The entry permit and consent to mine were granted in May 2021.

c. Furthermore, an earlier 12 month entry permit over the reserve was granted on 23 December 2016 however the permit was subject to a twelve-month, low-impact reconnaissance agreement between 3D and the Yilka native title party. This allowed restricted access and limited sampling with no regional soil geochemistry or drilling permitted.

d. A condition of approval from the Minister for Aboriginal Affairs came with a request for 3D to consult with a second native title claimant group being the Sullivan and Edwards group. On 22 June 2017 the Federal Court handed down a decision, ruling that the two claims from the Sullivan-Edwards group and the Yilka group be dealt with in one determination and be represented by one prescribed body corporate. Due to the time required to put that determination into effect, the earlier entry permit and limited reconnaissance agreement expired.

e. It was not until 26 September 2019 that the appropriate corporation representing the native title claims was incorporated, however, as the body corporate was still in the early stages of establishing its organisation it was still not in a position to provide the required access agreement nor grant any access to the claim area.

f. 3D continued negotiations and met with lawyers from the Central Desert Native Title Services and the prescribed body corporate, after which eventually an access deed was executed on 17 December 2020. The Aboriginal Lands Trust recommended the Minister for Aboriginal Affairs sign the Mining Entry Permit on the 18th of February 2021 and that entry permit was signed on 8 May 2021. Accordingly, due to access

restrictions over that time, no exploration and little to no ground reconnaissance had been possible on the tenement for some years.

g. The work now done is a work program for required heritage clearance which was submitted in June 2021 with a field heritage clearance survey performed on 30 and 31 August 2021. Preparations are now underway for reconnaissance and regional soil sampling. Accordingly, the Mining Entry Permit was made available just 11 weeks, 10 weeks and 4 weeks prior to the anniversary date of the licence during which time the above work was commenced.

h. The value of the work planned in the 2021/22 expenditure years is:

E38/2774: approximately $76,100

E38/3249: approximately $56,800

E38/2274: approximately $221,230.

THE OBJECTIONS

50 Mr Foley objected to the exemptions as follows:

a. E38/3249, recorded on the objection as: There have been entry permits successfully negotiated since January 2017 they have had more than enough time to meet their commitments and have already been granted enough exemptions.

b. E38/2774, recorded on the objection as: There have been entry permits successfully negotiated since January 2017. They have had more than enough time to meet their obligations and commitments and have already been granted enough exemptions.

c. E38/2274 (By letter dated 26 August 2021):

I sold them a share of the lease in September 2011 and they were supposed to explore, invest and develop the property. Over the last 10 years I have asked them to tell me what they have done to improve my property and they have flatly refused to correspond with me at all on the matter.

I understand that they have not even set foot on my property in this time.

A mining entry permit was issued in January 2017 and another ASX announcement was made in January 2021 to confirm the mining entry permit had been successfully negotiated with the native title holders.

They have refused to give me a copy of these agreements.

In regards to this application for exemption for the year ending 09/06/21 they did have an agreement with the native title holders, so I refute any claim that they might present that their access has been denied by the local native title holders.

51 On 20 June 2022 Mr Foley provided what he called his "particulars for objection 631675 to application for exemption 629751 affecting E 38/2274." In addition to the information provided in his objection to the application for exemption to expenditure on the tenement he adds that Cosmo Gold and 3D Resources have been granted exemptions on expenditure at least seven times, that 3D Resources were invited to return for a further extension of the Mining Entry Permit granted in December 2016 but that they did not make use of the Mining Entry Permit and did not apply for an extension, and if they had have applied for extension and continued with a mining exploration program they would not have required the current applications for exemption from expenditure. He also said in the particulars that when he found out about the Mining Entry Permit he rang up Gavin Dunne from the Central Desert Land Council and Mr Dunne "was very angry that [3D Resources and Cosmo Gold] did not pursue the extension." Despite being ordered to do so, no particulars were specifically lodged in relation to the other 2 tenement objections. However, as the applications for exemption cited the same reasons for the applications, I have taken the particulars to be relevant to all 3 objections.

52 Accordingly, from the outset of the filing of the applications for exemption and the objections to those applications, the parties raised the following issues:

a. that although the applicant had held the tenements for some time, it had only, in the past, had limited access over a 12 month period, and

b. that access had been thwarted to a certain extent during that 12 month period and then thwarted completely after that 12 month period by the process of the native title claims over the entirety of the areas of the three tenements, access only being regained very shortly before the expiry of the relevant expenditure years,

c. but that the access granted under that 12 month agreement, the opportunities taken during that 12 month agreement and the opportunity to extend the 12 month agreement or negotiate for further access was not adequately pursued by Cosmo Gold to satisfy their obligations as a tenement holder and to Mr Foley as a joint tenement holder on E38/2274.

53 For some time during the course of the application and objection, there had been a dispute about availability of the written agreement between 3D and the Yilka Native Title group (**the Letter Agreement**) and the 12 month entry permit granted on 23 December 2016 referred to in the statutory declarations supporting the applications. The production of the Letter Agreement and the provision of it to Mr Foley was ordered in June 2022. It and the Mining Entry Permit were also annexed to the affidavit of Peter Robert Mitchell sworn on 1 July 2022 in support of application for exemption 629751 affecting E38/2274, filed and served on Mr Foley, according to the applicant's counsel, on the same date.

THE EVIDENCE IN THIS MATTER

54 Applications for exemption under s 102 of the Act are dealt with by the Warden pursuant to the Warden's administrative functions. Where it is necessary to do so in order to properly carry out the Warden's role in those proceedings, reference may be had to material that has been placed on the Department file in relation to the matter before the Warden.[16] In addition, under reg 154(1)(d) the Warden has the power to inform themself of any matter in any manner they consider appropriate. 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.[17]

55 At the hearing in the present case, the applicant did not directly seek to prove the truth of the contents of the statutory declarations which supported the applications by tendering them, or calling the deponent. In ***Diamond Rose NL v Hawks***[18] Warden Calder considered the use of statutory declarations which had not only been attached to the applications he was considering, and those made on the tenements in the past, but which 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, and he had regard to them.

56 Mr Foley was not legally represented at the hearing, nor for some time before the hearing. In the present case, the applicant did not make submissions on the statutory declarations, and nor did Mr Foley, and the statutory declarations were not formally tendered. Accordingly, other than to address the notification of the reasons for the application, I have

[16] ***Diamond Rose NL v Hawks*** unreported, Perth Warden's Court, 26 May 2000, 15.
[17] ***Diamond Rose NL v Hawks*** unreported, Perth Warden's Court, 26 May 2000, 15.
[18] ***Diamond Rose NL v Hawks*** unreported, Perth Warden's Court, 26 May 2000.

only considered and assessed the weight of information contained in the statutory declarations where the applicant attempted to prove it by other means at the hearing. In my view it would be unfair to Mr Foley, given he is unrepresented and faced other difficulties in the hearing, for me to have recourse to the statutory declarations when no submissions were made on them, they were not tendered by consent, or at all and neither was their admissibility canvassed. Further, I was referred in closing submissions to the parties' particulars. Neither are particulars evidence – they are a summation of the evidence contained in sworn documents, or the expected evidence, should the matter proceed to hearing. Therefore, I have not taken as true facts set out in the particulars, unless they have been proved through Mr Mitchell or documents tendered through him or by consent. It may be that statutory declarations and particulars have significant weight when there is no objection to the application, however once there is an objection, the applicant is on notice that it may not be in a position to rely on previously filed documents. This is particularly the case where the objector is, ultimately, unrepresented and may not appreciate that he may have to meet those documents and facts alleged in them.

57 Further, while reference was made in the applications to previous exemptions, I have not accessed the Department file on those applications. The previous applications and supporting documents, and exemption certificates were not tendered in evidence, and it would be unfair to Mr Foley to now have regard to them to determine my recommendation, other than where the applicant has tendered information of them through Mr Mitchell or by consent.

58 The applicant called Peter Mitchell to give evidence. His affidavit sworn 1 July 2022 became exhibit 4 and contained the following annexures:

> PM1: Letter Agreement between 3D Resources, Cosmo Newberry Aboriginal Corporation and Yilka Native Title Claim dated 26 July 2016 on the letterhead of Central Desert Native Title Services,
>
> PM2: Letter to Peter Mitchell from the Director Land Operations, Department of Aboriginal Affairs (WA) dated 15 November 2016,
>
> PM3: Letter to Peter Mitchell from the Hon Peter Collier, Minister for Aboriginal Affairs, dated 23 December 2016 annexing a signed Entry Permit to Reserves 22032, 25050, 25051 and 20396, in relation to tenements, among others, E38/2274 and E38/2774, also dated 23 December 2016,
>
> PM4: Mining Tenement exploration search E38/2274 dated 29 June 2022,

PM5: Letter to Peter Mitchell from Aboriginal Lands Trust dated 4 January 2017,
PM6: Letter to Peter Mitchell from Cross Country Native Title Services Pty Ltd dated 24 April 2017, addressing tenements, among others, E38/2774 and E38/2274,
PM7: Public Notice – Sullivan Edwards Native Title – Yamarna & Cosmo Newberry Reserves, dated 17 October 2017.

59 Mr Mitchell gave evidence by video link from Melbourne and was asked to recount much of what was in his affidavit. In that respect I found his evidence confused and muddled. He had a poor memory of dates and processes, and it is unclear why he was asked about those dates and processes, given his evidence was already in affidavit form. His confusion was compounded by the fact that his affidavit was unpaginated and unindexed, which was what was tendered. In fact, he said at one stage in his evidence that he had printed off and was referring to copies of documents not from his affidavit, but from elsewhere. He therefore found it difficult to identify documents he was referred to, and some of the hearing was spent holding up documents to the screen to ensure he and Cosmo Gold's counsel were referring to the same document. This was particularly difficult for Mr Foley to follow given his sight difficulties.

60 However, much of Mr Mitchell's evidence on dates and times was uncontroversial, and where he was confused or had no recollection of matters and dates, despite his affidavit, I have accepted the information in his affidavit over his oral evidence, accepting that he was put in a difficult position trying to remember matters on the spot that occurred some time ago, without the aid of a properly paginated or indexed affidavit, and that witnesses may be apprehensive, effecting their demeanour, without necessarily reflecting on their credibility.

61 There were some areas of contention between the applicant and Mr Foley and therefore I have been careful to consider Mr Mitchell's credibility and the propositions put by Mr Foley when determining those matters.

62 After both parties had closed their cases, the applicant sought to tender a letter dated 4 August 2022 from the Yilka Talintji Aboriginal Corporation, addressed to the Directors of Cosmo Gold Ltd. After some discussion Mr Foley had no objection to the applicant having leave to re-open its case and tender the letter. The letter became exhibit 5.

63 Mr Mitchell's affidavit refers only to Objection 631675 against Application for Exemption 629751 relating to E38/2274. Mr Mitchell gave general evidence about the circumstances

surrounding all of the tenements and the progression of work on them, however there was no supporting documentation relating specifically to E38/3249 and E38/2774. That in my view weakens the strength of the applications for exemption on those 2 tenements and I have taken that into account when considering the applications and their objections thereto.

64 It is my view that most documents tendered in this matter, particularly the annexures to exhibit 4, read with ***Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 5)*** [2016] FCA 752 and ***Murray on behalf of the Yilka Native Title Claimants v State of Western Australia (No 6)*** [2017] FCA 703, speak for themselves, and provide a path through the history of this matter, from which inferences may be made about what has lead to Cosmo Gold seeking an exemption for expenditure, particularly on E38/2274 and E38/2774.

The history of the ground and native title

65 I accept from publicly available Federal Court decisions[19] that, in very simplified terms:

a. Harvey Murray on behalf of the Yilka Group commenced a native title claim for land around Cosmo Newberry Community on 15 December 2008. Other claim groups and families sought to join that claim over the same ground, or to be heard. In 2011 representatives of the Edwards and Sullivan families filed a native title application over an area which overlaps but is slightly smaller than the Yilka claim area. Their claim was heard at the same time as the Yilka claim.
b. The claims were preceded by another claim, known as the Wongatha claim, which covered similar area around Cosmo Newberry Community, and which was dismissed in 2007.[20]
c. The hearing of evidence, applications and submissions occurred between 2011 and 2015 including, in 2013, an application by the State of Western Australia to have proceedings dismissed or permanently stayed.

[19] ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia*** [2010] FCA 595; ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 4)*** [2013] FCA 413; ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 5)*** [2016] FCA 413; ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 6)*** [2017] FCA 703.

[20] ***Harrington-Smith on behalf of the Wongatha People v The State of Western Australia (No 9)*** 2007 FCA 31.

d. On 29 June 2016 his Honour Justice McKerracher delivered reasons for determining that both the Yilka applicant and Sullivan-Edwards applicant had made out their respective claims, and they were entitled to hold native title together. His Honour ordered that "the parties consult in relation to all matters that may be pertinent to a proposed form of Determination or Determinations to give effect to" his reasons.[21]

e. By his orders in the 2016 determination, his Honour appears to have hoped that the parties would consider and negotiate the matters required to give effect to his determination.[22] The parties mediated for several months, particularly over whether one or two Prescribed Bodies Corporate would be appropriate. There was also disagreement between the parties as to the form of the Minute of the Proposed Orders and Determination of Native Title, and some respondents who had not meaningfully taken part in any of the proceedings sought alternative forms of the Minute. Gold Road Resources Limited, "a respondent which has been particularly active only in the issue of whether there is to be one Prescribed Body Corporate or two" were also involved in the dispute over the form of the Minute. Ultimately, there was no agreement between the parties on whether there should be one determination or two, and one Prescribed Body Corporate, or two.[23]

f. On 22 June 2017 his Honour ordered that there be one Prescribed Body Corporate.

g. As at the time of the 2016 reasons, E38/2274 was live but did not extinguish, partially or wholly, native title.

66 Cosmo Gold made much of discord between the native title claim groups during the time it was negotiating access in the present case. Of note in that respect are his Honour's remarks in conclusion:[24]

> *Whilst this determination reflects the past, its main function relates to the future. It is not appropriate to perpetuate the errors of the past by isolating the two groups. It is time they worked together. It is time for the leaders to take responsibility to see that this occurs. I do not intend to penalise others within the groups and others external to them by requiring them to deal with an unwieldy and inappropriate set of multiple structures. This is not to say that all difficulties are in the past. It is to say that it is time to move on from them.*

[21] ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 5)*** [2016] FCA 413 [2478] – [2480].
[22] ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 6)*** [2017] FCA 703 [2].
[23] ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 6)*** [2017] FCA 703 [2] – [5].
[24] ***Murray on behalf of the Yilka Native Title Claimants v The State of Western Australia (No 6)*** [2017] FCA 703 [55].

The evidence of Peter Mitchell and Cosmo Gold

67 Mr Mitchell is a director of 3D, but not Cosmo Gold. 3D's interest in E 38/2274 was registered in 2013.

68 An agreement for 3D to purchase an interest in E 38/2274 was made between 3D and Mr Foley "in or around September 2011."[25] E 38/2274 and other tenements were held by 3D until they were transferred to Cosmo Gold "in 2020."[26] From the time of their acquisition, according to Mr Mitchell, 3D worked with the "relevant native title parties claiming an interest in the land"[27] to allow the conduct of exploration activities on the tenement's covered by their claim. I accept that, from Exhibit 2, all three tenements the subject of the applications for exemption are covered by that claim.

69 Mr Mitchell's evidence in his affidavit was that on 26 July 2016 Cosmo entered into a Letter Agreement for 'the conduct of reconnaissance activity' with the Yilka native title party. Relevantly, the Letter Agreement, annexed as PM1 to the affidavit, provides as follows:

a. The agreement leading to the Letter Agreement appears to have been concluded on 28 April 2016.
b. The Cosmo Newbury community and Yilka consented to 3D Resources:
    i. entering and re-entering tenements E38/2274, E38/2627, E38/2774, E38/2850 and E38/2851;
    ii. taking sample bags or drill cores from previous soil or drilling programs;
    iii. inspecting, photographing and taking GPS coordinates of structures and geological settings;
    iv. undertaking other minimal impact activities as notified, and
    v. establishing tent or caravan camps in locations acceptable to monitors and not involving heavy vehicles or water bores and not involving the clearing of vegetation.
c. That a system of monitors would be established and that 3D Resources personnel would be accompanied at all times by 2 monitors while on the land.

[25] Affidavit of Peter Mitchell sworn 1 July 2022 [6].
[26] Affidavit of Peter Mitchell sworn 1 July 2022 [5].
[27] Affidavit of Peter Mitchell sworn 1 July 2022 [6].

d. That 3D Resources must only travel on established roads and tracks within the tenements, and only then if the use of those roads or tracks would not cause unacceptable damage.
e. That the rights and obligations under the Letter Agreement may be assigned to a prescribed body corporate.
f. That the Letter Agreement terminates:
    i. one year from the date of the Mining Access Permit grant, or
    ii. in the event that a Mining Access Permit was not granted within a period of 90 days of the execution of the Letter Agreement, or
    iii. by either party giving notice to the other.
g. Further, that the Mining Access Permit expired upon termination of the Letter Agreement if it had not already done so.

70 Some observations can be made in relation to the Letter Agreement at this point:

a. the letter agreement does not cover E38/3429;
b. the Letter Agreement does not include the Sullivan-Edwards claimant, also on court records at that time as claiming an interest in the land;
c. while the letter itself is dated 26 July 2016, the signatures attesting to the agreement are not dated. With no further evidence, I am therefore not certain as to what date the agreement was signed nor sent to the relevant Minister in support of the Mining Entry Permit, although I note that annexure PM2, a letter from the Department of Aboriginal Affairs to Mr Mitchell dated 15 November 2016, refers to Mr Mitchell's letter to them of 20 October 2016;
d. the parties anticipated that the Mining Entry Permit would be for a period of 12 months;
e. there was no provision in the Letter Agreement for an extension of that period and while there was no specific embargo on a renegotiation subsequent to the expiration of the 12 months for further access, neither is there recorded in that Letter Agreement the anticipation of the parties that that would occur.

71 I accept, as a result of Mr Mitchell's evidence, and the letter from the Yilka Talintji Aboriginal Corporation that as a result of the Letter Agreement a limited Mining Entry Permit was granted by the relevant Minister on 23 December 2016 for a period of 12 months, being annexure PM3 to Mr Mitchell's affidavit. The Mining Entry Permit covers E38/2274, E38/2627, E38/2774, E38/2850 and E38/2851. The permit refers directly to the

Letter Agreement and its terms and conditions. In accordance with the Letter Agreement the access permit was valid from 23 December 2016 until whichever was the sooner of:

i. one year from the date the permit was issued;
ii. the date the Letter Agreement is terminated, in accordance with the terms of that Letter Agreement; or
iii. the date the Minister for Aboriginal Affairs revokes the permit.

72 Details of the Mining Entry Permit can be seen on the tenement register search for E38/2274 which is annexure PM4.

73 PM4 also shows that Mr Foley holds 250 shares in the tenement and Cosmo Gold Limited holds 750. It also shows that on 8 May 2013 Preston Flynn is registered as transferring 25 of that person's shares to Mr Foley on that date and a remaining 75 shares to 3D Resources Ltd on that date. The search shows that on 28 February 2017 a transfer was registered where Mr Foley's 25 shares became 250 shares. On 22 September 2020 the transfer of shares from 3D Resources to Cosmo Gold Pty Ltd (later renamed Cosmo Gold Limited) was registered. I accept that the dates on which transfers are registered in a tenement search may not reflect accurately the date on which an agreement was made between the parties to so transfer.

74 In the section headed "Endorsements and Conditions" in the tenement search, the following is seen:

a. under endorsements: under endorsement 2: "Consent to explore on Use and Benefit of Aborigines Reserve 22032 granted by the Minister responsible for the Mining Act 1978 subject to the following endorsements…" Start date 9 January 2017;
b. under conditions: "1 ~~The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Use and Benefit of Aborigines Reserve 22032~~." Start date 10 June 2011, end date 8 January 2017;
c. under condition 1: "~~Consent to explore on Use and Benefit of Aborigines Reserve 22032 granted by the Minister responsible for the Mining Act 1978 subject to the following conditions~~:..." Start date 9 January 2017, end date 25 May 2021;
d. under conditions: "6 ~~Entry on Use and Benefit of Aborigines Reserve 22032 and activities undertaken on the licence by any non-Aboriginal lessee, licensee, employee, contractor or agent being authorised by an entry permit issued under the~~

~~provisions of the Aboriginal Affairs Planning Authority Act 1972.~~" Start date 9 January 2017, end date 25 May 2021;

e. under conditions: under condition 8: "Consent to mine on R22032 – "C" Class Reserve Use & Benefit of Aborigines granted." Start date 25 May 2021.

75 Mr Mitchell's evidence about those various conditions and endorsements on the tenement search was that the dates reflected under the scored through condition 6 are incorrect, and do not reflect what occurred. He believed that the 9 January 2017 date was the date the Mining Entry Permit under cover of the letter from the Minister was received, however in his view the end date is incorrect, as the entry permit was only to last for 12 months, and there were no further negotiations. He also said that the end date of 25 May 2021 reflects the date of the second Mining Entry Permit received once all of the Native Title groups had agreed on appropriate access and advised the Minister so. Therefore, he inferred, and I agree it is a reasonable inference to make, the registration of the 2021 Mining Entry Permit, reflected in the entry reproduced at point [74(e)] above, necessarily caused the Department to strike out the previous one, noted in Conditions 1 and 6, it being, in their view, no longer valid. Mr Mitchell said that 3D Resources had instructed its lawyers to ask the Department to amend the end date of the 2016 Mining Entry Permit, however so far, their lawyer had had no success.

76 Mr Mitchell's oral evidence about the process of engaging with the Yilka and gaining access to the tenements was that it was a long process. The company tried "many times" to obtain a full access agreement with them, to no avail. No full access agreement was ever signed with them, as the representatives of the Yilka group wanted terms which were too unworkable.

77 The agreement negotiated, evidenced by the Letter Agreement, did not grant access which enabled 3D to properly explore the ground, given there was an embargo on taking samples unless they had already been created by previous miners, and that only existing tracks and roads could be used. Mr Mitchell's affidavit said that as a result of the "competing native title claims in the Federal Court the initial Letter Agreement…was deemed by all parties to be null and void and expired at the same time as the expiry of the [Mining Entry Permit]."[28] In evidence at the hearing, Mr Mitchell was of the view that there were 2

[28] Affidavit of Peter Mitchell sworn 1 July 2022 [19].

reasons why, once the Mining Entry Permit expired, no further negotiations took place until years later:

a. Being unable to properly traverse the ground meant that no real plan could be developed by 3D to explore the ground. The Yilka group required a detailed plan of where samples were going to be taken before they would allow access which would result in ground disturbance; 3D being unable to do so, they were unable to negotiate further, or for more expansive access, and
b. The determination that the Sullivan-Edwards native title claimants also held the relevant land, and the time that the native title groups took to determine the appropriate governing body and constitute the Prescribed Body Corporate.

78 In November 2016, 1 month before the Mining Entry permit was issued, 3D received a letter from the Department of Aboriginal Affairs, being PM2 to Mr Mitchell's affidavit. The letter highlights to 3D that the Federal Court had ruled in June 2016 that both the Yilka and Sullivan-Edwards families held native title over the relevant area. It reminded 3D that the Sullivan-Edwards family have the right to be considered inhabitants under the relevant legislation and therefore needed to be included in all future consultation process and, further, that any request to the Aboriginal Lands Trust for recommending a Mining Access Permit by the Minister would require comment from the Sullivan-Edwards claimants. Details of their representative were provided.

79 The Mining Entry Permit was granted on 23 December 2016 (**the 2016 Permit**). Mr Mitchell's evidence was that despite his knowledge of the Sullivan-Edwards group in about November 2016, the application pursuant to the Letter Agreement with the Yilka group was submitted, and approved, he assumed, without the need for the Sullivan-Edward's input. He said that he was not aware of the Federal Court determination incorporating them into the native title application and nor the outcome of that application until he received the information from the Department of Aboriginal Affairs.

80 On 4 January 2017 3D received a letter from the Aboriginal Lands Trust confirming that both native title groups constituted a single native title claim group and reminding 3D that they must also consult with the Sullivan-Edwards native title party with respect to its activities on the tenements. That is PM5 annexed to Mr Mitchell's affidavit.

81 On 24 April 2017 3D received a letter from Cross Country Native Title Services representing the Sullivan-Edwards group. The letter put 3D on notice that the Sullivan-

Edwards group prohibited any ground disturbing activity and requested consultation with that group regarding activity on the tenements. The letter is annexure PM6 to Mr Mitchell's affidavit. Further, a public notice regarding the need for mining and other groups to include the Sullivan-Edwards group in any negotiations about the land, annexed as PM7 to Mr Mitchell's affidavit, was received by him, he said, on 23 October 2017. Mr Mitchell's view in oral evidence was that given that at that point there was no prescribed body corporate available to represent both the claimants, it was not possible for 3D to enter into any further exploration agreements to support an application for and the grant of a further entry permit. Mr Mitchell gave unchallenged evidence at the hearing that it was not until September 2019 that the Yilka Talintji Aboriginal Corporation was created to represent both the groups. I was not provided at the hearing with any documentation confirming the date of the incorporation of that company, neither do I have anything before me that suggests that that is incorrect, so I accept that that was the time the Prescribed Body Corporate was constituted.

82 Mr Mitchell's evidence regarding what occurred between the completion of the 2016 Mining Entry Permit and the December 2020 agreement in his affidavit bears repeating in full:[29]

> *19. As a result of the competing native title claims in the Federal Court the initial Letter Agreement with the Yilka NTP was deemed by all parties to be null and void and expired at the same time as the expiry of the MEP.*
>
> *20. As there was no Registered Native Title Body Corporate available to represent both native title claimants it was not possible for 3D to enter into a further exploration agreement to support an application for and grant of a further MEP.*
>
> *21. Following resolution of competing native title claims in the Federal Court, it was not until September 2019 that the Yilka Talintji Aboriginal Corporation (YTAC) was created to represent both the formerly competing native title groups.*
>
> *22. I am aware that during December 2020 Cosmo entered into the Yilka Mineral Exploration and Land Access Deed of Agreement with YTAC to permit for access to conduct exploration activities on the area covered by the Tenements.*

[29] Affidavit of Peter Mitchell sworn 1 July 2022 [19] – [22].

83 In oral evidence he said that despite the tenements then being transferred to Cosmo Gold, of which Mr Mitchell is not a director, he was aware of the continuing negotiations for access to the tenements through his continuing relationships with the directors of Cosmo Gold. He gave evidence that he was aware that during December 2020 Cosmo Gold entered into the Yilka Mineral Exploration and Land Access Deed of Agreement, with the Prescribed Body Corporate permitting access for the conduct of exploration activities on the tenements. His oral evidence under cross examination was that negotiations had been occurring through May and June 2020, "or possibly a bit earlier." However, in evidence in chief and re-examination there was a consistent tone in his evidence that it was only when the Prescribed Body Corporate was constituted, being September 2019, could they commence negotiations, the inference being that negotiations commenced at that time.

84 Unlike the previous Mining Entry Permit, however, he said the Mining Entry Permit was not granted immediately due to, in his view, a state election and various government agencies being in 'care-taker' mode. The Mining Entry Permit following the December 2020 agreement was issued, Mr Mitchell said, on 8 May 2021, although the tenement register has it registered on E38/2274 on 25 May 2021 (**the 2021 Permit**).

85 Mr Mitchell's summary in his oral evidence was that it took two years from the Federal Court determination to form the Prescribed Body Corporate, and 18 more months to conclude and receive an access agreement with that body.

86 It was Mr Mitchell's memory, upon cross examination, that 3D had not had any specific written correspondence with the Sullivan-Edwards group prior to negotiations with the prescribed body corporate, but that 3D and Cosmo Gold had tried to negotiate entry prior to the body corporate being established and constituted. He recalled that the negotiations with the Sullivan-Edwards group were by telephone, although he believed that the company felt that if the groups were not prepared to negotiate together then there was not much 3D and Cosmo Gold could do. Once the Prescribed Body Corporate was operating, draft agreements were prepared, which he had seen.

87 However, the evidence in his affidavit suggests that there was no attempt at negotiation between 2017 and 2019 with anyone – the inference is that there was no point. The oral evidence and the evidence contained in the letter from Central Desert Native Title Services suggests something different.

88 The 2021 Mining Entry Permit was not annexed to the affidavit or produced in any other form to confirm the date, however, in my view nothing turns on the 2-week difference in the dates of that given in evidence and as recorded in the register. On either date, the Mining Entry Permit was granted a matter of weeks or one or 2 months before the expiration of the expenditure year for each of the tenements, although, granted, some had longer to run than others. Neither therefore can I confirm from any other evidence that the 2021 Mining Entry Permit covered all three tenements the subject of the exemption application, however, on the basis that Mr Mitchell's evidence refers to tenements in the plural, and that the three tenements fall within the native title claim area there is a reasonable inference, in my view, from Mr Mitchell's evidence that the ongoing lack of access related to all three tenements and that for the relevant expenditure year, access was only granted to some or all of the tenements very shortly before the expiration of the relevant tenement years.

89 Mr Mitchell was questioned by Mr Foley in cross examination about the original agreement between 3D and Mr Foley. Mr Mitchell accepted that, although he had no direct knowledge of the time, 3D had some interest in or control over Mr Foley's tenement in approximately 2005. Mr Mitchell also said that at one point Mr Foley had been paid by 3D to negotiate with native title groups to attempt to gain access, although he did not say which ones and when this was. Mr Foley made the point that 3D had had control of his property since 2005 and had done nothing with it. I infer from Mr Foley's submissions and his cross-examination questions that he complains that 3D and subsequently Cosmo Gold have simply banked these tenements and are using the difficulty in negotiations with the native title claim groups as an excuse.

90 Mr Foley felt that Cosmo Gold were blaming him for a failed initial public offering in 2020. Mr Mitchell explained in cross examination that the initial public offering did not go ahead because the Australian Stock Exchange had requested that a Mining Entry Permit be incorporated into the float, not being satisfied that an agreement with the Prescribed Body Corporate was sufficient. Accordingly, the float could not go ahead for some months.

91 The letter from the Yilka Talintji Aboriginal Group, signed by Harvey Murray, which became exhibit 5, in some ways casts a different light on Mr Mitchell's recollections of the ability to negotiate. It does appear that, from exhibit 5, there was an expectation on the part at least of the Yilka Group that the 2016 Mining Entry Permit would lead to further negotiations and an additional access agreement. That is because the letter says

> [the] *1 year only agreement between the parties* [was] *to allow all parties to meet each other on Yilka country; for 3D to understand the cultural heritage of Yilka country and allow them to carry out preliminary work on what the land, tracks, and any previous work looked like to help them plan their future exploration activities; and what would be required by them to be able to work with the Yilka people in the future once a formal access agreement had being completed.*
>
> *…*
> *3D only visited Cosmo Newberry community for a short time in mid-2017 and carried out minimal reconnaissance. Following discussions between all the parties, after completion of the 2017 field visit, it was agreed that the LARA be terminated and no further access by 3D be made until a full Access Agreement had be[en] finalised. We can confirm that no further access to Yilka country by 3D*
> *was made or able to be made prior to the Full Access Agreement in December 2020 [being] completed.*
>
> *Any mining entry permit (MEP) held by 3D at a time prior to December 2020 would have become invalid.*

92 On one reading of the letter it suggests the following:

a. The expectation was that 3D could and would attend the tenement on a number of occasions, but did not, visiting only once, and for a short time;
b. That those anticipated visits were not just to be for sampling and mapping, but were also about cultural recognition and planning;
c. The Letter Agreement, and therefore entry rights, was terminated, by agreement, as opposed to it running its one-year course, and not because there was an acknowledgement that it was "null and void," and expiring at the same time as the 2016 Mining Entry Permit;
d. That there was an expectation at the time of the initial entry agreement (in 2016) that there would be further negotiations subsequent to (or perhaps during) the 12 month entry running its course, and
e. That there was an expectation, despite the Yilka group and 3D agreeing the Letter Agreement was not applicable, that, at least at the end of the 12 months, there nevertheless would be continuing negotiations for a full access agreement, despite there being no Prescribed Body Corporate.

93 In addition to the expenditure in the relevant expenditure years, exhibit 2 shows the following has been spent:

YEAR	TENEMENT	SPEND $	TENEMENT	SPEND $	TENEMENT	SPEND $
2013	E38/2274	23,990				
2014		12,347	E38/2774	11,295		
2015		14,596		10,193		
2016		49,446		16,010		
2017		38,780		15,698		
2018		86,907*		50,629*		
2019		71,597		20,465	E38/3249	21,308*
2020		40,994		25,594		6,582

* Amount above minimum required expenditure for that year.

94 The expenditure made after the relevant expenditure year, and planned for the future, was contained in the statutory declarations supporting the applications, and as such I have not had those amounts proved before me. Therefore, considering that factor under s 102(4), I am unable to report on that factor, and that may effect the Minister's decision.

Evidence from Mr Foley

95 Being unrepresented, I explained to Mr Foley in the hearing the process of the hearing, and that the hearing date was the date to present evidence supporting his objections. Mr Foley declined to give oral evidence in relation to his objections. He had not provided prior to the hearing written sworn evidence or a statement of evidence. He had previously produced a number of documents such as newspaper articles about the initial public offering of Cosmo Gold, and the original deed of agreement between he and 3D. After discussions with him at the hearing, Mr Foley accepted that none of those documents were admissible because either they were simply newspaper articles from which I could take nothing but, in any event, the salient points from which had already been given in Mr Mitchell's evidence, or they were not relevant. I was not satisfied that knowledge of the commercial arrangement between Mr Foley and 3D would assist in determining whether an exemption should be granted for the admitted under expenditure in the relevant tenement year. The only relevance of the agreement was that Mr Foley had given over to 3D and consequently Cosmo Gold the operation of the exploration licence on their jointly held tenement. The parties admitted that that was the case and accordingly I did not need to see the deed to

make a determination on that issue. Neither is a determination on that issue an essential element of the application for exemption or Mr Foley's objections.

96 Mr Foley's particulars said that Gavin Dunne was annoyed that 3D did not negotiate further access to the tenements. Similar to the letter that became exhibit 5, that is hearsay. However, nothing was submitted under Mr Dunne's hand, unlike exhibit 5, and Mr Foley did not give or submit evidence on oath as to how he knew that was said. The statement is therefore hearsay that Mr Foley has asked the court to rely on, given effectively from the bar table, through himself. Given the bland nature of the statement and the inability of the applicant to cross examine Mr Foley or Mr Dunne about it I am not prepared to accept that statement in that form. The proposition about Mr Dunne's attitude was put to Mr Mitchell in cross examination, and he denied that there was, in reality, and despite the attempts to engage the Sullivan-Edwards group, any possibility after 2017 of negotiating with the Yilka or anyone else, until at least towards the end of 2019.

A REQUEST FOR A RE-TRIAL

97 On 12 August 2022 Mr Foley sent an email to the Department, asking for a re-trial, because:

a. He was at a disadvantage not being aware of the full facts.

b. 3D Resources told "blatant lies" regarding how long it had had effective control over his tenement, being 2007, when he thought it was 2005, which, he admitted, was in fact his error.

c. 3D resources have asked for a 100% exemption, when they have spent some money, and could have asked for partial exemptions, the result being that they did not have to prove the amount they had spent, putting Mr Foley at a disadvantage in being unable to interrogate the work that was done.

d. He will be asking for a copy of the Form 5 Operations report.

98 As Mr Foley acknowledged in the body of his request, such a request is extraordinary. Mr Foley's request could be either to start the hearing again, or to re-convene the hearing and continue with evidence. Usually, a request for a 'retrial' occurs as a result of an allegation of error, or a miscarriage of justice, in an application for review of the decision so made. Where the allegation is that the preliminary decision-maker may fall into error from something which occurred in the hearing, a 'hearing' would usually take place to ensure that the decision is not unreliable or wrong, or a miscarriage of justice is not caused to one or both parties, based on that error. However, that would require addressing relevant parts

of the hearing, and perhaps calling further evidence. That is not what Mr Foley appears to be requesting – there is no allegation that I have, or may, fall into error.

99 Given the list of issues raised by Mr Foley, it appears to me that he is complaining that he was unable to present his case fully at the original hearing, and would like to start again, or at least go over some of the evidence again. While not on all fours with the present case, the High Court of Australia's decisions on the question of procedural fairness in administrative decision-making and review, addressed again recently in the decision of ***Nathanson v Minister for Home Affairs***[30] provide some guidance. In that case, while evidence was presented at the hearing in the Administrative Appeals Tribunal hearing, the reliance the Minister was placing on that evidence in addressing a primary consideration under the relevant direction was not clear until the completion of the hearing. Rather than invite the applicant to address the evidence in the context of that consideration, the Tribunal Member proceeded to make a determination, finding against the applicant in relation to that point. The High Court found that was a breach of procedural fairness.[31]

100 However, it would only be a breach of procedural fairness that would lead to jurisdictional error if the failure to accord procedural fairness was material to the Tribunal's decision; that is, the breach of procedural fairness deprived the applicant of a realistic possibility of a different outcome.[32] To have accorded the claimed procedural fairness to the applicant in that case, the Tribunal would effectively have had to repeat some if not all of the process of the hearing. A fundamental purpose of affording procedural fairness is to afford an opportunity to raise relevant matters which are not already obvious, or not liable to be advanced by the apparently persuasive story of the opposing party.[33] Re-conducting a hearing, or a good portion of a hearing is a serious step, hence the need for materiality in the breach before such a step is taken.[34]

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[30] ***Nathanson v Minister for Home Affairs*** [2022] HCA 26.
[31] ***Nathanson v Minister for Home Affairs*** [2022] HCA 26 [1] per Kiefel CJ, Keane and Gleeson JJ.
[32] ***Nathanson v Minister for Home Affairs*** [2022] HCA 26 [1] and [2] per Kiefel CJ, Keane and Gleeson JJ, Edelman J strongly dissenting in relation to the proof of materiality that is required to lead to a decision being invalid.
[33] ***Nathanson v Minister for Home Affairs*** [2022] HCA 26 [33] citing ***Kioa v West*** (1985) 159 CLR 550, 633; ***International Finance Trust Co Ltd v New South Wales Crime Commission*** (2009) 240 CLR 319, 380 [143]; ***Condon v Pompano Pty Ltd*** (2013) 252 CLR 38, 107 [186].
[34] ***Nathanson v Minister for Home Affairs*** [2022] HCA 26 [30].

101 To allow Mr Foley to be re-heard, or present new facts or submissions, I should be satisfied, according to the Majority in ***Nathanson***, of the realistic possibility that a different decision could be made had Mr Foley been given the opportunity to do so in the initial hearing on an issue that requires consideration. I should not ask how Mr Foley would take advantage of the lost opportunity, just whether he would take advantage of the fair opportunity, and, whether, by doing so, he could achieve a favourable outcome.[35] Applying his Honour Justice Edelman's test for whether there has been materiality, if, relevant to the present case, Mr Foley has shown that there might have been things that Mr Foley might have said or evidence he might have called at the hearing that might have assisted his case in a manner that might lead to a different result, he should be re-heard.[36]

102 In relation to Mr Foley's request:

a. *He was at a disadvantage not being aware of the full facts.* Mr Foley has not set out what facts he was not aware of, however, I have set out elsewhere in these reasons the contents of the applications for exemption, the statutory declarations accompanying the applications, the particulars filed by the applicant (**the procedural documents**) and, to a large extent, the contents of Mr Mitchell's affidavit, which included the Letter Agreement, associated Mining Entry Permit and covering letter from the Minister, all of which were served on Mr Foley, or were available through the Department or publicly. If Mr Foley is concerned with facts from the point of view of the applicant, it is difficult to discern what he was not aware of that has formed part of the applicant's case for exemptions. In any event, given the evidentiary difficulties I have identified with some of those documents, and the need to ensure procedural fairness to Mr Foley because he was unrepresented and had various medical issues, I have had regard to little of the information contained in the procedural documents. Even on Edelman J's statement of the onus, I cannot conceive of any facts that Mr Foley might have had something to say about that might have assisted his case as against the facts presented by the applicant.

   If Mr Foley has facts he would like to present that do not relate to the applicant, then I cannot be expected to guess at what they might be – it was incumbent upon him to raise them firstly in the hearing, or at least in the request for the 'retrial' application,

[35] ***Nathanson v Minister for Home Affairs*** [2022] HCA 26 [33].
[36] ***Nathanson v Minister for Home Affairs*** [2022] HCA 26 [127].

so an assessment of the application can be made. The applicant for exemption deserves some certainly in its application, it having run its case based on the particulars provided by the objector and the way in which Mr Foley ran his case at the hearing. I do not consider it appropriate to list the application for a rehearing simply to explore these issues when no cogent reason for a rehearing has been put before me.

b. *3D Resources told "blatant lies" regarding how long it had had effective control over his tenement, being 2007, when he thought it was 2005, which, he admitted, was in fact his error.* It appears that Mr Foley may be referring to a portion of his cross examination where Mr Mitchell admitted that he did not know when 3D engaged commercially with Mr Foley. Mr Mitchell did not tell a lie when he said 2005 – he was clear that that was speculation on his part. In any event, the history of the tenement was only background, and the difference between 2005 and 2007 in the context of this matter is irrelevant. Again, without further, I do not consider it appropriate to list an application for a re-opening of the hearing, let alone list a complete re-hearing of the matter, on such scant information.

c. *3D resources have asked for a 100% exemption, when they have spent some money, and could have asked for partial exemptions, the result being that they did not have to prove the amount they had spent, putting Mr Foley at a disadvantage in being unable to interrogate the work that was done* and

d. *He will be asking for a copy of the Form 5 Operations report.*

These aspects of Mr Foley's request are more akin to a request to lead fresh or new evidence, rather than a failure to address an aspect of the applicant's case that was until the hearing or my determination unknown to Mr Foley. It may be that Mr Foley is conflating the purpose and procedure of an application for forfeiture with an objection to an application for exemption of expenditure. The work done on a tenement and the associated Form 5 are relevant if claimed as expenditure which amounts to minimum expenditure, or is used to resist a finding of forfeiture, once under expenditure is found, and can rightly be the subject of cross examination and other evidence in an application for forfeiture. The hearing on this matter was not an application for forfeiture.

In any event, I have reduced the weight I am able to accord to the applicant's case in relation to the relevance of work done on the tenement because those documents have

not been supplied, and therefore, in effect, I have found that the lack of documentation supports, to an extent, Mr Foley's objections, so he will not be disadvantaged by not now being able to obtain them and interrogate the applicant on them in the applications for exemption for expenditure.

Further, these were items available to Mr Foley, had he sought them, during the proceedings, or through the Department.

103 Accordingly, acknowledging the need for procedural fairness, I decline to accede to Mr Foley's request for a re-trial, or to list the matter to hear further argument on Mr Foley's request.

DETERMINATION AS TO EXEMPTIONS FROM EXPENDITURE

104 The applicant has claimed pursuant to section 102(2)(b) that time has been required to evaluate work done on the licence, to plan future exploration or mining or raise capital. Other than some general information about what has occurred on each tenement since the mining entry permits were granted, I have not been provided with any information as to what evaluation was undertaken during the time of the licence such that no money was spent on it or as to what planning of future exploration took place or capital raising therefor. Accordingly, I am not satisfied that I can make a recommendation in relation to the exemption applications for the three licences under that section.

105 The applicant has claimed that the ground contains a mineral deposit which is uneconomic, or that economic or marketing problems make mining operations unviable, but that they will become viable in the future. While there has been some information about floats and the ASX, there is no information provided as to specific economic or marketing problems encountered by the applicant and accordingly I am not satisfied that I can make a recommendation on any of the licenses under s 102(2)(e).

106 The applicant has claimed that the ground the subject of the licenses contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation. I have not been given any information that the ground contains any mineral ore or any details of current or proposed future operations, and how they will be sustained and accordingly I cannot find that it is required to sustain the future of any operation, being the operation proposed for the licenses themselves or any other of the tenements belonging to this project. Accordingly, I am not satisfied that I could make a recommendation under s 102(2)(f).

107 While the applicant has claimed in each application that the licenses are part of the Cosmo Newbery combined reporting group, and that the aggregate expenditure incurred upon the combined tenements is such as to satisfy the expenditure requirements of the licence the subject of the application had the aggregate expenditure been apportioned between the combined reporting tenements, no supporting information in admissible form has been provided to support the claim relating to aggregate expenditure, and accordingly I am not satisfied that I can make a recommendation pursuant to section 102(2)(h).

108 Accordingly, realistically, the applications are limited to the grounds set out in sections 102(2)(g) and 102(3). Further, effectively, each of those grounds contains the same reasons in this case:

a. There was a delay in obtaining the Mining Entry Permit, which was eventually granted in May 2021, that delay leading to a limited time to explore on each of the tenements, and insufficient time to complete expenditure;
b. That delay was in turn caused by delays in conducting negotiations with the representative Prescribed Body Corporate of the native title groups, there being a requirement that a permit is not granted without their permission.

109 Sections 102(2) and 102(3) constitute separate pathways to the grant of a certificate of exemption, being separate sources of discretionary power.[37] The discretion is bounded by the subject matter, scope and purpose of the Act.[38] I will address the application under s 102(2)(g) first.

110 The question for determination is whether the proper and effective exploration of the tenements was thwarted by the inability of the holders of the tenements to reach agreement leading to the issuing of a Mining Entry Permit in sufficient time in the relevant tenement year, that is, in the terms of s 102(2)(g), whether there was political, environmental or other difficulties in obtaining requisite approvals which prevented mining or restricted it in a manner that was, or subject to conditions that were, for the time being impracticable. "Mining" in this case, means exploration, as that is the purpose of the licences.

[37] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [66], confirmed in ***Thompson v Siberia Mining Corporation Pty Ltd*** [2021 WASCA 115 [131].
[38] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [67].

111 A successful exemption under s 102(2)(g) will generally be supported by a demonstration of genuine and reasonable attempts to progress towards obtaining requisite approvals or permits.[39]

112 Much of the evidence produced by the applicant and objector at the hearing related to matters which occurred prior to the relevant expenditure years. An application for exemption of expenditure is of course an application in relation to the currently relevant year. Mr Foley's objections appear to be based on the assumptions that:

a. There was access granted in 2016/2017, but that access was not fully utilized,
b. There was the opportunity to renegotiate for further access subsequent to the 2016/2017 Mining Entry Permit, either in the Letter Agreement, or otherwise, but that opportunity was not properly pursued.

113 Accordingly, Mr Foley's contention is that the applicant did not make genuine and reasonable attempts to obtain the necessary permits for entry. Reading the letter from the Yilka Talintja Aboriginal Corporation, I am not surprised Mr Foley has made the assumptions he has. The letter does speak of only one site visit, when it appears the expectation was for more, or at least that there would be more visits with the Yilka people, and the letter speaks of termination, suggesting the relationship was ended, as opposed to 3D being stymied for a time by the Federal Court outcomes and the 2016 Mining Entry Permit simply ran its course. However:

a. The writer of the letter was not called by either party to give evidence, and therefore I must be careful not to speculate on what the writer meant, and
b. Without the presence of the letter writer, and cross examination, I cannot make positive findings on exactly what the letter means, or whether the relationship was terminated, in the sense that contractual relations were brought to an end prematurely and where there was the opportunity for further negotiation.

114 I accept that, as I have said, there is some suggestion in the letter that supports Mr Foley's assumptions and submissions. Neither does it appear, in my view, that prior to the Prescribed Body Corporate being constituted, 3D made any real attempts to include the Edwards-Sullivan group in the negotiations. Mr Mitchell's evidence was that there was nothing in writing but contact with them may have been conducted by some telephone

[39] ***Berkeley Resources Pty Ltd & Anor v Limelight Industries Pty Ltd*** [2013] WAMW 2 [95].

calls. This is despite the numerous letters and notices being sent to 3D about the presence of that group, that group's right to have a say on who enters the land, the need to include them in discussions and the provision, in very early 2017, of their representative's contact details, and, more importantly, notification of the presence of the Edwards-Sullivan group before the 2016 Mining Entry Permit was approved on 23 December 2016.

115 No evidence was lead, nor legal submissions made in the hearing as to the effects of the Prescribed Body Corporate, and whether it was possible, or in the applicant's case, was not, to have an access agreement prior to the body corporate being constituted. The evidence relied on surrounded Mr Mitchell's assumptions and speculation that they were not going to progress without it.

116 The letter from Central Desert Native Title Services, annexed as PM6 to Mr Mitchell's affidavit, says "Thank you for your correspondence of 10 Apil 2017." Further, it says

> *In relation to your request that our clients "discuss [3D Resource's] program with the Yilka Group…", I advise you that:*
>
> 1. *Our clients continue to be ignored and excluded by the Yilka…*
> 2. *Your agreement with the Yilka native title claim group has no bearing on or relevance for our clients.*
> 3. *Our clients have grave concerns about heritage protection…and …are calling on all mining companies…not to carry out ground disturbing activities until they have first properly consulted with our clients…*

117 The Public Notice dated October 2017, annexure PM7 to Mr Mitchell's affidavit, invites mining companies to contact the Sullivan-Edwards Group representative prior to the constitution of a Prescribed Body Corporate for the purpose of access to land. The inferences available from the letter and the public notice are that:

a. 3D did respond to Cross Country Native Title Services in writing, if that is what "correspondence" means:

b. In 3D suggesting that the Sullivan-Edwards group discuss 3D's program (presumably in the context of the then existing Letter Agreement and access) with the Yilka Group, that may have been the extent of their attempt to negotiate with the Sullivan-Edwards group;

c. The letter writer strongly protesting that their client is ignored by the Yilka Group, and that the Letter Agreement has no relevance or bearing on their client, and from

the wording of the public notice, the Sullivan-Edwards were expecting, and were open to, ongoing negotiations before the Prescribed Body Corporate was constituted.

118 Having myself read the determinations of Justice McKerracher, it seems that there was discord between the native title groups, however, that was in relation to the native title applications. The evidence of Mr Mitchell, and the evidence submitted on behalf of Cosmo Gold, was somewhat inconsistent regarding whether there was the possibility or expectation that negotiations would take place after 2017, and leading up to late 2019, and with whom, and whether there was in fact any such attempts.

119 I also find it difficult to accept that, having had significant negotiations which were not successful for a full access agreement with the Yilka Group, as Mr Mitchell recounted in his oral evidence, but of course wanting to do all it could to ensure compliance with its expenditure conditions, as all mining companies no doubt are, 3D would not have been aware that the native title determination, over that very ground they are wanting to explore, was delivered in June 2016, before the signing of the Letter Agreement, although I accept that that Letter Agreement reflected an agreement which was concluded in April 2016. It took letters and public notices for 3D to attempt to engage with the Sullivan-Edwards Group, over 6 months later, and, then, only to refer the group to the existing agreement with another group.

120 Because of the inconsistencies in the evidence, I cannot make a finding that weighs in the applicant's favour as to its past conduct, that is, that it did all it could to progress matters towards the effective exploration of the tenements in years prior to the relevant tenement years.

121 However, the absence of that positive finding does not add much weight to Mr Foley's objections; whatever occurred prior to the relevant tenement years, and whatever the cause of the need for the lengthy negotiations from the time Mr Mitchell believed 3D could engage with the one Prescribed Body Corporate to December 2020, in the relevant tenement years, in this case, negotiations were occurring, according to Mr Mitchell's evidence, which I accept. Mr Foley may suggest that 3D did not try hard enough to negotiate through and after 2017, and perhaps 3D brought a reticence of the native title groups to negotiate with them upon themselves, apparently supported by suggestions that appear to have been made to the Central Desert Native Title Services prompting the response from it on 24 April 2017, and proceeding with the application for the 2016 Mining

Entry Permit when it knew, on Mr Mitchell's evidence, that the Sullivan-Edwards group were native title holders. However, by the relevant tenement years, negotiations were self-evidently underway, and in fact almost completed, for access to the tenements in accordance with the conditions on the licence, at least as it appears on E38/2274.

122 Given the difficulties his Honour Justice McKerracher noted in his judgements and those exposed in PM6 and PM7 between the two native title groups, and the previous Letter Agreement being with only one of those parties and 3D, I accept that it may have been unlikely there was going to be any consistent agreement between them, as one group, for access prior to the constitution of the Prescribed Body Corporate, even if 3D had diligently attempted to bring the parties together with unified support for a Mining Entry Permit. Therefore, while I have found that it may be the case that 3D and Cosmo Gold may have brought some of the difficulties on itself, by 2018, after the expiration of the 12 month Mining Entry Permit, 3D and Cosmo Gold found itself without having the ability to exercise full exploration activities on the tenements, leading to the need for some negotiation through the relevant tenement years once the Prescribed Body Corporate was constituted.

123 Whether it was the state election which was the cause of the then delay between December 2020 and May 2021 for the Mining Entry Permit is not of consequence to this matter; the fact is, the Mining Entry Permit was not issued until May 2021, and thus no entry was permitted, despite the agreement in December 2020. Whether it was because of the state election, or some other political reason, I am satisfied that by that time the reason had nothing to do with Cosmo Gold.

124 It is not the case that simply because exemptions for the same reasons have been granted, or similar events have occurred in the past, exemptions are granted again. In some cases, where the circumstances allow it, there is an expectation of consistent decision-making. However, there may be cases where further applications might cast doubt on the ability, or willingness, of the tenement holder to satisfy the prescribed conditions attaching to the grant of the tenement.[40] In other words, the circumstances may have changed such that an application for exemption on the same grounds no longer applies. Or it may be that, even where the circumstances appear to be the same, after a number of such applications, an objector may well raise the question of whether the applicant has the ability to address

[40] ***Haoma Mining NL v Tunza Holdings Pty Ltd & Anor*** [2006] WASCA 19 [60].

those circumstances by, relevant to an application under S102(2)(g), making genuine and reasonable attempts to take the necessary steps in having the approvals required granted.

125 The background to these tenements, the native title matters and the previous exemptions, and, therefore, lack of work on the tenements, are factors relevant in two ways in this matter:

a. The difficulties of which Mr Mitchell gave evidence were ongoing and had, he suggested a cumulative effect on the tenements; not having access to the tenements, particularly after December 2017, and without relevant samples obtained from a drilling plan or planned program of work from the tenement there is only so much 'off-site' work from year to year that could be expected to occur, and

b. The current grounds upon which exemptions have been granted in the past is a mandatory consideration under s 102(4) of the Act. Mr Mitchell's evidence was of a number of years of inability to access the tenement because of a lack of access due to the uncertainty over native title holders. I accept that the Letter Agreement only gave very limited access; so limited, that no effective progress could be achieved. The restrictions on access continued, into the relevant tenement years, until those years were almost complete.

126 Each application was for the full minimum expenditure amount required by the relevant conditions. I note, however, that the expenditure in each Form 5 Operations Report filed for the relevant period, as set out in Exhibit 2 is not $0. For E38/2274, the expenditure claimed is $54,727, leaving a shortfall of $71,273. For E38/2774, the expenditure claimed is $20,702, leaving a shortfall of $49,298. For E38/3249, the expenditure claimed is $9,711, leaving a shortfall of $10,289. None of the Form 5 Operation Expenditure Reports were provided to me in evidence, either for the current relevant years or past years when previous exemptions have been granted, so it is not possible to determine what work was claimed in them, or what work has been done on each tenement, either in the past, in the relevant tenement years, or since then.

127 Further, neither do I have any evidence before me of the reasons for the exemptions granted in the past other than a submission from the bar table that it is for the same reasons as the current applications and inferences from Mr Mitchell's evidence. Consistent with my views of other Department file material, I have not independently sought that information. Therefore, I am unsure of the nature of the work done in the relevant

tenement years, or in the relevant past years, nor the grounds upon which exemptions have been granted. While the grounds upon which exemptions have been made, and work done and money spent on the tenement are mandatory relevant considerations under s 102(4), there can be no weight in favour of the applicant given in this case in relation to the grounds for past exemptions and any work done and that may affect the ability of the minister to grant the exemptions.

128 Further, exhibit 2 shows that in 2019 in relation to E38/3294 and 2018 in relation to E38/2274 and E38/2774, and therefore several years after the Letter Agreement ceased operation, minimum expenditure was achieved. Accordingly, it cannot be said that access and work to be performed was such that each year 3D faced such difficulties. The reasons for the ability to achieve expenditure in those years, in the face of a lack of access, was not addressed by the applicant, nor was it explained what that work was that it could not be repeated or enhanced in the relevant tenement years.

129 While I accept that those years are not the relevant tenement years, the absence of those explanations also means that I cannot place so much weight on the supposed cumulative effect of the limited and then lack of any access to the tenements leading up to the relevant tenement years. In fact, it is in the very years in which Mr Mitchell said there was an absence of any negotiations that the minimum was met, in the absence of explanation, which further detracts weight from that cumulative effect.

130 I have highlighted the inconsistencies and lack of information in the applicant's case. The objections by Mr Foley, and his complaints, are somewhat borne out by those factors. Perhaps the parties interested in the tenements and land had different expectations about what was to occur as a result of the Letter Agreement and resulting entry, and that there is a question over whether the agreement was terminated, or it simply ran its course, and the parties assumed that the relationship, for the time being, was on-hold, and therefore, practically, access was terminated.

131 Nevertheless, I am satisfied that:

a. Each of the tenements, at the time of being held by Cosmo Gold, fell entirely within the Yilka/Sullivan-Edwards Native Title Determination;

b. Each of the tenements was therefore in a Reserve which required agreement of the native title holders for access and use by Cosmo Gold;

c. The Prescribed Body Corporate did not exist until September 2019, as far as Mr Mitchell was aware. The expenditure years commencing 10 June 2020 (E38/2274), 17 July 2020 (E38/2774) and 18 July 2020 (E38/2020), while this time period is not within the expenditure years, it is relevant history which assists in explaining what lead to events, or lack of events, in the expenditure year, and the need for an exemption from expenditure. While there are inconsistencies in Mr Mitchell's evidence as to when negotiations did commence, I accept that it was prior to the commencement of the relevant tenement years.

d. Given his Honour Justice McKerracher ordered the parties to incorporate one Prescribed Body Corporate in June 2017, after they were given almost 12 months to determine that on their own, but also given the protracted history of the claims, the parties' inability to agree to the Minute of Orders and whether there was to be one prescribed body corporate or two, and the comments of his Honour set out at [66] above, reflecting the difficulties the groups had with one another, I am prepared to accept that it took that long to constitute the body corporate and for that body to commence united negotiations with prospective miners. I caution, however, that the evidence presented at the hearing of the incorporation and constitution of the body corporate was not of significant weight. Had Mr Foley contested the date of the incorporation, had I then not had before me documentary proof of the incorporation date, I would not have been able to rely on the vague terms of Mr Mitchell's affidavit and the even more vague terms of his oral evidence. As it is, I consider that Mr Foley's attack was on the significant lack of attempts at negotiating at any time, rather than Mr Mitchell's memory for dates.

e. Negotiations proceeded, with an agreement being reached between Cosmo Gold and the Prescribed Body Corporate in December 2020. The 2016 Letter Agreement negotiations were concluded in April 2016, but entry was not formalised until December 2016, a time frame which suggests possibly at least a year of negotiations to get to that point. Therefore, Mr Mitchell's evidence that it took 14 months (from September 2019 to December 2020) to finalise the 2020 access agreement is not unreasonable, and I give his evidence of that time frame some weight.

f. A West Australian state election was held on 13 March 2021. The Mining Entry Permit requires the signature of the Minister, not someone in their Department. Accordingly, it seems reasonable that there was a delay in having the Minister approve and sign the Mining Entry Permit during that time, for whatever reason.

g. While it may be that some licence holders are able to satisfy their minimum condition of expenditure in a short time, it seems unlikely that an exploration licence holder with a minimum expenditure of $70,000, $20,000 and $126,000 in the relevant year would be in a position, having held the tenements for a number of years with no on-site work able to be performed, to fully satisfy that condition in such a short time to the end of the year. In my view whether Cosmo Gold has made all efforts to comply in the short time they did have access is not a relevant consideration in this case at this stage. The focus of the factors under s 102(2) are the reasons why an exemption may be granted, not the reasons for under expenditure.[41] To seek an explanation of why Cosmo Gold did not fulfill their expenditure conditions in the time they had would shift that focus to requiring Cosmo Gold to explain their non-compliance, as opposed to the reasons why they found themselves in the position of being unable to comply.

132 The focus of the application for exemption was that Cosmo Gold had limited access to the tenements during the relevant year, that is, they had no access until relatively close to the expiration of the years. Further, the focus of the application was that that was because of their inability, as opposed to their lack of effort in, negotiating an access agreement which would lead to the required access. They had been negotiating prior to the relevant tenement years, whether in September 2019 or later, but still, relevantly, before the commencement of the relevant tenement years. Therefore, if it is accepted that Cosmo Gold only had access for a short period, and it is accepted that they were never going to be able to comply with their conditions, that weighs in favour of granting the exemption.

133 In the relevant tenement years, the applicant has spent money on the tenements, set out at [92] of these reasons, and that weighs in favour of the applications being granted.

134 Section 102(2)(g) requires that there are:

- political, environmental or other difficulties

[41] ***Siberia Mining Corporation Pty Ltd v O'Sullivan*** [2020] WASC 214 [62], citing ***Carnegie Gold Pty Ltd v Maughan*** [2018] WASC 366 [74].

- In obtaining requisite approvals
- Such that the applicant is prevented from mining or is so restricted in mining that it is impractical to mine.

135 While it may be that Cosmo Gold's attitude to the native title groups and negotiating with them contributed to a breakdown in negotiations in the past, the negotiations with the Prescribed Body Corporate commenced before the relevant tenement years and were completed within the relevant tenement years. Agreed access was required before the requisite government approvals would be granted. A full exploration program could not be undertaken until access was granted. There is nothing before me to suggest that the negotiations were unusually long or were obstructed in any particular way by then by Cosmo Gold. It was not until those negotiations came to a successful conclusion that permits for entry could be obtained. Having spent some money on the tenements during the relevant tenement years, I am satisfied that while the lack of approvals did not entirely restrict mining, it restricted mining in such a way that it was impractical for that time to satisfy the minimum requisite expenditure in the relevant tenement years, and that the lack of an access agreement with the relevant Prescribed Body Corporate, by that time constituted, was a difficulty encountered by the applicant.

136 Weighing up all the factors I have considered, including the factors contained in Mr Foley's objections, and while some factors weigh against the exemption, I am satisfied that, overall, the factors in favour of the applicant's application outweigh those against it, including those raised by Mr Foley, and I recommend the granting of exemptions for expenditure on all three tenements.

137 Having made that recommendation:

a. it is not necessary for me to consider the application under s 102(3), and

b. I direct the recommendation and these reasons be sent to the Minister upon publication.

Warden