

**CENTAMIN EXPLORATION (W.A.) PTY LTD AND OTHERS V. R.J. GETHING AND OTHERS
NO. 1178 of 1982 (SUPREME COURT OF WESTERN AUSTRALIA)**

by Peter Wiese*

The severe limitations of the scope for obtaining relief by way of *certiorari* have been confirmed by the decision of the Full Court of the Supreme Court of Western Australia in *Centamin Exploration (W.A.) Pty Ltd and Others v. R.J. Gething and Others* — as yet unreported, judgement delivered 28th May, 1982.

The order sought was to remove into the Supreme Court for the purpose of being quashed the Warden's recommendation to the Minister. This recommendation was to refuse applications for Coal Mining Leases under the *Mining Act, 1904 (W.A.)*.

The Full Court examined the leading cases on *certiorari* including *Testro Bros. Pty Ltd v. Tait (1963) 109 C.L.R. 353*, and concluded that *certiorari* will not lie unless the decision under attack could of its own force prejudicially affect the rights of the applicant.

The Full Court examined the relevant provisions of the *Mining Act, 1904 (W.A.)* relating to the application for and grant of leases. It noted that the Warden's recommendation is really only a report to the Minister which the latter has absolute discretion to accept or reject (the granting authority is, in fact, the Governor in the Executive Council).

In short, the Court concluded that the Warden makes no decision as to rights. The Minister's discretion as to the grant of the lease is not fettered in any way by the Warden's recommendation.

The Full Court's decision, although made in relation to the provisions of the now repealed legislation, is applicable to the new legislation (*Mining Act, 1978-1982*) in relation to those tenements the grant of which is quite clearly in the discretion of the Minister (exploration licences, mining leases and general purpose leases). In relation to an application for the grant of those tenements, judicial review of a Warden's recommendation by way of *certiorari* will not lie.

The decision also appears to apply in relation to the special prospecting licences referred to in ss.56A and 70. However, it should be noted that where an application for a special prospecting licence under either of those sections is not opposed the Warden has power to grant the application; and where the application is opposed, the Warden may either refuse the application (in which case an appeal will lie to the Minister), or may recommend the application to the Minister, who may refuse it or grant it. It may be arguable that, at least in the case of a refusal of an application by the Warden, that refusal does in some relevant way condition the exercise by the Minister of his power to uphold or dismiss a subsequent appeal to him.

It is suggested that the appropriate procedure for judicially challenging a Warden's recommendation is either *mandamus*, or preferably a declaratory order relying on the Supreme Court's jurisdiction to make a declaration of right coupled with an injunction to restrain the Minister from denying that right.

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BRANCH NEWS

The Western Australian Branch invited officers of the Western Australia Mines Department to the social function which followed the Annual General Meeting on 1 December, 1982.

The Victorian Branch has organized for papers to be presented at 5.30 p.m., 15 March, 1983.

Topics to be discussed are:

SOLE RISK AND NON CONSENT

(1) Phillip Ward (with an emphasis on mining)

(2) Gerald L. Ryan (with an emphasis on petroleum)

Session will be held in the Theatre, BHP House.

Further information may be obtained from the Association's office — (03) 67 2544.