

The Warden considered this view to be consistent with the filtering role that has been identified as a purpose for which Warden's conduct proceedings in Open Court.⁵ The Warden considered that there were two primary reasons for the consistency:

- (a) a Warden is in a better position to determine whether or not there has been non-compliance with expenditure conditions of sufficient gravity to justify forfeiture; and
- (b) a Warden should be able to bring to finality an application that has no prospect of success because of the relevant factual circumstances.

Further, the Warden considered that there was little purpose in having the power to make a ruling on a no case submission⁶, or for a party to make a no case submission to the Warden, if the matter must proceed, in any event, to the Minister for final disposition. The Warden stated that a tribunal or court gives consideration to a no case submission to prevent a matter from unnecessarily proceeding with attendant cost and time consequences. No applicant should have the right to compel the continuance of an application that has no prospects of success. By way of obiter remarks, the Warden expressed the view that, for the same reasons provided above, an implied power to dismiss an application also exists in respect of s 96 of the Mining Act.

APPLICATION FOR ORDERS NISI FOR JUDICIAL REVIEW OF WARDEN'S DECISION*

Re Her Honour Warden Richardson SM; Ex Parte Precious Metals Australia Ltd [2006] WASC 192)

Judicial review – objection – exemption application – mineral claims.

This was an application by Precious Metals for judicial review of a decision by the Meekatharra Mining Warden to dismiss as incompetent objections lodged by Precious Metals to exemption applications by WMC Resources Ltd outside of the time period set by the Mining Registrars. Precious Metals applied for orders nisi for writs of prohibition, mandamus or certiorari.

Background

WMC Resources sought exemptions from labour conditions applying to 185 mineral claims granted under the repealed *Mining Act 1904* (WA) (1904 Act) and continued by virtue of the State Agreement scheduled to the *Uranium (Yeelirrie) Agreement Act 1978* (WA). Precious Metals had applied for an extension of time to lodge objections to the exemption applications under the *Mining Regulations 1925* (WA) (1925 Regulations). The Warden dismissed Precious Metals' application.¹

Grounds for judicial review

Precious Metals sought judicial review of the Warden's decision on the following grounds:

⁵ *Re French; Ex parte Serpentine-Jarrahdale Ratepayers Association* (1994) 11 WAR 315.

⁶ *Commercial Properties Pty Ltd v Italo Nominees Pty Ltd* (unreported, Supreme Court of Western Australia Full Court, 16 December 1988, BC8800832).

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¹ The Warden's reasons are outlined at (2006) 25 ARELJ 127.

- the Warden erred in deciding that the Mining Registrars could fix the time for the lodgement of objections under reg 242 of the 1925 Regulations;
- the Warden erred in deciding that she lacked the power to extend the time for objections; and
- the Warden lacked the jurisdiction to consider the exemption applications because of the stated economic grounds. Only the Minister had jurisdiction to grant exemptions on these grounds pursuant to reg 55(12) of the 1925 Regulations.

Test

Blaxell J held that the correct test for whether orders nisi should be granted is that stated by Parker J in *Re Capobianco; Ex parte Caselli*.² This test is that the case be arguable without there having to be some reasonable or real prospect of success.³

Decision

Blaxell J held that Precious Metals had satisfied the test in relation to two grounds, but not the third:

- It was arguable that the Mining Registrars did not have the power to fix the period for the lodgement of objections. Although this power would “very sensibly fit” within the delegated functions of Registrars in reg 242 of the 1925 Regulations, it would be a strained construction of the words “grant and register...any transaction affecting the [mineral claim]” to include this power.
- It was arguable that the Warden had the power to extend the time allowed for objections to exemption applications under s 48 of the *Interpretation Act 1984* (WA) which provides that where a written law confers a power or imposes a duty, the power may be expected and the duty shall be performed from time to time as occasion requires.
- It was not arguable that applications for exemption on economic grounds can only be brought to the Minister, and the Warden lacks the jurisdiction to hear such claims. This is because the Warden has wide discretion to grant exemption applications, and such an interpretation would contradict the opening words of reg 171 of the 1925 Regulations (“The holder of any mining tenement...may obtain exemption...”). There is also no reason why the power of the Minister to grant dispensation cannot co-exist with the power of the Warden to grant exemption.

Precious Metals has lodged an appeal against the decision not to grant orders nisi on the jurisdictional ground.

² (Unreported, Supreme Court of Western Australia, Parker J, 980567, 25 September 1998).

³ Cf the approach of Martin CJ in the recent case of *McKay v Commissioner of Police* [2006] WASC 189. Martin CJ stated at [2] that “[I]t would be an inappropriate exercise of the powers conferred upon such a judge to issue an order nisi unless he or she were satisfied that the arguable case had some *reasonable* prospect of success [emphasis added].