As part of the first phase of the review, in February 2006, a Discussion Paper (A Framework for Alternative Urban Water Supplies) was released providing recommendations for the safe and sustainable use of rainwater, stormwater, greywater and treated sewage in urban areas.

As part of the second phase of the review, the State Government released a further discussion paper, *A Framework for Alternative Urban Water Supplies: Industrial Water,* which provides recommendations for the safe and sustainable use of industrial water. Submissions on the discussion paper were due on 16 March 2007.

The recommendations for regulatory changes included the following:

1. The reuse of industrial water for industrial processes (eg cooling, material washing) will not be regulated where the reuse of industrial water is exclusively for an industrial process (on-site or off-site), although the workplace risks must be assessed and managed in accordance with the normal occupational health and safety framework and environmental risks should be managed through the *Environment Protection Act 1970*.
2. New legislation is proposed to manage environmental and health risks in relation to the non-industrial reuse of industrial water (on-site or off-site), which sets out appropriate assessment process and allows for controls to be imposed based on the level of risk.
3. During the (current) review of the *Environment Protection (Prescribed Waste) Regulations 1998*, consideration will be given to the definition of industrial water and to development of guidelines to provide guidance on managing environmental and health risks for non-industrial uses.
4. Amendments are recommended to the *Industrial Waste Management Policy (Prescribed Waste) 2000* and existing guidance to ensure consistency with the proposed changes to the *Environment Protection (Prescribed Waste) Regulations 1998*.

WESTERN AUSTRALIA

EXEMPTION FROM EXPENDITURE CONDITIONS AND PLAINT FOR FORFEITURE*

Grange Resources Ltd & Horseshoe Gold Mine Pty Ltd v George Francis Lee and Warwick John Flint ([2006] WAMW 8)

Application for exemption from expenditure conditions – Plaint for forfeiture – Mining Act 1978 (WA) s 98, s 102, *Mining Regulations 1981* (WA) reg 31.

Facts

Messrs Lee and Flint ("the plaintiffs" or "objectors") lodged plaints for the forfeiture of three mining leases held by Grange Resources Ltd ("Grange"), namely M52/743 ("Horseshoe"), M52/180 ("Green Dragon") and M52/165 ("Thaduna").

Grange had lodged an application for exemption from expenditure conditions in respect of the Thaduna lease. The relevant expenditure year was from September 2003 to September 2004. The plaintiffs objected to the application for exemption.

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In relation to the Horseshoe and Green Dragon mining leases, Grange did not apply for exemption from expenditure. Grange claimed to have complied with the expenditure conditions of those two leases.

Warden's Decision

The plaint for forfeiture of Horseshoe was dismissed, the Warden having been satisfied that in excess of $241,000 was spent. The Warden recommended refusal of the exemption for Thaduna and recommended forfeiture of Thaduna and Green Dragon.

Horseshoe Forfeiture Plaint – Mine on Care and Maintenance

The mine at Horseshoe was on "care and maintenance" during the relevant expenditure year. Grange submitted that all of the expenditure on the Horseshoe lease was sufficiently and properly connected with "mining operations" as defined in the Act.[1] It contended that expenditure incurred during care, maintenance and rehabilitation is allowable expenditure for the purposes of regulation 3.[2] Grange submitted that expenditure in connection with aerial surveys, office work done by a director of Grange, work done in connection with the bores and wages paid to caretakers was allowable expenditure. In relation to the expenditure claimed for the caretakers, those employees carried out various tasks in compliance with the tenement conditions, and therefore this expenditure was relevant.[3] These tasks included inspecting, maintaining and monitoring bores, pipes, tanks and dams, keeping mine site records and arranging for the delivery of supplies that were utilised at the campsite.

The plaintiffs submitted that the expenditure was not within the meaning of the Act and the Regulations given the fact that the tenement had not been mined since 1994 and Grange was unwilling to use its relatively large cash assets to try to improve its resource classification.[4]

Warden's Conclusions on the Horseshoe Forfeiture Plaint

The Warden dismissed the plaint for forfeiture. He considered that Grange had satisfied the minimum expenditure condition in respect of the Horseshoe tenement; the expenditure incurred by the caretakers was work within the meaning of regulation 31. The work was connected with a mining operation that had ceased in 1994, but in respect of which the tenement holder had ongoing statutory obligations to fulfil.[5] On this point, the Warden commented that the legislation creates obligations on tenement holders that continue beyond the cessation of extractive and processing operations on tenements and include, in particular, environmental obligations.[6]

Expenses could be claimed even though Grange had no plans at all concerning the mine other than holding the tenement. The Warden, whilst agreeing with the decision of Warden Reynolds SM in *Craig v Spargos Exploration NL*,[7] noted that where an employee performs what may be called

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1 Paragraph 86. A description of the expenditure is set out in paragraphs 12-15 (environmental rehabilitation), 16-18 (water sampling and reports), 22-30 (caretakers) and elsewhere.

2 Paragraph 87.

3 Paragraph 88.

4 Paragraphs 90 to 91.

5 Paragraph 93.

6 Paragraph 94.

7 *Craig v Spargos Exploration NL and Queen Margaret Gold Mines NL* (22 December 1986, Kalgoorlie Warden's Court).

"mere caretaker duties"[8] in conjunction with other duties that may be seen to be connected with mining, the expenses of the caretaker do not need to be separated from expenses which can be attributed to mere caretaking.[9]

Green Dragon Forfeiture Plaint

Grange submitted that it had caused expenditure to be incurred in respect of Green Dragon and Thaduna, namely, by the activities of a third party, Murchison Copper[10] during the relevant expenditure year.[11] Murchison Copper subsequently exercised an option to purchase Green Dragon, demonstrating that the work by Mr Hull and Murchison was done *bona fide* in connection with mining those tenements.[12] Grange also contended that there was a significant inter-dependence between the three tenements in respect of the economic viability of proposed future operations on all three tenements.[13]

The plaintiffs submitted that Grange never had any real intention of itself expending any funds on the Green Dragon tenement.[14] The expenditure incurred by Mr Hull and Murchison was for a purpose unconnected with any mining operation of Grange.[15]

Warden's Conclusions on the Green Dragon Forfeiture Plaint

The Warden held that the expenditure claimed, other than rent and rates, was not expenditure as contemplated by regulation 31 for the reasons that it was not caused by the tenement holder and it was not expenditure incurred in connection with mining on the lease.[16] The Warden found that the costs of the activities of Mr Hull on the tenement, and the cost of preparation for Murchison Copper of the information memorandum, did not represent expenditure by Grange in connection with Green Dragon. All that Grange did was to permit Mr Hull and Murchison Copper to enter the tenement.[17]

In the opinion of the Warden, that was not "causing" work to be carried out or expenditure to be incurred by the person to whom the permission is given.[18] The mere fact that activities and expenditure of the type undertaken by Mr Hull and by Murchison Copper may have resulted in better or additional knowledge being gained about the commercial potential of the tenement was not sufficient to characterise that expenditure as expenditure for the purposes of regulation 31.[19]

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8 In *Craig v Spargos Exploration* Warden Reynolds had found that a person is a "mere caretaker" when he or she is stationed at a mine site simply to keep people away from the mine and to prevent stealing.

9 Paragraphs 95 to 97.

10 Paragraph 114. In 2002 a Mr Hull visited and undertook some sampling on the Thaduna and Green Dragon tenements. In order to pursue his ideas relating to the treatment of copper ore bodies, Mr Hull caused the incorporation of Murchison Copper and an information memorandum was prepared. In March 2005 the Murchison-Grange purchase option agreement in respect of Thaduna and Green Dragon was signed.

11 The costs of Mr Hull and Murchison were relevant to the Thaduna lease as well as the Green Dragon lease. The Thaduna plaint is discussed below.

12 Paragraph 114.

13 Paragraphs 114 (and 168 in relation to Thaduna).

14 Paragraphs 100 (and 163 in relation to Thaduna).

15 Paragraphs 102 to 109.

16 Paragraphs 115 (and 171 in relation to Thaduna).

17 Paragraph 115 (and 171 in relation to Thaduna).

18 *Nova Resources NL v French* (1995) 12 WAR 50.

19 Paragraph 115.

The Warden considered it significant, although not determinative, that it was never contemplated during the relevant year that Grange would itself undertake any mining or processing activities on Green Dragon, even if it had been established by Mr Hull and Murchison Copper that it would have been economic to do so.[20]

The factors influencing the Warden's decision that the non-compliance with the expenditure requirement was of sufficient gravity to justify forfeiture were Grange's intention that it would not itself expend any funds on the tenement (except rent and rates) and the fact that the shortfall was around 90% of the minimum expenditure requirement.[21]

The Warden opined that it would defeat the expenditure policy of the legislation if, merely by entering into a sale agreement with a third party purchaser, forfeiture could be avoided.[22] Moreover, Mr Hull and Murchison were aware of the risk of forfeiture arising from the plaint.[23] It was also significant that it appeared that neither Mr Hull nor Murchison had the financial means to undertake sufficient work on the tenement, and thereby advance the purposes of the Act.[24]

Thaduna Exemption from Expenditure Application

Grange submitted that:

(a) Thaduna "contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future": section 102(2)(e) of the *Mining Act*;[25]

(b) Thaduna "contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation": section 102(2)(f) of the *Mining Act*;[26] and

(c) "there are other reasons that may, in the opinion of the Minister, be sufficient to justify exemption": section 102(3) of the *Mining Act*. This provision requires the Minister to have regard to circumstances that are "unique, unusual or exceptional".[27]

The objectors submitted that:

(a) the only expenditure that could be claimed for the subject expenditure year was attributable to the work and activities of Mr Hull, which was not caused by Grange;[28]

(b) in respect of sections 102(2)(e) and (f) of the *Mining Act*, Grange had not discharged the burden of proof because there must be in existence at the time when the

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20 Paragraph 116.
21 Paragraphs 120, 124 and 125.
22 Paragraph 128.
23 Paragraph 127.
24 Paragraph 128.
25 Paragraph 131.
26 Paragraph 131.
27 Paragraph 143.
28 Paragraph 148.

application is being considered a current mining operation or one where feasibility studies have shown that there can be a proposed mining operation.[29]

Warden's Conclusions on the Thaduna Exemption Application

The Warden considered that the evidence was entirely inconclusive in that it was insufficient to establish the exemption grounds contained in either section 102(2)(e) or (f) of the *Mining Act*.[30] With respect to section 102(2)(f), the Warden considered that Grange merely hoped that a mining operation would be commenced.[31] This was significant because, in the opinion of the Warden, "proposed" in section 102(2)(f) means more than a mere expression of intention or hope or expectation.[32]

The Warden commented that in giving consideration to the application of section 102(2)(f) it was appropriate to take into account the extent to which the presence of mineral ore had been established in accordance with the JORC guidelines.[33]

The Warden considered that there was no further reason that would justify the Minister granting a certificate of exemption pursuant to section 102(3) of the Act. In arriving at this conclusion the Warden took into account the hopes and involvement of Mr Hull and of Murchison but considered that this factor was outweighed by evidence that at all material times Mr Hull and Murchison were fully aware of the plaints for forfeiture against the three mining tenements.[34]

Thaduna Plaint for Forfeiture

As with the plaint relating to the Green Dragon lease, the Warden found that Grange had caused no expenditure to be made for mining operations on Thaduna. All Grange did was permit Mr Hull and Murchison to enter the Thaduna lease, for purposes unconnected (at the relevant time) with any proposed mining operation by Grange.[35]

The Warden emphasised that the expenditure obligation is one of the most fundamental obligations, if not the most fundamental obligation, of a tenement holder, and non-compliance, other than the most minor, must always be viewed seriously. Where the extent of non-compliance is significant in relation to the amount of required expenditure, then, prima facie, forfeiture will follow.[36]

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29 Paragraph 150.
30 Paragraph 151.
31 Paragraph 153.
32 Paragraph 154.
33 Paragraph 155.
34 Paragraph 158.
35 See above in relation to the Green Dragon plaint (especially footnotes 10 to 17).
36 Paragraph 128.