5. In accordance with the decision to refuse leave to amend the order *nisi* in respect of the meeting between Mr Clifford and the Hon Mr Carpenter, the application for discovery of documents relevant to that meeting should be dismissed.[19]

Adequacy of the Affidavit Verifying the List of Documents Voluntarily Given

In relation to the adequacy of the affidavit verifying a list of documents sworn by Mr Stevens, Buss JA held:

1. Although Form No 17 (list of documents) and Form No 18 (affidavit verifying list of documents) referred to in Order 26 of the *Rules of the Supreme Court 1971* (WA) do not contain a statement that a person making an affidavit of discovery on behalf of the State or a body corporate has made "due and proper inquiries", such a statement should be included in the affidavit or list of documents.[20]

2. Mr Steven's averment that he had caused "substantial and detailed inquiries" to be made was materially different from an averment that he had made "due and proper inquiries" in the context of these proceedings. "Due and proper inquiries" would require Mr Stevens to, at least, make inquiries of the first respondent, whereas "substantial and detailed inquiries" may not.[21]

3. Mr Stevens was an appropriate person to swear the affidavit verifying the list of documents.[22]

4. He should swear a supplementary or substitute affidavit in which he deposes that he has made "due and proper inquiries" in relation to the documents which the first respondent had before him or otherwise considered in making the decision in question.[23]

CERTIFICATES OF EXEMPTION UNDER SECTION 102(2)(e)*

Australian Gold Resources Pty Ltd v Exmin Pty Ltd ([2005] WAWM 29)

Application for exemption – Section 102(2)(e) – Uneconomic deposit – Marketing problems

Background

Australian Gold Resources Pty Ltd (AGR) applied for certificates of exemption in respect of various mining leases pursuant to section 102(2)(e) of the *Mining Act 1978* (WA).

Exmin Pty Ltd (Exmin) lodged objections to the grant of the exemption applications and plaints for forfeiture of the mining leases.

The plaints were dismissed for non-compliance with regulation 122 of the *Mining Regulations 1981* (WA). While this decision was the subject of proceedings before the Supreme Court for judicial review, the exemption applications were heard by Warden Calder.

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19 See paragraph 96.
20 See paragraph 106.
21 See paragraph 107.
22 See paragraph 109.
23 See paragraph 110.
* Robert Edel and Alex Jones, Phillips Fox.

Section 102(2)(e) provides that a certificate of exemption may be granted on the basis:

> "that the ground the subject of the mining tenement contains a mineral deposit which is uneconomic but 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."

Evidence

The hearing occurred over seven days. It was common ground that the tenements contained a coal deposit.

Both parties lead substantial expert evidence in relation to the following issues:

(a) whether the coal deposit was sufficiently delineated for an assessment to be made as to the economics of the deposit or whether, in order for this assessment to be properly made, it was necessary for a life of mine plan to be prepared;

(b) whether the coal deposit was uneconomic during the reporting year;

(c) whether the coal deposit was reasonably likely to become economic in the future; and

(d) whether there was a market for the coal taking into account the different ways in which the coal could potentially be utilised, including export, power generation using a variety of emerging technologies such as IGCC and conversion to alternative fuel sources.

Warden Calder considered that AGR's expert witnesses had more experience and expertise than Exmin's expert witnesses and that the evidence of AGR's expert witnesses was generally to be preferred.

Warden Calder reached the following conclusion of fact:

(a) the tenements contained a significant deposit of coal;

(b) the different portions of the deposit were either in the inferred, indicated or measured category under the JORC code;

(c) no further drilling was necessary in order to identify the extent or nature of the deposit;

(d) there was currently no market for the coal;

(e) in particular IGCC technology remains experimental and is not yet commercially viable;

(f) the coal deposit was not currently economic;

(g) the coal deposit "could" become economic if various specified circumstances changed;

(h) it could not be said that it was "likely" or that it could be "reasonable expected" that any of the changes of circumstance would occur; and

(i) accordingly, it could not be said that the coal deposit may reasonably be expected to become economic in the future.

Application of Section 102(2)(e)

It was submitted on behalf of the AGR that:

(a) subsection 102(2)(e) has two separate limbs and if either limb was satisfied a certificate of exemption should be granted;

(b) under the first limb it was necessary to establish that:

(i) the ground the subject of the mining tenement contains a mineral deposit;

(ii) the mineral deposit is uneconomic; and

(iii) the mineral deposit may reasonably be expected to become economic in the future;

(c) under the second limb it was necessary to establish that:

(i) the ground contains a mineral deposit; and

(ii) at the relevant time economic or marketing problems are such as not to make the mining operations viable.

The Warden accepted this submission as to the construction of section 102(2)(e) of the *Mining Act 1978* (WA). The Warden held that:

(a) an exemption could not be granted under the first limb because it could not be said that the coal deposit may reasonably be expected to become economic in the future; but

(b) an exemption could be granted under the second limb because there was no market for the coal and the lack of a market constituted a marketing problem.

APPLICATION TO STAY PROCEEDINGS BEFORE THE WARDEN AND AMEND OBJECTIONS*

Hamersley Resources & Ors v Cazaly Iron Pty Ltd ([2006] WAMW 18)

Amendment of objection to tenement application – Application of section 142(4) to proceedings before Warden in open court – Stay of hearing of objection to tenement application pending outcome of related judicial proceedings

Background

E46/209 held by Hamersley Resources Ltd (a subsidiary of Rio Tinto Ltd), Hancock Prospecting Pty Ltd and Wright Prospecting Pty Ltd (together Rio JV) expired on 26 August 2005 because the extension of term application was not received until after the expiry date.

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* Robert Edel and Alex Jones Phillips Fox.
By way of disclosure, the authors represent Cazaly Resources Limited in relation to this dispute. The authors have endeavoured to provide an objective and impartial summary of the dispute. The allegations raised by Cazaly Resouces Limited in the amended objection are disputed either in whole or in part by the other parties to the proceedings.