from arguing that the Cazaly Application had priority under section 105A. If the decision terminating the Cazaly Application was subsequently overturned, in the absence of further intervention by the Court of Appeal, Cazaly would have been deprived of the opportunity to rely upon section 105A at the hearing of the objection and the Cazaly Application could therefore be deprived of its priority. Cazaly would thereby be prejudiced and the integrity of the proceeding before the Warden would be undermined.[20]

(b) The amended objections to the Rio Applications and the proceedings before the Court of Appeal in relation to the Minister's decision to terminate the Cazaly Application raise common issues, including the meaning and effect of section 111A, the meaning and effect of section 105A and the lawfulness of the iron ore policy.[21] It is simply inappropriate for the Warden to embark on a hearing where it appears very likely that the Court of Appeal will consider and decide most of the issues of law. It is highly desirable for the Warden to benefit from the decision of the Court of Appeal. It is in the best interests of the administration of the *Mining Act 1978* (WA) that there be consistency and certainty in the application of the law. If the hearing were to proceed, there is a significant risk that the Warden's recommendation would be the subject of proceedings for judicial review.[22]

EXEMPTION FROM EXPENDITURE CONDITIONS ON GROUNDS OF UNWORKABILITY*

WMC Resources Ltd v Van Blitterswyk ([2006] WAMW 17, Leonora Warden's Court, Warden Auty SM, 26 September 2006)

Exemption – Expenditure – Objection – Plaint – Shortfall – Mining Lease – Evidence

Legislation

Mining Act 1978 (WA), s 102(2)(d), s 102(2)(e) and s 102(3): Exemption from expenditure conditions.

Facts

WMC Resources Ltd (WMC) applied for exemption from expenditure in respect of ML 37/96. Mr Van Blitterswyk objected on the basis that the non-compliance (insufficient expenditure) was of sufficient gravity to justify forfeiture.

Warden's Decision

Recommendation that the application for exemption be granted and objection be dismissed.

WMC's Case

WMC contended that the ground was unworkable and uneconomic to mine in the time leading up to the application. The ground was said to be unworkable for the following reasons:

(a) the tenement was small in size – 400m x 400m (16.06 ha);

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20 Paragraphs 52-55.
21 Paragraphs 52 and 55.
22 Paragraph 55.
* Mark van Brakel, Clayton Utz.

(b) the tenement was in an isolated location and was difficult to access;

(c) the nickel deposit was located between 50m and 150m underground;

(d) the deposit subsumed the greater part of the southern area of the tenement and potentially stretched into the contiguous tenement to the south;

(e) the only economically viable means of exploiting the deposit was by open cut mining; and

(f) exploiting the deposit by open cut mining was not possible without the acquisition of the contiguous tenements (the lease being too small to support infrastructure and overburden).

WMC further submitted that it was uneconomic for a company the size of WMC to mine the deposit having regard to the various factors listed above, but that it would be economic undertaking for a smaller entity. WMC had entered into an agreement for the sale of the tenement to Australian Mines Ltd (AML) pursuant to which AML were committed to expending a minimum $200,000 within the first 12 months.

AML gave evidence that it was ready to commence work on the tenement upon the resolution of the objection and plaint and that it was already in discussions with holders of contiguous tenements to address the present unworkability of the open cut option.

Van Blitterswyk's Case

Mr Van Blitterswyk contended that "unworkable" in the *Mining Act* related to the question of access due to flooding or adverse weather conditions. Further, Mr Van Blitterswyk was of the view that he would be in a position to work the ground or find investors to do so and that he had equipment available to him for this purpose.

Reasons for Decision

The Warden was of the view that the grounds for the exemption pursuant to s 102(2)(d) of the *Mining Act* were made out. The Warden accepted that the tenement was unworkable unless surrounding tenements were acquired.

The Warden made the following comment: "'Unworkable' in the Mining Act is not defined but, in my view should be understood to include the inability to exploit a tenement given the appropriate methodology adopted."

WONGATHA – A QUESTION OF FRAMING?*

Harrington-Smith v Western Australia (No 9) ([2007] FCA 31)

Introduction and Summary

The decision of his Honour Justice Lindgren in *Harrington-Smith v Western Australia (No 9)* ("*Wongatha*")[1] was delivered on 5 February 2007 at Kalgoorlie.

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* Marshall McKenna, Hunt & Humphry.
With thanks to Melissa Watts, Associate and Jemimah Mills, articled clerk, both of Hunt and Humphry for their valuable contributions.

1 [2007] FCA 31.