

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : FORREST & FORREST PTY LTD -v- THE  
HONOURABLE WILLIAM RICHARD MARMION,  
MINISTER FOR MINES & PETROLEUM [2016]  
WASC 270

**CORAM** : TOTTLE J

**HEARD** : 19 APRIL 2016

**DELIVERED** : 26 AUGUST 2016

**FILE NO/S** : CIV 2348 of 2015

**BETWEEN** : FORREST & FORREST PTY LTD  
Plaintiff

AND

THE HONOURABLE WILLIAM RICHARD  
MARMION, MINISTER FOR MINES &  
PETROLEUM  
Respondent

KEVIN MICHAEL TAVENER, MINING WARDEN  
First Other Party

CAULDRON ENERGY LIMITED  
Second Other Party

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*Catchwords:*

Judicial review - Decision of Minister to progress application for mining  
exploration licences - Where Mining Warden recommended refusal -  
Application dismissed

Judicial review - Jurisdictional error - Whether Minister's jurisdiction enlivened under *Mining Act 1978* (WA), s 57(1) and s 59(6) - Where Minister's jurisdiction dependent upon receipt of report from Mining Warden - Whether hearing before Warden finished where submissions on conditions not made to Warden - Whether parties intended to be heard on conditions if Warden recommended refusal of mining exploration licences

Judicial review - Natural justice - Hearing rule - Whether applicant had opportunity to be heard - Where cut-off date for submissions - Where submissions can still be made to Minister pursuant to *Mining Act 1978* (WA), s 63AA(1) - Opportunity to be heard available

Judicial review - Failure to take into account relevant consideration - Whether stand-alone principle that decision maker must consider the most recent or up-to-date information is recognised - Minister not bound to consider most recent or up-to-date information in making decision to advance mining exploration licences

*Legislation:*

*Mining Act 1978* (WA), s 57, s 58, s 59, s 63AA  
*Native Title Act 1993* (Cth)  
*Rules of the Supreme Court 1971* (WA), O 56(1)

*Result:*

Leave to proceed with application granted  
Application dismissed

*Category:* B

**Representation:**

*Counsel:*

Plaintiff	:	Mr S M Davies SC & Mr A J Papamatheos
Respondent	:	No appearance
First Other Party	:	No appearance
Second Other Party	:	Mr T Kavenagh

*Solicitors:*

Plaintiff : Mizen & Mizen  
Respondent : State Solicitor for Western Australia  
First Other Party : State Solicitor for Western Australia  
Second Other Party : Hunt & Humphry

**Case(s) referred to in judgment(s):**

Hot Holdings Pty Ltd v Creasy [1996] HCA 44; (1996) 185 CLR 149  
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24  
Minister for Immigration and Border Protection v MZYTS [2013] FCAFC 114;  
(2013) 230 FCR 431  
Re Calder; Ex parte Cable Sands (1998) 20 WAR 343  
SZJTQ v Minister for Immigration and Citizenship [2008] FCA 1938

**TOTTLE J:**

**Introduction**

1           The applicant, Forrest and Forrest Pty Ltd (Forrest), applies for  
judicial review of the decision made by the Respondent, the Minister for  
Mines and Petroleum, on 22 December 2014 to progress applications for  
exploration licences to the determination process under the *Mining Act  
1978* (WA) (the Act) and the *Native Title Act 1993* (Cth). The  
applications had been made by the Second Other Party, Cauldron Energy  
Limited (Cauldron). The First Other Party was the warden, who had  
recommended the applications be refused following a hearing in  
December 2013.

2           The land which is the subject of the exploration licence applications  
is located south of Onslow in the Pilbara region of Western Australia, and  
falls within the area covered by a pastoral lease, held by Forrest, known as  
the Minderoo Pastoral Station. The Ashburton River flows through the  
area covered by the applications.

3           The Minister and the warden have filed notices of intention to abide  
the outcome of the application.

**The facts**

4           Forrest relied upon two affidavits sworn by its solicitor, Mr Alan  
Mizen, on 27 August 2015 and 7 October 2015, and upon an affidavit  
sworn by Mr Phillip Nicolaou on 5 November 2015. At the material time,  
Mr Nicolaou held the position of Team Leader in Tenure and Native Title,  
Mineral Titles, within the Department of Mines and Petroleum, and was  
responsible for corresponding with the parties. In the course of the  
hearing of the judicial review application, the transcript of the final day of  
the hearing before the warden was received in evidence.

5           There was, however, no dispute about the material facts, and the  
following account of the facts as I find them is derived from the  
documents attached to the affidavits.

6           Cauldron applied for the exploration licences with the intention of  
exploring for uranium if the licences were granted.

7           In December 2013, there was a hearing before the warden of  
Cauldron's applications and Forrest's objections to them.

8           On the last day of the hearing before the warden, 12 December 2013, senior counsel for Forrest handed up to the warden a list of conditions that Forrest contended the warden should recommend be applied to the exploration licences, if his Honour was minded to recommend the grant of them.

9           Forrest's senior counsel then made a submission to the warden that consideration of the conditions and the making of submissions in relation to them should be deferred until after the warden delivered his report recommending the grant or refusal of the applications. The warden expressed a preference for deferring consideration of the conditions, and counsel for Cauldron agreed with that course. Cauldron also provided a list of conditions that it submitted should apply. Shortly thereafter, the warden set a date for the publication of his report, being 21 February 2014, and adjourned the hearing. I will refer to the discussion between counsel and the warden in relation to the issue of conditions in more detail when considering ground 1 of the application.

10          On 12 December 2013, after the hearing had ended, Cauldron's solicitors wrote to Forrest's solicitors 'withdrawing' the list of conditions it had proposed.

11          The warden published his report on 14 February 2014 in the presence of the parties' lawyers. The warden recommended that the applications be refused. This recommendation flowed from findings made by the warden expressed in the following terms:

63.       The exploration of the proposed leases can be carried out, with appropriate conditions. In my view, the evidence raised a number of potential risks, the emphasis as to the degree of risk being dependent on one's perspective. The evidence of Mr Hillman was useful in stating the risks associated with the proposed activity can be assessed and managed with the appropriate planning and execution, which required sufficient funding.

64.       The applicant, however, at this time does not have the financial capacity to undertake the proposed exploration, taking into account all of the circumstances.

12          There was no evidence as to what was said at the hearing at which the warden published his report. I infer that no submissions were made about potential conditions on that occasion.

13          By letter, Cauldron made a submission to the Minister that the warden's recommendation should not be followed and that the Minister

should grant the applications. Forrest responded with submissions made on its behalf by its solicitors urging the Minister to follow the warden's recommendation.

14           Between March and mid-June 2015, each of Cauldron and Forrest made various submissions to the Minister by which they sought to persuade him of the merits of their respective positions. I will refer to the parties' submissions in more detail in due course.

15           On 10 June 2014, Forrest's solicitors made a final submission on its behalf. The submission included a reference to an announcement made that day by Cauldron to the Australian Stock Exchange. The ASX announcement recorded that Cauldron had secured funding of \$11 million by means of a series of share placement agreements made with Chinese investors.

16           On 13 June 2014, Mr Nicolaou sent a letter to Forrest stating that the warden's recommendation and the parties' submissions would be referred to the Minister.

17           Forrest did not suggest in its correspondence that the hearing before the warden had not been completed.

18           On 5 December 2014, Forrest's solicitors sent a letter to the Minister enclosing an announcement made by Cauldron to the ASX on 16 October 2014 recording that Cauldron's shares had been placed in a trading halt pending an announcement about legal proceedings that had been commenced against Cauldron by certain companies over an agreement to pay \$1 million for the subscription of shares in Cauldron. In the 16 October 2014 ASX announcement, Cauldron recorded its belief that the legal proceedings were without merit and would be defended vigorously. In their letter of 5 December 2014, Forrest's solicitors expressed their belief that the litigation referred to in Cauldron's announcement was likely to place Cauldron's ability to call on those Chinese investors the subject of the 10 June 2014 announcement in serious jeopardy. Forrest's solicitors submitted that the position concerning the 'secured Chinese investment' remained uncertain and referred back to the submissions made in their letter of 10 June 2014.

19           On 9 December 2014, Mr Nicolaou sent an email to Forrest's solicitors informing them that the Minister would make his decision on the basis of the submissions previously made by the parties and the submissions contained in Forrest's solicitors' letter of 5 December 2014 had been lodged too late for the Minister to consider.

TOTTLE J

20 On 22 December 2015, the Minister made the decision under review and, on 5 January 2015, the parties were informed of the decision.

21 On 30 March 2015, Forrest's solicitors wrote to the warden's clerk asking for the hearing before the warden to be relisted. Forrest contended that the hearing was incomplete because, relevantly, the warden had not heard evidence or taken submissions on the conditions to be applied to any exploration licences that might be granted. Correspondence ensued between the parties' solicitors and the Warden's Court Officer that culminated in a letter from the Warden's Court Officer dated 5 August 2015 recording the warden's view that he was *functus officio*. That letter was the catalyst for the application for judicial review which was commenced on 27 August 2015.

### **The grounds of review in outline**

22 In outline, the grounds upon which Forrest bases its application for review are as follows:

- (1) the Minister's power to determine the applications was not enlivened because the warden had not completed the hearing of the applications and thus had not provided a report to the Minister in accordance with the statutory requirement to do so;
- (2) the Minister failed to observe the requirements of procedural fairness by not affording Forrest the opportunity to be heard on the issue of conditions prior to determining to progress the applications;
- (3) the Minister failed to consider up-to-date information about Cauldron's financial capacity and thereby failed to perform his statutory task and exceeded his jurisdiction.

### **Statutory framework**

23 The starting point is s 57(1) of the Act. It provides that, subject to the Act, the Minister may, on the application of any person and after receiving the recommendation of the mining registrar or the warden in accordance with s 59, grant to that person an exploration licence on such terms and conditions as the Minister may determine. Section 57(3) provides that the mining registrar or the warden shall not recommend the grant of an exploration licence unless satisfied the applicant is able to effectively explore the land in respect of which the application has been made.

24 Section 58 sets out the procedure for applying for an exploration licence. Relevantly, s 58(1)(b) reads as follows:

- (1) An application for an exploration licence -
  - (a) ...
  - (b) shall be accompanied by a statement specifying -
    - (i) the proposed method of exploration of the area in respect of which the licence is sought; and
    - (ii) the details of the programme of work proposed to be carried out in such area; and
    - (iii) the estimated amount of money proposed to be expended on the exploration; and
    - (iv) the technical and, subject to subsection (1aa), financial resources available to the applicant;

25 Section 58(3) provides that an applicant shall, at the request of a mining registrar or warden, furnish such further information in relation to the application, or such evidence in support of it, as the mining registrar or warden may require, but such requests shall not extend to requests for information or evidence about assays or results of testing or sampling the applicant may have undertaken on the land.

26 The role of the warden in the process of determining an application for an exploration licence, including when there is an objection to the application, is set out in s 59 of the Act.

27 Section 59(1) provides that a person who wishes to object to the granting of an application for an exploration licence may do so by lodging a notice of objection.

28 Sections 59(4), (5) and (6) read as follows:

- (4) Where a notice of objection -
  - (a) is lodged within the prescribed time; or
  - (b) is not lodged within the prescribed time but is lodged before the mining registrar has forwarded a report to the Minister under subsection (2) and the warden is satisfied that there are reasonable grounds for late lodgment,

and the notice of objection is not withdrawn, the warden shall hear the application for the exploration licence on a day appointed by

the warden and may give any person who has lodged such a notice of objection an opportunity to be heard.

- (5) The warden shall as soon as practicable after the hearing of the application forward to the Minister for the Minister's consideration -
- (a) the notes of evidence; and
  - (b) any maps or other documents referred to in the notes of evidence; and
  - (c) a report which recommends the grant or refusal of the exploration licence and sets out the reasons for that recommendation.
- (6) On receipt of a report under subsection (2) or (5), the Minister may grant or refuse the exploration licence as the Minister thinks fit, and irrespective of whether -
- (a) the report recommends the grant or refusal of the exploration licence; and
  - (b) the applicant has or has not complied in all respects with the provisions of this Act.

29 The Minister's power to impose conditions on an exploration licence does not lapse upon the grant of an exploration licence. Section 63AA(1) provides the Minister may impose reasonable conditions on the holder of the licence for the purpose of preventing or reducing or making good injury to the land over which the licence is sought or granted or injury to anything on or below the natural surface of that land or consequential damage to any other land, not only on the granting of an exploration licence but also at any subsequent time.

### **Leave to proceed**

30 The application was commenced just over seven weeks after the expiry of the limitation period provided by O 56(1) of the *Rules of the Supreme Court 1971 (WA)*, thus Forrest requires leave to proceed.

31 In his affidavit of 27 August 2015, Mr Mizen explained that, until his firm received the letter from the Warden's Court Officer of 5 August 2015 stating the warden considered he was *functus officio*, Forrest considered it likely that the warden would provide the applicant with a hearing on the issue of the conditions. This was the reason why this application was not commenced earlier. Cauldron made no submissions as to whether leave should be granted. Having regard to the explanation provided by

Mr Mizen on Forrest's behalf and the relatively short period of the delay, I am satisfied that Forrest should be granted leave to proceed with the application.

**Ground 1: Was the Minister's power to grant exploration licences enlivened?**

32 Ground 1 reads as follows:

- (1) On 22 December 2014, the Respondent made a jurisdictional error or, alternatively, erred in law, in determining that there was sufficient reason to allow exploration licence applications 08/2385, 08/2386 and 08/2387 (Exploration Licence Applications) to progress to the determination process under the *Mining Act 1978* and *Native Title Act 1993*, in that at the time of the determination:
- (a) the First Other Party, as warden, had not completed the hearing of the Exploration Licence Applications under s 59(4) of the *Mining Act*; or
  - (b) the Respondent had not received a report under s 59(5)(c) of the *Mining Act* so as to enliven the Respondent's jurisdiction to consider whether to grant or refuse the Exploration Licence Applications in that at the time of the determination the Respondent had not received a report under s 59(5)(c) of the *Mining Act*, because the First Other Party had not had a hearing of the Exploration Licence Applications as to conditions to be imposed for any grant of those applications and reported to the Respondent on the matter of conditions; or
  - (c) alternatively, that which is set out in both paragraphs (a) and (b) above.

33 If the Minister's power to grant or refuse the exploration licences had not been enlivened, then steps taken by the Minister to progress the licence applications would be beyond the Minister's statutory power and, by taking those steps, the Minister would commit a jurisdictional error.

**The approach adopted by the parties and the warden to the issue of conditions**

34 The submission made by senior counsel for Forrest as to how the warden should approach the question of conditions was as follows:

DAVIES, MR: ... The first submission we make is this - and we're only putting these conditions up as a real fallback position **because it's our submission that the application should be recommended for refusal and we don't even get to the conditions.** So it's really on the fallback

position. But the second thing we say is that this issue about conditions shouldn't be debated now and in this hearing, that we should await your Honour's decision and **depending on what your Honour's decision, we may or may not have to deal with conditions at all.**

**If our primary submission is accepted, we don't have to spend time debating conditions.** But that course is desirable in any event because firstly, whichever way the decision went - let's say the decision went against us - your Honour's reasons would contain matters that would assist and be relevant to formulating appropriate conditions because your Honour would take a view about particular points and then the parties could consider that, having regard to what your Honour has said.

But there's also a practical reason which is I put to Mr Cousins the substance of these conditions that we're proposing in cross-examination and we haven't yet got the transcript of that, and my learned friend put to our witnesses the substance of certain conditions as, could you live with this or could you live with that, and neither of us have got the transcript and so without the transcript it's a little bit difficult to precisely formulate what parties have said they could or couldn't live with.

That's another reason why we would say that any real debate on conditions should await your Honour's reasons. But if your Honour was against us on that we didn't want to take the position where we didn't put anything before your Honour in the way of conditions and that's why we prepared the document that we have. If your Honour please, those are our submissions.

THE WARDEN: Thank you. Just as a tentative view, my view would be the conditions can wait till a decision has been made. So there's no need to discuss the conditions at this stage. My preference is to defer consideration of conditions until the preliminary decision, if I can put it in those terms, is made.

GERUS, MR: Yes, your Honour (ts 326.1, 12 December 2013). (emphasis added)

35 A few moments later, counsel for Cauldron handed up to the warden a document dealing with conditions. The relevant passage of the transcript reads as follows:

GERUS, MR: Sorry, no, your Honour, I was just concerned that we may have filed it but we have prepared - well, I should say Ms MacMaster, late into that night, prepared a document and, in light of your Honour's ruling, we won't - I see.

THE WARDEN: It's probably best to do it in those two stages. The original - initial decision, depending on what that outcome is, then we can go to the conditions because the conditions can be quite complex.

36 The warden and counsel went on to discuss relisting the matter before the warden nominated a return date for the matter and adjourned the hearing:

THE WARDEN: ... What I propose to do is - I realise I had something else to do. What I normally do is or I propose to do it, anyway, is if I give you a date in February, I just nominate a date in February as a mention date so you know where you're going. But to - if I can and finish the decision earlier then I will simply - contact both parties and we can do it at an earlier stage.

...

THE WARDEN: ... on that basis, I will adjourn the court.

### **Forrest's submissions on ground 1**

37 The central propositions forming the foundation of Forrest's argument on ground 1 were two-fold.

- (1) The hearing before the warden was not completed. A report recommending the grant or refusal of an exploration licence could only be prepared 'after the hearing of the application'. As a consequence, the material forwarded by the warden to the Minister did not include a report made in accordance with s 59(5)(c) of the Act.
- (2) The Minister's power to grant or refuse an application for an exploration licence is conditioned by receipt of a recommendation from the warden, s 57(1) and s 59(6) of the Act: *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; (1996) 185 CLR 149. As the Minister had not received a report within the meaning of s 59(5), his power to grant or refuse exploration licences in accordance with the applications had not been enlivened.

38 In addition, Forrest submitted that the role of the Minister as the ultimate decision-maker does not diminish the responsibility of the warden to make recommendations as to the conditions that might be imposed: *Re Calder; Ex parte Cable Sands* (1998) 20 WAR 343, 358 (Steytler J, as his Honour then was). Forrest stressed that it is usual practice for the warden to make recommendations to the Minister on the issue of conditions. Forrest submitted that, in this case, the conditions that might be applied to the exploration licences were of significant practical importance because there were concerns about the adequacy of Cauldron's

financial resources to undertake exploration in a manner that addressed the risks of polluting the Ashburton River and related aquifers.

39 Forrest submitted that making written submissions to the Minister on the conditions that should apply was not as effective as making oral submissions to the warden who had the benefit of hearing the evidence and observing witnesses.

### **Cauldron's submissions on ground 1**

40 Cauldron submitted that the hearing before the warden had been completed. It submitted that the warden and the parties only contemplated the hearing being reconvened to allow the parties to make submissions on conditions if the warden's recommendation was that exploration licences be granted. Cauldron submitted that Forrest was entitled to 'an opportunity to be heard' (pursuant to s 59(4) of the Act), but elected not to be heard on the issue of conditions if the warden's recommendation was that the applications be refused. Cauldron drew attention to the fact that the issue of conditions had been ventilated before the warden - relevant evidence was adduced and witnesses cross-examined - and Forrest was under no disadvantage because submissions on conditions could have been, and still can be, made to the Minister. The decision about what conditions should be imposed is ultimately one for the Minister to make and there is no statutory requirement that the warden make recommendations about conditions.

### **Ground 1 disposition**

41 I have concluded that the hearing before the warden of the applications for exploration licences and Forrest's objections to them was completed when the warden published his report on 14 February 2014. It follows that I am satisfied that the warden forwarded to the Minister a report within the meaning of s 59(5) of the Act recommending the refusal of the exploration licences. Thus, the Minister's power to grant or refuse the exploration licences was enlivened.

42 I have reached this conclusion because, whilst the interchanges between counsel and the warden were slightly disjointed, it appears plain to me that the parties agreed they would not make submissions on the issue of conditions if the warden recommended the refusal of the applications. This agreement was then reflected in the warden's ruling that he would not hear submissions on conditions on 12 December 2013 and that he would only hear submissions on conditions if his recommendation was that the applications should be granted. The

agreement and the ruling emerge both explicitly and implicitly from the exchanges between counsel and the warden as recorded in the transcript of the closing stages of the hearing on 12 December 2013.

**Ground 2: Was Forrest afforded the opportunity to have its submissions on conditions heard by the Minister?**

43 Ground 2 reads as follows:

Further or alternatively, the Respondent breached the rules of natural justice by determining that there were sufficient grounds to allow the Exploration Licence Applications to progress to the determination processes under the *Mining Act* and *Native Title Act* by not providing the applicant an opportunity to make submissions as to conditions to be imposed by the Respondent in respect of the Exploration Licence Applications.

**Ground 2 disposition**

44 I am not persuaded by this ground for two reasons.

- (1) Forrest had the opportunity to make submissions to the Minister about the conditions to be imposed on the exploration licences, and it did so. Cauldron's first submission to the Minister was by letter dated 10 March 2014. In that letter, Cauldron submitted the applications 'should be granted on standard conditions'. In a letter to the Minister from Forrest's solicitors on 19 May 2014, Forrest took issue with Cauldron's submission that the exploration licences should be granted on standard conditions and its solicitors stated:

We do not agree with the standard conditions are appropriate given the need to protect the Ashburton alluvium aquifer, the evidence given by all experts of the potential for contamination of that aquifer by inappropriate drilling.

In its submissions of 10 June 2014, Forrest did not make further submissions as to conditions or expand upon their previous submission that conditions should not be granted on standard conditions.

- (2) Forrest presently has the right to make submissions to the Minister if it wishes to do so. The Minister has not granted the applications and Forrest may make submissions both up to and after the grant of the applications on the conditions that should be applied. As I

have noted above the Minister has power to impose conditions after exploration licences are granted.

**Ground 3: Was the Minister required to consider up-to-date information on Cauldron's financial capacity?**

45 Ground 3 reads as follows:

Further or alternatively, on 22 December 2014 the Respondent made a jurisdictional error or, alternatively, erred in law, in determining that there were sufficient grounds to allow the Exploration Licence Applications to progress to the determination process under the *Mining Act* and *Native Title Act*, without taking into account a relevant consideration in determining the Exploration Licence Applications pursuant to s 59(6) of the *Mining Act*, namely the latest information on whether the Second Other Party was able to effectively explore the land in respect of which the Exploration Licence Applications had been made:

- (a) at a reasonable time prior to the exercise of the Respondent's jurisdiction under s 59(6) of the *Mining Act*; or
- (b) alternatively, at the time immediately prior to the exercise of the Respondent's jurisdiction under s 59(6) of the *Mining Act*.

**Forrest's submissions on ground 3**

46 Forrest's submissions begin with the uncontroversial propositions that: a failure to take into account a relevant consideration occurs if a decision maker fails to take into account a consideration he or she was bound to take into account; the factors the decision maker is bound to consider in making the decision are determined by construction of the statute conferring the discretion; and, if the factors that a decision maker is bound to consider are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the relevant statute: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 (Mason J) (*Peko-Wallsend*).

47 In support of its submission that, upon the proper construction of the Act, the Minister is bound to take into account the most 'up-to-date financial information available', Forrest submits that the Minister's function could be undermined if the warden's report and recommendation become out-of-date and do not properly reflect the applicant's capacity at the time of the decision. Forrest argues that this submission is supported by the text and structure, as well as the subject-matter, scope and purpose of the Act and, in relation to those matters, it relies on the following:

- (a) an application for a exploration licence must be accompanied by a statement specifying the financial resources available to the plaintiff: s 58(1)(b)(iv);
- (b) the warden has the power to request more current financial information from the parties, pursuant to s 58(3) - this, it was submitted, indicates that the recommendation to the Minister was intended to be based on up-to-date information;
- (c) the fact that the warden only makes a recommendation and it is the Minister who makes the decision emphasises the importance of the Minister having up-to-date financial information; and
- (d) s 59(5) of the Act provides that the warden shall forward his report and recommendation to the Minister 'as soon as practicable' - it was submitted that the requirement for prompt reporting indicates it is important the financial information does not become outdated.

48 Forrest's submissions in relation to ground 3 are reinforced by reliance on what has been described as a stand-alone principle of administrative law, namely that a decision maker must take into account the most recent information available at the time of the decision: *Peko-Wallsend* [45]; *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; (2013) 230 FCR 431 [45] - [46], [75] and [77]; *SZJTQ v Minister for Immigration and Citizenship* [2008] FCA 1938 [32].

### Cauldron's submissions on ground 3

49 Cauldron submitted that:

- (a) It is significant that the Act does not confer any power on the Minister to request further information from an applicant for an exploration licence. Cauldron submitted that as the Minister did not have the power to request information from an applicant, the Act could not be construed as imposing an obligation on him to take into account 'the most up-to-date financial information'. In other words, how could the Minister be obliged to take into account information that he had no power to obtain?
- (b) The authorities relied upon by Forrest in support of its submission that a stand-alone principle of administrative law obliged the Minister to take into account the most up-to-date information do not assist in the exercise of construing the Act.

- (c) The Act directs attention to the 'financial resources available to the applicant' (s 58(1)) at the time the application was made.
- (d) The material submitted to the Minister under cover of Forrest's solicitors' letter dated 5 December 2014 did not constitute 'the latest financial information available' and amounted to no more than 'an unsubstantiated submission'.

### Ground 3 disposition

50 I have concluded that the Minister was not bound by the Act to consider any information about the financial resources available to Cauldron other than that contained in the statement accompanying the applications for exploration licences and contained in the warden's report and accompanying materials. My reasons for so concluding are as follows.

51 **First**, the Minister's discretion to grant an exploration licence is expressed to be 'subject to this Act'. This indicates that the Minister's discretion is not unfettered and must be exercised in accordance with the requirements of the Act. These include the initial requirements of an application as set out in s 58(1) and the requirement that the Minister receive a recommendation from the warden. The Minister is required to take into account the warden's recommendation: *Hot Holdings Pty Ltd v Creasy* 171 - 175.

52 **Secondly**, the requirement in s 58(1)(b)(iv) that an application for an exploration licence be accompanied by a statement specifying the financial resources available to the applicant and the requirement in s 58(3) that an applicant furnish such further information or evidence in support of the application as the warden may require supports the proposition that the warden must make a recommendation based on the most current information about an applicant's financial resources furnished to him or her.

53 **Thirdly**, s 59(5) imposes an obligation on the warden to forward to the Minister the notes of evidence, any maps or documents referred to in the notes of evidence and the report containing the recommendation as soon as practicable. The statutory imperative to forward the warden's materials 'as soon as practicable' discloses a legislative intent that the Minister's decision to grant or refuse to grant the exploration licence should be made while the information in the report and other materials is still current so there should be no necessity for the Minister to conduct further inquiries. The existence of this intention is reinforced by the

absence of a power on the part of the Minister to compel an applicant to produce further information or evidence. Ensuring that the warden forwards his report and recommendation and other materials to the Minister as soon as practicable is the mechanism by which the legislature intended that the Minister would be able to make a decision based on information that was current at the time of the decision.

54           **Fourthly**, the absence of any statutory procedure empowering the Minister to call for further information or evidence about an application for an exploration licence supports the conclusion that the information about the financial resources available to an applicant that the Minister is bound to take into account is the information contained in the statement accompanying the application and any information in the warden's report or accompanying materials. Had the legislature intended that the Minister would be bound to take into account information available after the date of warden's report and recommendation, the Act would have provided the Minister with the coercive powers required to ensure that such information was available.

55           **Fifthly**, on my construction of the relevant provisions of the Act, the principle that decision makers should make decisions on the basis of the most current material available at the time of the decision finds statutory expression in the obligation on the warden to forward the report and recommendation to the Minister as soon as practicable with the intention that the Minister will make a decision whilst the information in the report and accompanying materials is current. The principle must be considered in the context of the provisions of the statute conferring the decision making power and must be reconciled with those provisions. It cannot be invoked to impose an obligation that is not in harmony with the relevant statutory scheme.

56           For the avoidance of doubt, nothing that I have written should be taken as suggesting that the Minister is not permitted to take into account information that is more recent than that considered by the warden. My reasons are directed to the issue of whether the Minister is bound to take into account more recent information.

### **Conclusion**

57           I grant leave to Forrest to proceed with the application, but dismiss the application.

58           I will hear the parties in relation to costs.