
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : **ALINTA ENERGY CLEAN ENERGY
DEVELOPMENT PTY LTD v PILBARA ENERGY
(GENERATION) PTY LTD [NO 3] [2025] WAMW 3**

CORAM : WARDEN T MCPHEE

HEARD : 13 June 2024, 16 August 2024, 8 October 2024

DELIVERED : 7 February 2025

FILE NO/S : Extension of Time 692809 to file Proposed Objections
691874 – 691892 in respect of Applications for
Miscellaneous Licences 46/182-196, 198, 201-202 & 204

TENEMENT NO/S : Applications for Miscellaneous Licences 46/182-196, 198,
201-202 & 204

BETWEEN : **PILBARA ENERGY (GENERATION) PTY LTD**
(Applicant)

AND

**ALINTA ENERGY CLEAN ENERGY
DEVELOPMENT PTY LTD**
(Proposed Objector)

Catchwords: Extension of time, late objection, turns on its own facts

Legislation:

Mining Act 1978 (WA): s 91(6), 162B, 117(2)

Result: Applications for Extension of Time dismissed.

Representation:

Counsel:

Applicant	:	Mr Papamatheos with Mr Masson
Proposed Objector	:	Mr S K Dhamananda SC with Mr O’Leary

Solicitors:

Applicant	:	Ensign Legal
Proposed Objector	:	Austwide Legal

Cases referred to:

- ***APA Pilbara Holdings Pty Ltd v FMG Pilbara Pty Ltd & Ors*** [2025] WAMW 4
- ***Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd [No 2]*** [2025] WAMW 2
- ***Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd [No 3]*** [2025] WAMW 3
- ***Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd*** [2024] WAMW 30
- ***APA Pilbara Holdings Pty Ltd v Central Pilbara South Iron Ore Pty Ltd*** [2024] WAMW 40 (APA No 1)
- ***Rosane Pty Ltd v East Laverton Exploration Pty Ltd*** [2024] WAMW 39
- ***Molopo Australia Limited v Eastern Gold NL*** [1989] WAR 270
- ***NiWest Limited v Rangeview Asset Pty Ltd*** 2024 WAMW 49
- ***William Robert Richmond v Regis Resources Ltd*** [No 3] [2023] WAMW 44

Introduction & Summary

- 1) This matter returns to me following the publication of my reasons in *Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd [No 2]* [2025] WAMW 2 (*Alinta No 2*).
- 2) These reasons ought be read in conjunction with the reasons in *Alinta No 2*, as well as *Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd* [2024] WAMW 30, (*Alinta No 1*).
- 3) I refer to the *Alinta No 1* reasons and in particular paragraphs 1 – 47 of the addendum thereto, in respect of why this matter returned before me on 8 October 2024.
- 4) Following those events, I heard and determined a further dispute, as reflected in the *Alinta No 2* reasons, where I granted Alinta’s Interlocutory Application dated 21 June 2024, to reopen *Alinta No 1*.
- 5) These reasons, being *Alinta No 3* contain the decision relating to the consequences of outcome of *Alinta No 2*, also heard before me on 8 October 2024.
- 6) The references to parties and defined terms in these reasons are intended to be consistent with those in *Alinta No 1*, and *Alinta No 2*.

Alinta No 3 – Detailed Background

- 7) These reasons address the consequences of the matter I have referred to as *Alinta No 2*. I do not repeat the general comments made in paragraphs [6] – [20] of *Alinta No 2*, save to note that those comments remain applicable.
- 8) The tortuous path which has been followed to reach this point now requires the consideration of the Extension Applications made pursuant to section 162B of the Act, addressed in *Alinta No 1*, considered afresh with the addition of the New Evidence referred to in *Alinta No 2*.

- 9) The detailed background of the matter may be seen in *Alinta No 1*, as well as Schedule 1 of *Alinta No 2*.
- 10) The first thing to note squarely, is that it is the consideration of the effect of the New Evidence which is required.
- 11) I will state now, firmly, that I do not propose to reconsider a number of legal issues which arose and were determined in *Alinta No 1*.
- 12) In particular, FMG’s argument about “purpose” as required by section 91 will not be revisited.
- 13) In this matter, and in subsequent decisions published this day, FMG sought to preserve a review right in respect of the correctness of the view I expressed in *Alinta No 1* in respect of the construction and effect of section 91 of the Act.
- 14) Similarly too, Alinta, though with less directness, sought to reserve its position to challenge the view I expressed about section 117 in *Alinta No 1*.
- 15) In respect of both of those issues, the position I reached in *Alinta No 1* will remain applicable, though I note the challenge.
- 16) Consistency in administrative decision-making is, in my view an important consideration; see *William Robert Richmond v Regis Resources Ltd* [No 3] [2023] WAMW 44 (*Richmond No 3*).
- 17) Having undertaken an exercise of construction in *Alinta No 1* and expressed a view as to the manner in which those provisions are to be applied, that view will be maintained.
- 18) If I am wrong about those views, no doubt the well-resourced litigants in this matter will take appropriate steps in another place.
- 19) I will add too, that Alinta obliquely challenged my determination in *Alinta No 1*, that as part of the consideration of an application to lodge a late objection, that in order to establish an arguable objection, there is a

requirement to establish an evidentiary basis for the asserted position, to a prima facie level.

- 20) For the reasons set out below, I will not revisit that question either, though I give some more fulsome reasons for that view, out of deference to the submissions made by learned Senior Counsel for Alinta on 8 October 2024.

Alinta's position on the matter, and the effect of the New Evidence

- 21) The New Evidence of Mr Campbell, sought to be relied upon by Alinta, in broad terms, comes in the form of an Affidavit deposing that he is the “*Head of Power Development*” at APA Group Ltd.
- 22) The New Evidence in this respect must be read in the context of the relationship between Alinta and APA, as described in *Alinta No 1*.
- 23) He deposes to being employed by APA and authorised, now, to swear the further Affidavit in support of the Extension Applications for Alinta. He deposes to being a senior officer within Alinta, prior to November 2023.
- 24) He deposes to being a formally qualified engineer, with experience in wind energy projects.
- 25) The New Evidence then sets out references to a number of journal articles, which in broad terms, advance a basis for the assertion that wind farms within a degree of proximity may affect the operation of each other, depending on the wind direction and extent of what is referred to as the wake effect.
- 26) Further, at paras 9 & 11 of the New Evidence, the following was said:
- a. [9] *A windfarm, such as the one planned by PEG on the PEG Applications, has the potential to impact the output and profitability of another windfarm situated within close proximity due to wake effects (decreases in downwind windspeed). The Chichester Wind Project planned on L46/148, L46/159, L46/163-165, L46/167 and L46/181*

(Alinta Licences) would be situated within close proximity to any wind energy project by PEG on the PEG Applications.

b. [11] That article provides that an upwind windfarm generates 'wake effects' (ie decreases in downwind wind speeds) that undermine a downwind wind farm's power generation and revenues (see "DKC-1" at page 1).

- 27) The New Evidence, on my view of it, does not articulate the business position of Alinta in any other way as might be said to be relevant to the Proposed Objections, other than what is included in the above paragraphs.
- 28) Mr Campbell was not required for cross examination in respect of the New Evidence.
- 29) Alinta submitted that the New Evidence, in effect, bridges the gap I had articulated in *Alinta No 1*.
- 30) As indicated above, Senior Counsel for Alinta submitted that I had set the bar too high, in respect of my view in *Alinta No 1*, that there is a need to support the asserted arguability of an Objection with evidence, to a prima facie level.

Alinta No 1 and the factor of an Arguable Objection, as required by Molopo

- 31) It is not in dispute in this matter that the decision of *Molopo Australia Ltd v Eastern Gold NL* [1989] WAR 270 (*Molopo*) is binding on me.
- 32) What, in my view, falls out of the submissions in this matter, is a question of how *Molopo* is applied.
- 33) In particular, the key consideration, as I have regard to the manner in which the case was run, is the extent to which a party asserting an arguable Objection as part of an extension application, has an obligation to lead evidence in support of the position asserted in the pleaded objection.

- 34) At [95] – [114] of *Alinta No 1*, I set out my views in respect of that question. I have subsequently applied those views in *Rosane Pty Ltd v East Laverton Exploration Pty Ltd* [2024] WAMW 39.
- 35) In *Alinta No 1*, I expressed the view that when seeking an indulgence, which is what in my view, an extension of time to lodge a late objection is, there is a need to support an objection with an evidentiary foundation.
- 36) For the avoidance of doubt, I consider that position is directed by *Molopo*.
- 37) Kennedy J at 274:
- a. “ . . . The Regulation, in my opinion, gives the Warden a wide discretion to determine the time within which an objection may be lodged. I would further observe that it would be proper, notwithstanding the disavowals of the applicant before the warden, for the warden to have regard to the substance of the objection in determining whether a period of more than 30 days was reasonable. He would be entitled, for example, to take into account in this case the fact that one of the grounds of objection is that s 69 of the Act has been contravened. It might be thought appropriate to have that issue fully explored in adversarial proceedings before the application is granted.”
- 38) The essence of Senior Counsel for Alinta’s position was that that I had set the bar too high, and that I ought approach the evidentiary question on a similar basis to a ‘strike out’ application in other civil jurisdictions.
- 39) Nonetheless, there seemed in oral submissions to be an acceptance that in order to assess (adopting the words of Kennedy J) whether it be appropriate for the objection to be the subject of a full hearing, there is a necessity to consider the evidentiary underpinning of the asserted position. I do not consider there is any other way to comply with his Honours stricture to come to a view as to whether it is appropriate or not, to have a full hearing.

- 40) As a result, and with very great respect to learned Senior Counsel, I do not accept the submission above, that I ought to approach the question on a similar basis to a strike out.
- 41) I take that submission to mean, that on an application to strike out, say a Statement of Claim, or some portion of it, that the assertions and allegations contained in the Statement of Claim in question may be taken to be correct for that context.
- 42) As I understand it, if, being taken to be made out, there is a rational and coherent cause of action to be seen arising from the pleading, then the strike out fails. Ultimately whether the pleaded case succeeds at trial will of course depend on the evidence, but for the purposes of the strike out, a Court will accept the assertions pleaded at face value.
- 43) Applied in the context before me, that submission would compel a view that an asserted state of affairs in a proposed objection ought be taken as correct, and considered arguable, if it rationally gives rise to an objection as pleaded on its face.
- 44) Thus, in my view, Senior Counsel, very politely, challenged the correctness of one of the planks of the position I took in *Alinta No 1*, namely that there is a need for evidence to support the asserted objection, for it to be taken into account as a factor in favour of a grant of an extension of time.
- 45) I consider that proposition can also be tested in this hypothetical way. If a very, very late application for an objection was received, asserting jurisdictional error (say a flaw in marking out), which had not been made previously, then on Alinta's submitted approach, irrespective of the length of an unexplained delay, and in a circumstance where no other factors being in favour of a grant of an extension of time, the extension of time would likely have to be granted, on the simple assertion of faulty marking out accepted at face value.

- 46) That asserted ground of objection might then turn out to be entirely without an evidentiary foundation at trial, meaning the parties had been put to expense and trouble after the expiration of the relevant statutory timeframes, and the court to a hearing, in respect of a dispute for which there was never an evidentiary basis.
- 47) In my view, such an outcome is to be avoided, as it is on its face, unreasonable, and contrary to the proper application of section 162B of the Act.
- 48) In my view, the correct course on the hypothetical above, would be to require evidence of what the fault in marking out was on the application for an extension of time, at least to a prima facie level. That is a low bar, but a bar nonetheless. It is also knowledge entirely in the possession of the party making the application for an extension.
- 49) And so, for the avoidance of doubt, the view I take is that there is the need for evidence as I described it in *Alinta No 1*, and *Rosane*, in the context of the Extension Applications.
- 50) In my view, if an analogy is to be drawn to superior court procedure, the appropriate one is to an application to set aside a default judgement, or to file an appearance out of time.
- 51) In such cases there is, I understand, a need to condescend to particulars to demonstrate that what is asserted, actually has an evidentiary basis in the particular case so as to justify the trouble to the other party and the Court.
- 52) In this case in this administrative jurisdiction, Alinta is out of time for its objection. It seeks an indulgence.
- 53) The upshot of my view is that if Alinta wishes to bring an objection out of time and wishes to assert an arguable objection reliant on a factual state of affairs, there is a need to support it with actual evidence, to the low bar of a prima facie level.

- 54) It follows that I very respectfully disagree with the legal proposition put by learned Senior Counsel as to the approach taken when considering the arguability of an objection ground, as a factor in the context of the consideration of an application for an extension of time to lodge a late objection.

Can the Other Parts of the APA Alinta Disputes be considered as part of the Extension Applications

- 55) At the hearing on 8 October 2024, Senior Counsel for Alinta submitted I ought to take notice of the balance of the Alinta APA Dispute, to inform the nature of my determination here.
- 56) It is important to note that both protagonists in this dispute, have individually commenced a large number of miscellaneous licence applications, for seemingly similar purposes.
- 57) Neither grouping has sought to consolidate the various proceedings. Plainly, that has been done for tactical reasons that are easy to see, and need not be stated, as the intent behind the action is not relevant.
- 58) What is relevant is that the fact of the piecemeal or individualistic approach to the group of applications, has resulted in a very large number of disparate proceedings, with the different parts of the dispute rising up at different times for determination.
- 59) That was done, in this case, by Alinta, by choice. Alinta now say that I should have regard to the broader dispute in determining this matter.
- 60) The difficulty with the proposed approach, is that it becomes immediately unclear as to the basis upon which I have made the determination in this matter before me now.
- 61) Whilst I consider I have the power to call for information, essentially as I consider necessary, in a dispute like this one with well represented highly resourced litigants, I consider it would be erroneous to do so, replete with

the prospect of a denial of procedural fairness, depending on what I considered to look at, and how I went about it.

- 62) As a result, whilst I am obviously aware of the other parts of the broader dispute, and furthermore, seized of the evidence led in other parts of the dispute, I will approach my task in these reasons on the basis of what is reasonably, but unquestionably, before me in these proceedings.
- 63) That is, in my view, the evidence in respect of Exhibits 1 & 2 as referred to in *Alinta No 1*, and the New Evidence permitted following the reasons in *Alinta No 2*, which becomes Exhibit 3.

FMG's Position the matter, and the effect of the New Evidence

- 64) FMG opposed the tender of Exhibit 3. That dispute is dealt with in *Alinta No 2*.
- 65) In the alternative FMG firmly submitted that I ought not alter my views as expressed in *Alinta No 1*, even with the benefit of Exhibit 3.
- 66) The reason that was submitted, was simply that the New Evidence could not alter the substantive outcome, in light of the views I had expressed in *Alinta No 1*.
- 67) That was because, broadly, the New Evidence could only be read in the context of the purported effect of adjacent wind farms, and therefore, was wholly linked to the possible future rights arising from the possible holding of the Alinta Applications in the future, and the capacity, after grant, to seek protection against injurious affection to the business or activity conducted on those tenements, under section 117 of the Act.
- 68) The New Evidence, it was submitted, did not address any question of other detriment to Alinta.

Analysis

- 69) Considering the New Evidence, the issue which fall for determination now in these reasons, is really, whether the New Evidence, when considered in the context of the evidence already led (Exhibits 1 & 2 referred to in *Alinta No 1*), compel me to a different view as to whether the objection is supported to the necessary degree so as to be able to be regarded as arguable, and therefore a factor in favour of the grant of an extension of time.
- 70) I will again state that Senior Counsel submitted that I had set the bar too high, however that is the view I expressed in *Alinta No 1*, and will maintain.
- 71) I note in this respect, that the paragraphs of the New Evidence I have extracted above, are wholly grounded in the possible future wind farms. It is not in dispute, that the wind farms in question are not yet in existence. It is not in dispute that they are proposed to sit upon tenements which have not yet been granted.
- 72) The evidence in Exhibit 1, Mr Rogers' Affidavit refers to the existing business of APA (not itself the extension applicant in this proceeding), however those references (see Para 9 of Exhibit 1) relate to power generated from solar farms. There is no evidence to suggest that the FMG Applications will be detrimental to those solar farms, or the business associated with it.
- 73) It follows the New Evidence does not directly address the question of whether the FMG Applications will otherwise impact deleteriously the business of Alinta in some way unrelated to the as yet ungranted tenements the subject of the Alinta Applications.
- 74) In this respect, the real issue, as I now perceive it, is the reach and correctness of the view I expressed in respect of section 117 in *Alinta No 1*.

- 75) In *Alinta No 1*, I expressed the view that there is no capacity to object relying on section 117, in respect of possible future tenement holdings.
- 76) Evidence sought to be relied upon, which is entirely dependent on the grant of those possible future tenements, does not escape the effect of that reasoning.
- 77) In short, the New Evidence, read fairly, only assists Alinta, were I to depart from the view I have already expressed about section 117. I decline to do so. I note in this respect, that the reasoning in *Alinta No 1* in respect of section 117, was applied by his Honour Warden Maughan in *APA Pilbara Holdings Pty Ltd v Central Pilbara South Iron Ore Pty Ltd & Central Pilbara North Iron Ore Pty Ltd* [2024] WAMW 40.
- 78) I have already referred to the *Richmond No 3* decision and do so again to emphasise the importance of consistency in administrative decision making in this jurisdiction.
- 79) There remains no other evidence in support of the objection as to the alleged determinantal effect of the FMG Applications on Alinta.
- 80) Thus, my view is that the Proposed Objection remains without an evidentiary foundation in that respect. That is a factor against the grant of the Extension Applications.

The Position in this Case Now

- 81) The evidentiary position in this case is the same as in *Alinta No 1*, with the addition of the New Evidence.
- 82) The question then becomes, relevantly for the redetermination of the Extension Applications, whether the New Evidence compels the arrival at a different position on the question of an arguable Objection.
- 83) I have expressed my view above that it does not.

- 84) It follows, that in this case now, there remains no evidentiary basis to a prima facie level in support of the asserted Objections based on the alleged negative impact of the FMG Applications to Alinta.
- 85) When that factor, as reconsidered in light of Exhibit 3, which is consistent with the view I reached in *Alinta No 1*, is placed into the matrix of other factors identified in *Alinta No 1* as being relevant, the overall outcome also remains the same.
- 86) The position remains that there is an unarguable objection sought to be advanced.
- 87) Considering all of the factors in question as they present in the circumstances (and as referred to in *Alinta No 1*), as I consider I must applying *Molopo*, I am of the view that the Extension Applications are not reasonable in all of the circumstances.

Conclusion

- 88) The Extension Applications are dismissed.
- 89) I will hear the parties as to the form of final orders and any costs issues, and to that end note the exiting listing of the matter for mention only on 14 February 2025.
- 90) I maintain that listing and direct the parties to confer in respect of appropriate Orders, necessary to give effect to my reasons.



Warden T W McPhee
7 February 2025