JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	**ALINTA ENERGY CLEAN ENERGY DEVELOPMENT PTY LTD v PILBARA ENERGY (GENERATION) PTY LTD [NO 2] [2025] WAMW 2**
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, application to re-open evidence, Departmental error, turns on its own facts

Legislation:

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

Result: ***Application to re-open granted.***

Representation:

Counsel:

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

Solicitors:

Applicant	:	Austwide Legal
Proposed Objector	:	Ensign 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**
- ***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
- ***Semunigus v Minister for Immigration and Multicultural Affairs*** [2000] FCA 240; 96 FCR 533
- ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Limited (formerly, Pearl Gull Pty) and Silver Gull Iron Pty Ltd*** [No 2] [2022] WAMW 12

- ***Boucher v Australian Securities Commission*** (1996) 71 FCR 122

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*** [2024] WAMW 30, on 19 July 2022 (***Alinta No 1***).

2) I refer to those reasons, and in particular paragraphs 1 – 47 of the Addendum thereto, in respect of why this matter returned before me on the 16th of August 2024 (for directions), and then substantive hearing on 8 October 2024.

3) The question remained as to what to do with the Alinta's interlocutory application dated 21 June 2024 (the Interlocutory Application) as described in the ***Alinta No 1*** decision.

4) Before I come to that question, I must also note a series of other decisions, which are published contemporaneously with this one.

5) Somewhat like a hydra, this matter has developed into more discreet, but interrelated disputes between these parties and others.

6) It is appropriate at this juncture to list them all, at least insofar as they are disputes for which I have determined to publish reasons on this day.

7) In light of events as described in the Addendum to ***Alinta No 1***, and the extent of the evolving broader dispute also involving different parties, I indicated to the participants that I would likely publish a series of decisions contemporaneously.

8) I decided to take that course, as it appeared to me to be a dispute that had the prospect of fracturing into multiple different pieces of litigation across jurisdictions in a most inefficient manner.

9) Considering my responsibility to attend to matters in an efficient manner (insofar as I can), I formed the view that that aspiration is most likely to be achieved, if the possibility of further dispute as to the novel legal issues

across the many different applications, was constrained to a singular point in time, by way of the publication of a number of otherwise different determinations, on the same day.

10) Hopefully that may make any excursion by participants to another place, a more orderly affair than I have faced.

11) I also note that I have given consideration to consolidating the entirety of the dispute between the entities involved (as referred to in my decisions today) in an effort to determine that dispute efficiently.

12) I have determined at this time not to formally consolidate the proceedings, but rather, to provide individual sets of reasons for each aspect of the dispute contemporaneously, as the matters in dispute between the parties which I have now determined are, I expect, likely to give rise to one or more disputes in another place, in a number of possible permutations.

13) In this respect too, it will be noted that there is a decision of his Honour Warden Maughan referred to, ***APA Pilbara Holdings Pty Ltd v Central Pilbara South Iron Ore Pty Ltd & Central Pilbara North Iron Ore Pty Ltd*** [2024] WAMW 40 (***APA No 1)***, which I consider to be related (broadly at least) to these matters as well.

14) Nonetheless, in the fullness of time when the actual tenure applications which might remain to be determined in this jurisdiction fall for consideration, I note in these, and all the other sets of reasons, that I would anticipate that the dispute, or whatever remains of it, will most likely be consolidated.

15) The references to parties and defined terms in these reasons are intended to be consistent with those in ***Alinta No 1.***

16) The interrelated matters which are these:

a. ***Alinta No 1*** – see the reasons ***Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd*** [2024] WAMW 30

b. These reasons, ***Alinta No 2*** – Alinta's application to re-open ***Alinta No 1***, as a result of the matters described in the Addendum to the reasons in that matter. That application was heard before me on 8 October 2024.

c. ***Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd*** [No 3] [2025] WAMW 3, (***Alinta No 3)*** – The decision relating to the consequences of outcome of ***Alinta No 2***, also heard before me on 8 October 2024.

d. ***APA No 1*** **-** Warden Maughan's determination being APA's Applications for an extension of time to object to a number of extractive tenures, determined on the papers and published on 22 October 2024.

e. ***APA Pilbara Holdings Pty Ltd v FMG Pilbara Pty Ltd & Ors*** [2025] WAMW 4, (***APA No 2)*** **-** An Application by APA to Extend time to file objections to FMGs & Others extractive Applications with a hearing conducted before me on 23 October 2024.

f. ***APA Pilbara Holdings Pty Ltd v Muccan Minerals Pty Ltd & Ors*** [2025] WAMW 5 (***APA No 3)*** **-** An Application by APA to Extend time to file objections to Muccan Minerals & Others extractive Applications determined on the papers and published today.

17) Collectively, I will describe the whole of the disputes between these parties and others as referred to in the list of reasons referred to above, as the Alinta APA Dispute.

18) It would also be remiss of me to proceed without noting, that FMG's proposed energy corridor (arising from the FMG Applications referred to in ***Alinta No 1***), and the series of applications associated with it, are in train themselves, involving a variety of different parties, with various mention dates and dispute levels.

19) The precise number of individual disputes arising from the Alinta Applications as described in the ***Alinta No 1*** is not known to me with

clarity, nor the number of FMG Applications pertaining to its proposal as I have described it in ***Alinta No 1***.

20) The inability of the current systems utilised to manage the jurisdiction, to readily identify and track individual applications which are either related or part of a larger project (as that word may be readily understood in the mining context), hampers the ability of the Wardens to efficiently manage and determine them.

Further Background: A Study in Failed Case Management

21) Sometimes, despite one's best efforts, a ranging dispute between two very well resourced litigants, just gets out of hand. Such is the case here.

22) This dispute really concerns the conflict between Alinta and APA on the one side, and FMG on the other.

23) Both sides have made a number of discreet applications, by the Alinta and APA parties on the one hand, and by FMG on the other, for a series of miscellaneous licence applications which, when regarded objectively in total, amount to corridors.

24) Whilst FMG has sought to keep its powder dry to an extent, it appears tolerably plain from the materials before me, that both sides seek to establish wind farms and transmission corridors, to enable the supply of energy produced on the windfarms, to mining operations in the vicinity.

25) Regard may be had to the map in Schedule 1 of ***Alinta No 1*** for the geographical context.

26) In written submissions filed 6 September 2024, Alinta set out the course of events in a detailed chronological manner.

27) That chronology is helpful where it details the relevant factual events, and I have extracted it, and reproduce it in Schedule 1 of these reasons.

28) These reasons address the matter falling from the Addendum to the reasons I have referred to as ***Alinta No 1***.

29) Alinta submitted I ought promptly hear the Interlocutory Application to adduce further evidence, which was made after I reserved the decision in the matter, but not brought to my attention until after I had published my reasons on 15 July 2024.

30) It will be noted from the Addendum to which I have referred, that that Interlocutory Application was not considered by me before I published my decision, as it was never conveyed to me in any form.

31) I learned of it after the publication of my reasons, which led to the publication of the Addendum, the subsequent hearings, and now these reasons.

32) FMG takes a position that I ought not do that, and there is no reason to depart from the reasons and conclusions set out in ***Alinta No 1***.

Is there any Question of Apprehended Bias following Alinta No 1?

33) Concerns as to apprehended bias arising on my part arising from ***Alinta No 1*** was not a matter ventilated by any party, however in the rather peculiar circumstances presenting, I felt compelled to raise it myself.

34) I considered I ought ask the parties if there was any difficulty in a proposal that I ought hear Alinta's late Interlocutory Application, or whether I ought refer it to be heard by another Warden.

35) In ***Forrest & Forrest Pty Ltd v Minister for Aboriginal Affairs*** [2024] WASCA 96 (9 August 2024) at [90 – 103] Buss P, with whom Vaughan JA largely agreed, addressed a question of apprehended bias in the SAT in respect of a rehearing of a matter which had been the subject of a successful appeal.

36) That de novo type hearing, seems to me to be, in effect, what is sought here by the Alinta.

37) In particular, I note at [102] Buss P said:

a. *In British American Tobacco [139], Heydon, Kiefel and Bell JJ observed that it was recognised in Livesey that a fair-minded lay observer might reasonably apprehend that 'a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case'. Their Honours added that the recognition in Livesey was 'a recognition of human nature' [139].*

38) In this case before me I have previously expressed a view, in writing, that the evidentiary position of Alinta was inadequate.

39) In this matter, I was, in broad terms, quite critical of the approach taken on the question of the evidentiary support provided by Alinta.

40) I also expressed what might be regarded as a significant degree of frustration at the state of affairs as it came to be, and the errors made by the Department, and additional matters which in my view led to those errors.

41) It is put to me in this case now, that Alinta seeks to cure the evidentiary problems with the new evidence now sought to be tendered, after the reservation of the decision, and the publication of the ***Alinta No 1*** reasons with the Addendum.

42) On 19 August 2024 at the directions for the matter, I raised this issue with the parties. On that day, both parties indicated they held no concern as to any apprehended bias.

43) Nonetheless, I asked the parties to turn their minds to the question and addressing it in written submissions to be filed for the hearing (which then occurred on 8 October 2024) giving rise to these reasons.

44) Both parties did so. Both parties expressly disavowed any concern as to apprehended bias.

45) I am (and always was) satisfied I am able to bring an objective mind to the matters in dispute.

46) Furthermore, and as a result of what was effectively a joint submission by the parties which I accept, I am satisfied, and there is no contest before me, that an objective observer in possession of the relevant information, would hold no such concerns.

Alinta's position on the Application to Reopen

47) Stated briefly, Senior Counsel for Alinta submitted that once jurisdiction and power were established, (which was not ultimately disputed at hearing), the question, for an administrative decision maker, was really governed by the overarching need to arrive at the correct and fair decision in any particular circumstance.

48) In this case, the nature of events was such as to compel a view that in order to deal with the overall dispute fairly, I was required to give detailed consideration to the new evidence sought to be adduced by way of Alinta's Interlocutory Application, namely the Affidavit of Mr Campbell dated 21 June 2024 (the New Evidence).

FMG's Position on the Application to Reopen

49) FMG opposed the application to reopen on the basis of the discretionary aspects of the relevant power.

50) FMG's submission was that Alinta had not, in any event been materially denied procedural fairness, as when the conduct of the entirety of the proceeding was given consideration, no unfairness arose.

51) FMG buttressed that submission with a reliance on the notion of the finality of proceedings, and the submission that Alinta ought to have been on notice of the difficulties the Extension Applications faced in light of my decision in ***Bellavista Resources Ltd v Hamersley Iron Pty Ltd*** [2023] WAMW 49, and the reliance placed upon it by FMG in written submissions.

52) Whilst FMG accepted the fact of the error by the Department resulted in what might be referred to as some kind of apprehended unfairness, or unfairness at first glance, in essence, FMG submitted that the error did not materially impact the conduct of the proceedings, so as to warrant an order to re-open.

53) In this respect, FMG also raised the spector of a flood gates argument, that to permit Alinta to re-open in the manner proposed, would encourage other litigants to seek to adduce late evidence after hearings generally, to address shortcomings which might come to light in the conduct of a hearing.

Relevant Law

54) Alinta's written submissions went to some length to set out the jurisdictional basis sought to be advanced to permit the matter to be reopened to consider the New Evidence.

55) FMG conceded there was such power but resisted it on discretionary grounds.

56) That concession was entirely proper, however given the issue is one of power, it is appropriate to briefly state the relevant principles.

57) In paragraph 32 of the written submissions by Alinta filed 6 September 2024, the following was submitted:

a. *In Re Adams and the Tax Agents Board13, Brennan J observed that while an administrative body cannot judicially pronounce upon the limits on its authority "its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority".14 This is really to say that an administrator may determine his own competence to proceed.*

58) Relevantly, the above submission led into a discussion about the relevant principles of '*functus officio*' and whether I had power to reopen the evidentiary position in the sorts of circumstances presenting in the Addendum to ***Alinta No 1***.

59) In short terms, it was suggested that as I had expressly recalled the parties to make final orders following the decision, that the decision could not have been said to have been perfected.

60) I agree. See also ***Semunigus v Minister for Immigration and Multicultural Affairs*** [2000] FCA 240; 96 FCR 533

61) I also took a similar view in ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Limited (formerly, Pearl Gull Pty) and Silver Gull Iron Pty Ltd*** [No 2] [2022] WAMW 12.

62) I have, in previous decisions, opined at some length as to the importance of consistency in administrative decision making. Those views are applicable here too, in this context.

63) I further accept Alinta's submission that there is a statutory basis for the exercise of the relevant power in the circumstances.

64) I consider that basis arises from both sections 48 and 55 of the ***Interpretation Act*** WA 1984, as well as a number of the Regulations, properly construed, namely 152 and 154.

65) Alinta also cites the following from ***Minister for Immigration and Multicultural Affairs v Bhardwaj*** (2002) 209 CLR 597 (***Bhardwaj)****:*

a. 57 In *Bhardwaj*, Gaudron and Gummow JJ observed that:

i. "*[53]…[A] decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if [the decision-maker] proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed."30*

ii. In a separate judgment, Gleeson CJ observed as follows:

iii. *[5] There is nothing in the nature of an administrative decision which requires a conclusion that a power to make a decision, once purportedly exercised, is necessarily spent. In Ridge v Baldwin [1964] AC 40 at 79., Lord Reid said: "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid."*

iv. *[6] That general proposition must yield to the legislation under which a decision-maker is acting. And much may depend upon the nature of the power that is being exercised and of the error that has been made.*

v. *[8]… the facts of the present case show, circumstances can arise where a rigid approach to the principle of functus officio is inconsistent with good administration and fairness. The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers or, to use the language of Lord Reid, reconsider the whole matter afresh?"31*

66) Paragraphs 61 & 62 of Alinta's submissions also bare repeating:

a. *The High Court in Craig identified that failure to observe some applicable requirement of procedural fairness could constitute a reviewable error38 and failure to accord procedural fairness is now understood to be a jurisdictional error.39 The term "procedural fairness" is used interchangeably with "natural justice"'40 which the Warden is bound to accord under reg.154(1)(b) of the Mining Regulations. The primary aim of procedural fairness is to avoid practical injustice41 and a well established principle of procedural fairness is the "hearing rule": that an administrative decision-maker must afford a person whose interests will be adversely affected by a decision an opportunity to present his or her case. Breach of the principle by the decision-maker is a denial of procedural fairness and will be held void.42*

b. *62 Here, the failure of the office of the Warden to:*

i. *(a) hear the evidence the subject of the Further Evidence Application (a failure of procedural fairness and natural justice); and/or*

ii. *(b) consider relevant material put before him prior to making a decision, being the Further Evidence Application including the Second Affidavit of Mr Campbell affirmed 21 June 2024,*

c. *comprise jurisdictional errors, meaning the Warden is not functus officio.*

67) With respect, the legal submission made there by Senior Counsel is correct, and I accept it.

68) There is a matter which I must state though. In para 62 and 63 of the submissions as referred to above, there are two factual matters which do not materially alter the determination in this matter, however, cannot stand uncorrected.

69) The first arises from the statement of "the office of the Warden" as being responsible for the error in question.

70) I wish to record that the (hardworking and diligent) staff who undertake the Wardens Court administration, are not mine, in any way shape or form, as that phrase might be understood. The Court staff who attend are not my associates as that position may be commonly known in superior Courts.

71) They are staff who are employed by the Department of Energy, Mines Industry Regulation and Safety (the Department), as part of the resource tenure division of that Department.

72) They are not subject to my express control, though will, in the usual course follow most of the directions I give.

73) There are some further staff, who are employed by the Department of Justice (See Addendum in ***Alinta No 1***), who are again (as has been made very plain to me) not my staff to control.

74) Nor do I have any actual control over the case management systems elected to be utilised for the Wardens Court by the Department.

75) Further, in this case it is said by Alinta that I listed the Interlocutory Application for mention on 5 August 2024. I did not.

76) I did not see it until after the initial publication of my reasons in ***Alinta No 1***. The precise reason as to why and how it was initially listed for 5 August 2024 is not entirely clear to me, however it was not done by me nor any other Magistrate, at least insofar as I am able to determine.

77) Whilst it is not strictly speaking relevant given my views expressed below, what appears to have occurred is the Mining Registrar in consultation with the Wardens Court team leader in Perth, without reference to me, determined 5 August 2024 to be appropriate for the first return of the Interlocutory Application.

78) I add, there was plainly no *mal fides* involved. It was simply an error. The necessary connection between the interlocutory application and my reserved decision was simply not made. As I have already said in the addendum to ***Alinta No 1***, that error arises from the convoluted, inefficient and impractical manner in which the Wardens Court is (and always has been) operated.

79) The Wardens Court registry staff, ought be, at the least, co-located with the Wardens, and equipped with an appropriate case management system to enable the identification of urgent matters, requiring consideration, such as occurred here.

80) It follows from the above, barring the factual matter to which I have just referred, that I accept Alinta's submission that I have jurisdiction and power to reopen the matter in the manner sought.

81) Again, that was conceded by FMG, and properly so.

Analysis

82) Given the quite proper concession by FMG, that the contest is on the question of materiality of the error, the analysis becomes relatively straightforward.

83) It seems to me that to determine this dispute, the necessary approach is to sequentially consider the position.

84) There is no dispute that the Interlocutory Application to adduce the New Evidence, was made prior to the ***Alinta No 1*** reasons being initially published.

85) It was not considered as part of the decision in ***Alinta No 1***, which was adverse to Alinta.

86) There can therefore be no dispute that Alinta was denied absolutely, the opportunity to be heard on the matters raised in the Interlocutory Application.

87) That denial of procedural fairness, occurred and was caused by, an error in the handling of the filed Interlocutory Application, by the Wardens Court registry.

88) In my view, the proper characterisation of the position is entirely consistent with the circumstances giving rise to the ***Bhajwah*** decision.

89) It is therefore not a case where it is necessary to determine whether I had or had not taken into account some matter, which I had, for example, failed to expressly address in my reasons.

90) It simply was not done at all, and I did not turn my mind (as the decision maker), to the question asked in the late Interlocutory Application, before making my decision.

91) It follows that clear error is established. Alinta was denied procedural fairness.

92) The circumstances presenting are such, in my view, as to amount to a fundamental error of process, so as to be of itself without more, a jurisdictional error of a reviewable kind.

93) I will also deal with the question of materiality in some more detail.

94) The question, so far as I am able to perceive it, is really whether that error as identified has denied Alinta the realistic possibility of a different outcome than that reached in ***Alinta No 1***.

95) My reasons in ***Alinta No 1*** identified a sharp critique of the evidentiary position advanced by Alinta.

96) The Interlocutory Application plainly sought to address those concerns (which were apparent at the hearing of the matter given the fairly robust exchanges which occurred with counsel).

97) The New Evidence was not sworn in light of my reasons in ***Alinta No 1***, but before them. In this respect, they were plainly not responsive to the reasons, but rather responsive to the hearing, and a desire to seek to address perceived shortcomings prior to the final determination.

98) That makes the circumstances rather unique.

99) Having cursory regard to the New Evidence of Mr Campbell now sought to be advanced, I note immediately he appears to be better qualified to give the sort of evidence that he purports to, than Mr Rogers was.

100) He is an engineer. He offers on Affidavit, evidence directed to some of the matters I referred to by their absence, as part of the process of reasoning leading to my views as expressed in ***Alinta No 1***.

101) Having regard to the High Court authority I have already referred, and to ***Boucher v Australian Securities Commission*** (1996) 71 FCR 122 as it was referred to me by Senior Counsel for Alinta, I do not consider for the purposes of these reasons, that it is necessary to come to a finalised view as to the impact of the new evidence, in considering the question of whether to reopen.

102) That is particularly so in circumstances where I have identified that the error in question in this case, may be regarded as a fundamental one.

103) Rather, I consider that if I am satisfied that there is a possibility that the overall outcome might have been different had the error not occurred, I ought grant the application, and then consider the material in more detail.

104) I am so satisfied.

105) There can be no doubt that Alinta filed its application to adduce further evidence prior to the publication of my reasons.

106) In my view they were entitled to be heard about whether the New Evidence might have materially impacted the outcome of the matter in a substantive manner, rather than summarily dismiss the Interlocutory Application, based on an ex post facto assessment as to whether the New Evidence would (rather than might) move the needle on the eventual outcome.

107) I am not able to escape a view that the fundamental error on the part of the systems of the Wardens Court, has resulted in a fundamental denial of procedural fairness to Alinta, and would be seen as such by any observer, largely irrespective of what the New Evidence contained.

108) That error must be remedied, and in my view in the circumstances, must also be seen to be remedied.

109) I will briefly address the submission by FMG as to floodgates directly, as nothing in these reasons ought be taken to be an encouragement for parties to seek to adduce evidence by way of interlocutory application after hearing, as being the sort of event which may occur as a matter of course. It ought not.

110) It should be clear from my comments above, that such events ought be exceptional in nature, and arise only when necessary to ensure procedural fairness to both parties, as that concept applies to the whole of any particular proceeding.

Conclusion

111) The application to reopen the determination must be granted, with due consideration subsequently given to the New Evidence.

112) The Interlocutory Application dated 21 June 2024 sought the following orders:

a. 1) Alinta Energy Clean Energy Development Pty Ltd, the Applicant for an Extension of Time, have leave to rely on further evidence in support of its Application, being the second affidavit of David Keith Campbell affirmed 21 June 2024.

b. 2) No Order as to costs.

113) I will make the first Order sought, and further, order that the New Evidence will be permitted to be adduced, as Exhibit 3 in that dispute.

114) The effect of that decision is contained in reasons published contemporaneously with these reasons, though separately, as ***Alinta No 3***.

115) 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.

116) I maintain that listing and direct the parties to confer in respect of appropriate Orders necessary to give effect to my reasons.

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Warden T W McPhee
7 February 2025

Schedule A
Chronological Events taken from Alinta's submissions dated 6 September 2024

Background

8 On 20 December 2023, AECED's solicitors (then, Austwide Legal) filed the EOT for the objections numbered 691874-92 (**Objections**). Mr Evan Rogers affirmed an affidavit on 20 December 2023 in support of the EOT. That affidavit attached a copy of the Objections and copy of a map of the tenement applications. No separate submissions were filed at that time.

9 The Objections were made on grounds that the Applications lodged by PEG may have a detrimental impact on the Chichester Wind Project[1], a wind energy production infrastructure project to be located on AECED's pending applications for miscellaneous licences L46/148, L46/159, L46/163, L46/164, L46/165, L46/167 and L46/181 (**Alinta Licences**).[2]

10 AECED applied for the Alinta Licences between 1 September 2020 and 6 April 2023; those applications are subject to objections, which are still to be resolved. PEG has not objected to the Alinta Licences. The Applications are located within (at most) 10 - 15 kilometres of the Alinta Licences.[3]

11 The Applications lodged by PEG have been made for purposes including a power generation and transmission facility, and PEG has indicated its intention to

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[1] Note that on 1 November 2023, APA Group Ltd acquired Alinta Energy Pilbara Holdings Pty Ltd and Alinta Energy (Newman Storage) Pty Ltd. APA Group Ltd did not acquire AECED as part of the transaction, but at settlement of the transaction APA Group Ltd entered into an agreement with AECED that the Alinta Licences would be transferred to APA Pilbara Holdings Pty Ltd after they were granted. See copies of ASX announcements concerning the acquisition dated 23 August 2023 and 1 November 2023 at pages 21 and 28, being attachments "DKC-2" and "DKC-3" of the Affidavit of David Campbell affirmed 19 May 2024. APA Group Ltd (rather than AECED) will be developing the Chichester Wind Project.
[2] See Form 16 Objections and the Affidavit of Mr Rogers affirmed 20 December 2023 at [34]-[37].
[3] See Second Affidavit of Mr David Campbell affirmed 21 June 2024 at [14]-[15] and map at attachment "DKC-2" of that affidavit.

construct its own windfarm project on the Applications[4], though the details of the project and precise infrastructure planned by PEG has not been particularised in these EOT proceedings.

12 On 12 July 2024, PEG filed particulars regarding related applications by PEG for miscellaneous licences, L46/197, L46/199, L46/200 and L46/203 (as to which AECED has lodged "in-time" objections due to direct overlaps with the Alinta Licences). These four additional applications by PEG form part of the same contiguous block as the Applications and are for the same project.[5] PEG's particulars of application dated 12 July 2024 provide that L46/197, L46/199, L46/200 and L46/203 are intended to host wind turbines as part of Fortescue Limited's "Boney [sic] Downs Generation Hub" and AECED anticipates that the particulars for the Applications will state that the Applications are for the same purpose.

13 On 15 February 2024, PEG filed submissions in opposition to AECED's EOT.

14 On 27 February 2024, AECED filed counter-submissions to PEG's submissions dated 15 February 2024.

15 On 15 March 2024, PEG filed submissions in reply to AECED submissions dated 27 February 2024, but these submissions were not provided to AECED at that time. They were not provided to AECED until 2 May 2024 due to an administrative oversight by DEMIRS. AECED was not aware of those submissions prior to 2 May 2024.

16 On 20 May 2024, AECED filed submissions in response to PEG's submissions dated 15 March 2024 (and received by AECED on 2 May 2024), along with the affidavit of Mr David Campbell, Head of Power Development for APA Group Ltd, which was affirmed 19 May 2024.

[4] See PEG submissions dated 15 March 2024 at [17], [23]; see also Transcript of 13 June 2024 hearing at pages 75-76.
[5] See map at Schedule 1 and paragraphs [22] and [199] of *Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd* [2024] WAMW 30.

17 On 13 June 2024, Warden McPhee heard the EOT. At the hearing Warden McPhee reserved his decision on the EOT, and indicated that it would be delivered before 16 August 2024.

18 On 21 June 2024, AECED filed the Further Evidence Application. The Further Evidence Application included the supporting affidavit of Mr Rogers affirmed 21 June 2024 and the Second Affidavit of Mr Campbell affirmed 21 June 2024. Mr Campbell is the Head of Power Development for APA Group Ltd, is a qualified mechanical engineer, holds a Masters' Degree in Management and Engineering of Environment and Energy and has extensive experience in the management and engineering of energy projects, particularly in relation to wind energy projects.[6]

19 The Second Affidavit of Mr Campbell relates to the potential impact of the planned PEG windfarm on the planned Chichester Wind Project, given the close proximity between them, and attaches an article from Nature Energy tiled "Costs and consequences of wind turbine wake effects arising from uncoordinated wind energy development" (see "DKC-1" at page 5 of the Second Affidavit of Mr Campbell). AECED submits that this material supports the evidence of Mr Rogers by his affidavit of 20 December 2023[7] in that it shows that:

(a) 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 wind speed)[8];

(b) a recent study shows wind speed deficits could occur even up to 50 kilometres downwind[9] (which is a much greater distance than that between the Applications and Alinta Licences); and

(c) wake effects generated by wind farms had the potential to cause economic losses of several million dollars per annum to wind farms within 50 kilometres of other windfarms[10].

[6] See Second Affidavit of Mr David Campbell affirmed 21 June 2024 at [5]-[8].
[7] See [24] and [34]-[36] of Mr Rogers' affidavit affirmed 20 December 2023.
[8] Second Affidavit of Mr David Campbell affirmed 21 June 2024 at [9], [11].
[9] Second Affidavit of Mr David Campbell affirmed 21 June 2024 at [12].
[10] Second Affidavit of Mr David Campbell affirmed 21 June 2024 at [12].

20 The Further Evidence Application was filed with DEMIRS electronically by Austwide Legal on 21 June 2024 via Mineral Titles Online submission (submission ID 546545) and was then sent by email by Mr Rogers on 21 June 2024 to the Warden's Officer at wardens.officer@dmirs.wa.gov.au, copied to PEG's solicitors.

21 The Further Evidence Application was stamped received by DEMIRS on 24 June 2024.

22 On 25 June 2024, a mention hearing of the Further Evidence Application was listed for 5 August 2024, noting that regulation 153(3) of the *Mining Regulations* provides in relation to an application for interlocutory orders or directions: *"On receipt of the application, **the warden** must fix a date and time for the hearing of the application"* (emphasis added). That listing was communicated to the parties by email from Mr Geoff Benson, Mining Registrar of DEMIRS to the solicitors for AECED and PEG dated 25 June 2024.

23 On 15 July 2024, Warden McPhee published the Warden's Reasons.[11]

24 As published on 15 July 2024, the Warden's Reasons made no reference to the Further Evidence Application, although the Further Evidence Application had been listed for mention. Notably, the Warden's Reasons found the following at [201]-[202]:

> *"In my view, the factors to be considered are fairly evenly balanced. Ultimately in light of that balance, that which determines this application for an extension of time, **is really the absence of any evidence of any weight** in support of the contended detriment to Alinta of the Applications."* (emphasis added)

25 On 15 July 2024, upon receipt of the Warden's Reasons, AECED's representatives, Austwide Legal, wrote a letter to the Warden's Officer. On 16 July 2024, the Warden then removed the Warden's Reasons from DEMIRS' website and relisted the matter for mention on 19 July 2024.

26 On 19 July 2024, the matter went before the Warden for mention. At that mention the Warden made orders to the effect that:

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[11] *Alinta Energy Clean Energy Development Pty Ltd v Pilbara Energy (Generation) Pty Ltd* [2024] WAMW 30 at [210]-[211].

(a) the EOT be listed for mention on 16 August 2024;

(b) the Further Evidence Application be listed for mention on 16 August 2024;

(c) the parties are directed to confer and attend on 16 August 2024 with agreed of competing minutes;

(d) no order as to costs; and

(e) the listing of the Further Evidence Application on 5 August 2024 be vacated.

27 At the mention, the Warden said that on 16 August 2024 he wished to be addressed on his power and jurisdiction to give reasons further to the Warden's Reasons and, if he did possess that power, whether he should "re-open" the case in the circumstances.

28 On 19 July 2024, following the mention, Warden McPhee re-published the Warden's Reasons with the Addendum.