JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	**COVENANT FINANCE PTY LTD V SHIRE OF WAROONA [NO 2] [2025] WAMW 17**
CORAM	**:**	WARDEN T MCPHEE
HEARD	**:**	On the papers. Submissions filed 19 May 2025 (Applicant) and 26 May 2025 (Objector)
DELIVERED	**:**	4 June 2025
FILE NO/S	**:**	Objection 692337
TENEMENT NO/S	**:**	Application for Prospecting Licence 70/1770
BETWEEN	**:**	**COVENANT FINANCE PTY LTD** (Applicant) AND **SHIRE OF WAROONA** (Objector)

Catchwords: Costs, frivolous, novelty, turns on its own facts.

Legislation:

Mining Act 1978 (WA): sections 23, 24 and 120
Mining Regulations 1981 (WA): Regulation 165(4)

Result: ***1) Application for costs dismissed.***

Representation:

Counsel:

Applicant	:	N/A
Objector	:	N/A

Solicitors:

Applicant	:	Ensign Legal
Objector	:	Jackson MacDonald

Cases referred to:

- ***Covenant Finance Pty Ltd v Shire Of Waroona*** [2025] WAMW 11;
- ***William Robert Richmond v Regis Resources Ltd*** [No 3] [2023] WAMW 44;
- ***ACN 629 923 753 v Corker*** [2023] WAMW 1;
- ***MCA Nominees Pty Ltd v Lambretcht*** [2021] WAMW 21(S);
- ***Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2022] WAMW 13;
- ***Devin William Mclevie v Robert Peter Teune And Phoebe Zara Unkovich For One Part, And Vernon Wesley Strange For The Other*** [No 2] [2024] WAMW 48;
- ***Striker Resources v Benrama and Ellison*** (2001) WAMW 7;
- ***and Margaret River Resources Pty Ltd v Shire of Augusta Margaret River*** [2001] WAMW 8;
- ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468.

Introduction

1) I refer to my reasons in ***Covenant Finance Pty Ltd v Shire Of Waroona*** [2025] WAMW 11 (the Reasons). The Applicant now seeks costs. The Applicant filed written submissions on 19 May 2025 and the Objector responded on 26 May 2025.
2) The parties agreed I could deal with the costs dispute on the papers.
3) The relevant principles are not in issue, and set out in a number of recent decisions, namely:
    a. ***William Robert Richmond v Regis Resources Ltd*** [No 3] [2023] WAMW 44 (***Richmond No 3***);
    b. ***ACN 629 923 753 v Corker*** [2023] WAMW 1;
    c. ***MCA Nominees Pty Ltd v Lambretcht*** [2021] WAMW 21(S);
    d. ***Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2022] WAMW 13;
    e. ***Devin William Mclevie v Robert Peter Teune And Phoebe Zara Unkovich For One Part, And Vernon Wesley Strange For The Other*** [No 2] [2024] WAMW 48.
4) The Applicants position is that the conduct of the matter was frivolous, as in bound to fail and without merit, and plainly so on the pleaded case.
5) The Objectors position is that the position taken cannot be regarded as frivolous, even though the position taken ultimately failed.
6) In the final paragraph of the Objectors submissions, an application is made for its costs of the costs dispute. It says that there was nothing in the conduct of the Dispute which grounds a costs order, and so it ought be considered to be frivolous. I will return to the Shire application for costs at the end of my reasons.
7) If regard is had to the Reasons, it will be seen that the issues to be determined involved a marking out dispute, and a dispute associated with asserted public interest arising from section 120 of the Act considerations, and the operation of matters associated with the operation of section 23 and 24 of the Act.

8) As will be seen in the Reasons, none of the matters referred to above were able to be addressed by way of direct authority.

9) The marking out dispute involved the consideration of a novel (so far as I am aware) dispute as to whether the Form 20 needed to be visible.

10) The 'public interest' disputes associated with the environmental reserve matters, and the impact of section 23 and 24 of the Act, likewise, gave rise to a dispute that was not directly able to be addressed by direct authority.

11) So too the section 120 of the Act matter, which raised a mandatory consideration associated with town planning matters.

12) On the broader notion of 'public interest', the central plank of the approach in the Reasons is that where there are provisions in the Act, or alternatively, there is a regulatory framework which addresses the factual matter raised (in this case, the section 120 of the Act matters and the section 23 & 24 of the Act matters), the position to be taken by an Objector should be raised in the context of the applicable sections of the Act, or some other regulatory framework, rather than asserting that (or those) concern as a 'public interest' ground. I have said similar things in a number of other recent decisions referred to in the Reasons.

13) However, the determination that I have made (that the approach taken to refer to the various matters as 'public interest' grounds was erroneous), does not immediately mean that the substance of the matters referred to, were (and on the Applicants costs submissions would always be) of no merit at all in terms of an Objection, even were it properly framed.

14) Whilst I consider the position, I take on the relevant questions in this case to be correct, the position I have arrived at in the Reasons is novel in respect of the matters specifically considered.

15) As I understand it, part of the submission by the Applicant in support of the position taken on costs, is that the view that I have expressed in a number of decisions now, that where there is an existing mechanism under the Act, or some other regulatory framework which addresses the factual issue in play,

then the objection ought not be framed as a 'public interest' ground, means that such objection so able to be characterised is doomed to fail, without more.

16) That however, and with respect, places a gloss on the approach I have taken. It may be that in some cases, the factual matters relied upon are able to be relied upon to form the basis of a sound objection, properly framed under the provisions of the Act.

17) The point I have sought to make is that those matters are not 'public interest' matters as understood in the context of the Act.

18) Thus, in my view it will depend on the substance of the matter, and the relevant provisions of the Act (or other legislative framework) failing to be applied, which will determine in each case, whether the objection has any merit, or whether it may be regarded as frivolous.

19) As indicated, as far as I am aware, the section 120 of the Act issue, and the section 23 & 24 of the Act issue, were novel matters not previously considered in this jurisdiction.

20) If regard is had to the Reasons, it will be seen that in expressing my view I had regard to the mandatory consideration of section 120 of the Act, however determined the Objection on that basis ought fail as a result of the absence of any concern supported by evidence that was not addressed by reference to the section 23 & 24 of the Act matter.

21) My reasoning in respect of the section 23 & 24 argument was different, broadly that that mechanism would operate irrespective of my view, and there was no statutory foundation for me to provide any kind of advisory opinion to the Minister in respect of it.

22) In my view, the Court should be slow to stifle novel arguments by declaring them frivolous after the event of a loss, where there is no binding or guiding authority.

23) Further and in any event, in my view the reasoning applied by the Objector to arrive at a view that the matters raised were 'public interest' concerns which I ought to opine on, relying on ***Striker Resources v Benrama and Ellison*** (2001)

WAMW 7 and ***Margaret River Resources Pty Ltd v Shire of Augusta Margaret River*** [2001] WAMW 8, was arguable.

24) That novelty extends to the marking out point as well.

25) I will add that on the point of marking out, given the effect of the decision in ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468, that I expect parties in the jurisdiction will continue to be beset by arguments relating to the size and shape of trenches, rocks, posts, angles from the sun and who knows what else.

26) Perhaps in the fullness of time, the font size on a Form 20 will be called into question and be the subject of a contested application, given what I have said in the Reasons.

27) Whilst such points are no doubt frustrating for all concerned (and make for difficult cases to determine), they cannot be regarded as frivolous as a result of the jurisdictional effect of ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468, save in circumstances where they are advanced into the face of an existing determination on any particular point.

28) In that respect, I have set out in ***Richmond No 3*** my views as to consistency, and absent authority on any particular point, it seems to me that it would seldom be appropriate to determine that a novel argument raised in good faith (as occurred here) on the construction and operation of provisions of the Act unclarified, is frivolous for the purposes of Regulation 165(4) of the Regulations.

29) That novelty, inherent in all of the matters in issue in this dispute and resolved in the Reasons, is in my view sufficient to dispose of the application for costs by the Applicant.

30) There is no other basis for an order for costs to be made in favour of the Applicant; no evidence of undue delay or improper purpose was proffered, nor is any to be found in the evidence.

31) As a result, my view is that the Objection failed but was not frivolous in substance or conduct.

32) I have mentioned above that the Objector moved for an order for the costs of the costs dispute. The Applicant has not (so far as I am aware) filed any submission on the question of the costs said to be payable by it.

33) In an effort to avoid a Kafkaesque set of spiralling arguments about the costs of costs, I will simply say this. There is nothing in the conduct of the application for costs by the Applicant, which rises to the level of the frivolous as that term has been interpreted in this jurisdiction.

34) As set out in the Reasons, the Applicant was successful in all aspects of the dispute before me, for largely the reasons advanced by it.

35) The conduct of the costs dispute itself was efficiently undertaken, with written submissions filed, and no hearing called for. In those circumstances, the fact that it has failed, does not make it frivolous.

36) There is no order as to costs.

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Warden T W McPhee

4 June 2025