JURISDICTION	:	MINING WARDEN
LOCATION	:	PERTH
CITATION	:	POLARIS METALS PTY LTD v THE WILDERNESS SOCIETY WA, HELENA AND AURORA RANGE ADVOCATE INC & WILDFLOWER SOCIETY OF WESTERN AUSTRALIA [2017] WAMW 21
CORAM	:	WARDEN J O'SULLIVAN
HEARD	:	1 August 2017
DELIVERED	:	20 October 2017
FILE NO/S	:	Application for General Purpose Lease 77/124; Application for Miscellaneous Licence 77/270; Objections: 445769, 445855, 446117, 445854, 446528
TENEMENT NO/S	:	
BETWEEN	:	**POLARIS METALS PTY LTD** (Applicant) AND **THE WILDERNESS SOCIETY WA** (First Objector) **HELENA AND AURORA RANGE ADVOCATE INC.** (Second Objector) **WILDFLOWER SOCIETY OF WESTERN AUSTRALIA INC.** (Third Objector)

Catchwords: *Applications for General Purpose Lease and Miscellaneous Licence; environmental objections, role of the Warden.*

Legislation:

- *Mining Act 1978 ss6, 46A*
- *Environmental Protection Act 1986, ss5, 15, 16, 41A, 44, 45 & 47.*

Cases referred to:

- ***Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343
- ***Baxter v Serpentine – Jarrahdale Ratepayers and Residents Association (Inc)*** Unreported; Perth Wardens Court; 8 July 1999; Vol.14 No.2
- ***Poelina v Blackfin Pty Ltd*** [2012] WAMW 34
- ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153;
- ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd and Another*** [2007] 34 WAR 403
- ***Darling Range South Pty Ltd v Ferris*** (2012) WAMW 12
- ***Prima Resources Pty Ltd v Bartholomaeus & Sharp*** (2015) WAMW 11
- ***Boadicea Resources Ltd v Sharp & Ors*** (2016) WAMW 6
- ***FAI Insurances Ltd v Winneke*** (1981-1982) 151 CLR 342
- ***DFD Rhodes Pty Ltd v FMG Pilbara Pty Ltd*** [2005] WAMW 23
- ***Coastal Waters Alliance of Western Australia Incident v Environmental Protection Authority; Ex parte Coastal Waters Alliance of Western Australia Incident*** (1996) 90 LG ERA 136
- ***Lavender v Minister for Housing*** [1970] 1 WLR 1231
- ***Tortola v Saladar Pty Ltd*** [1985] WAR 195
- ***Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Co Pty Ltd*** (1990) 1 WAR 546
- ***Striker Resources NL v Benrama Pty Ltd and Bruce Ellison and Robyn Ellison*** [2001] WAMW 7
- ***FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation*** [2011] WAMW 13

Result:

1) It is recommended that the Minister for Mines grant G77/124 subject to him giving consideration to EPA Report 1599 together with any further materials and submissions provided by the Applicant and Objectors and the resolution of proceedings under Part IV of the *Environmental Protection Act 1986*.

2) L77/270 is granted subject to proceedings under Part IV of the *Environmental Protection Act 1986* and the Minister for Mines granting M77/1097.

Representation:

Counsel:

Applicant	:	Mr T Masson
Respondent	:	Mr J Southalan

Solicitors:

Applicant	:	Ensign Legal
Respondent	:	The Environmental Defender's Office (WA)

REASONS FOR DECISION

Background

1 These proceedings concern the Applicant's applications for:

(a) General Purpose Lease 77/124 including:

(i) Erecting plant and operating machinery;

(ii) Depositing and retreating materials; and

(iii) Other purposes directly connected with mining operations; and

(b) Miscellaneous Licence 77/270 for the purposes of a communications facility, road pipeline, powerline and taking water ("the Applications").

2 The decision whether or not to grant an application for a General Purpose Lease is a matter for the Minister for Mines upon receiving a recommendation from the Warden. The decision whether to grant a Miscellaneous Licence is a matter for the Warden.

3 Together with 6 other applications for mining tenements, some of which have already been granted or recommended for grant, the Applications are part of an iron ore mining proposal known as the Jackson 5 and Bungalbin East Iron Ore Project ("the Bungalbin Proposal). [1]

4 The total area to be disturbed as a consequence of the Bungalbin Proposal is 611 ha, comprised of 208 ha for the mine pits, 186 ha for waste rock landforms, 92 ha for supporting infrastructure and 125 ha for haul roads. [2]

5 The Objectors oppose both applications primarily because of concerns about the environmental impact of mining on the Mount Manning Helena Aurora

[1] Affidavit of Sean Michael Gregory sworn 26 October 2016 at [9]
[2] Affidavit of Sean Michael Gregory sworn 26 October 2016, SMG29 pg1

Range Conservation Park ("MMHARCP") which is about 100 km/h north of Southern Cross and 50 km/h north of Koolyanobbing. [3]

6 In May 2014 the Applicant referred the Bungalbin Proposal to the Environmental Protection Authority ("the EPA") and it is subject to Part IV proceeding under the *Environmental Protection Act 1986* ("the *EP Act*"). The EPA conducted an Assessment of Proponents Information ("API") and concluded that the proposal could not be managed to meet objectives for land forms and flora and vegetation and therefore should not be implemented.[4] That decision was the subject of an appeal to the Minister for Environment, who in turn directed the EPA to reassess the Bungalbin Proposal through a Public Environmental Review ("PER"):

> *"... [s]o that there is an appropriate opportunity for proponent and public input into the assessment".*

The Minister for Environment considered that this process will provide more detailed information to assist government in making an informed decision on the Bungalbin Proposal.[5]

7 As is evident from the purpose to which the Applications are directed they are ancillary to Mining Lease (M77/1097), which is one of four applications for mining leases included in the Bungalbin Proposal.

8 M77/1097 has already been the subject of a recommendation to the Minister that it be granted, there having been no objection. That application is, however, the subject of Part IV proceedings under the *EP Act.*

9 It is common ground that unless approval is granted to conduct mining operations on M77/1097, that G77/124 and L77/270 will fall away, as they serve no purpose.

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[3] Affidavit of Sean Michael Gregory sworn 26 October 2016, SMG29 pg1
[4] EPA Report 1537, 12 January 2015
[5] Minister's Appeal Determination, 22 April 2015, p1

10 On 13 February 2017 Warden Maughan heard the Applicant's Interlocutory Application directed to limiting the scope of the Warden's enquiry to whether the Applications complied with the *Mining Act 1978* ("the Act") and the *Mining Regulations* ("the Regulations").

11 The Applicant argued that if the Applications were otherwise compliant with the Act and Regulations, the environmental objections should be dealt with on the basis that no program of works or mining proposal for works could be approved by the Department of Mines, Industry Regulation and Safety ("DMIRS") unless approvals had been obtained pursuant to Part IV of the *EP Act*.

12 As at the date Warden Maughan dismissed the Interlocutory Application (7 April 2017), [6] the EPA was undertaking the PER on the Bungalbin Proposal but had not handed down its report.

13 In dismissing the Applicant's Interlocutory Application, Warden Maughan said: [7]

> *"The interlocutory application seeks to circumvent, in my view, the opportunity for the Warden to consider the EPA recommendations before making a recommendation to the Minister as to grant, and any terms or conditions which may be attached to that grant."*

14 His Honour[8] also went on to observe –

> *"What environmental factors are being considered by the EPA in relation to the mining lease are not presently known to me. On the basis of the objections filed and the ambit of the Environmental Protection Act* ***it is unlikely****, in my view, that public interest issues raised by the Objector such as:-*
>
> *I. "The impact on the outstanding natural beauty and visual amenity of this range – a range that is visited and enjoyed by a large number of tourists, four-wheel drivers, naturalists and scientists":-*

[6] Polaris Metals Pty Ltd v Helena and Aurora Range Advocates Inc, Wildflower Society of Western Australia (Inc), The Wilderness Society of Western Australia, unreported, Perth Warden's Court, 7 April 2017
[7] At [15]
[8] At [18]

II. "Interfere with or inhibit public access to and recreational use of this highly valued range";

are matters likely to be considered." (my emphasis)

15 Warden Maughan [9] also remarked –

"... I repeat the content of the Objector's submissions –

It is crystal clear that what the EPA considers and recommends will not be re-examined by the Warden.

It is well within the Objector's knowledge at this point in time as to what the EPA will 'consider' – it having made substantial submissions already."

16 On 28 April 2017 Warden Maughan set the matter down for hearing on 1-3 August 2017 and made programming orders which included the lodging of a Statement of Issues agreed between the parties and Particulars of Objection arising from the agreed issues. These documents were lodged on 16 and 18 May 2017 respectively.

17 On 22 June 2017 the EPA handed down Report 1599; once again the EPA concluded that the Bungalbin Proposal is environmentally unacceptable. Further, having reached that conclusion, the EPA did not include conditions and procedures to which the proposal should be subject.[10]

18 On 29 June 2017 the Objectors lodged an Interlocutory Application seeking, based on EPA Report 1599, that L77/270 be refused and that a recommendation be made to the Minister for Mines that G77/124 be refused. Ultimately, the Interlocutory Application was withdrawn.

19 At the mention hearing on 30 June 2017 both parties accepted that the purpose of the hearing on 1 August 2017 was not to re-visit the matters considered by the EPA. The Applicant, in particular, wanted all the other grounds of objection resolved so that there would be no delay in the event that the Bungalbin Proposal received approval pursuant to Part IV of the *EP Act*.

[9] At [21]
[10] EPA Report 1599 at pg 10

The Hearing on 1 August 2017

20 At the commencement of the hearing on 1 August 2017 I was advised that both the Applicant and the Objectors had appealed EPA Report 1599. In addition it became apparent that there were three significant developments since Warden Maughan had dismissed the Applicant's Interlocutory Application:

1) the EPA had in fact dealt with both of the issues that Warden Maughan had concluded were unlikely to be considered by the EPA;

2) EPA Report 1599 had not promulgated any conditions which, if imposed, would alleviate its concerns about the Bungalbin Proposal; and

3) the Objectors abandoned all of the grounds of objection directed to whether the Applications had failed to meet the formal requirements in the Act and Regulations.

21 Albeit for different reasons, neither party suggested that I should hear evidence with respect to the objections based on environmental grounds.

22 The Objectors contended that I should, without further inquiry, accept the findings in EPA's Report 1599 and that a recommendation should be made to the Minister for Mines that G77/124 be rejected. For the same reason, it was suggested, I should reject L77/270. It was further suggested that there were other grounds of public interest that required consideration, although it was conceded that all of these grounds were related to the environmental issues and would involve a balancing of these issues against the environmental concerns. One such example is the Strategic Review of the Conservation and Resource Values of the Banded Iron Formation of the Yilgarn Craton; Government of Western Australia 2007 ("the Strategic Review"). The Objectors also sought to demonstrate, inter alia, that the figures estimating the economic value of the Bungalbin Proposal to the State were inflated.

23 As the following passages from the Applicant's submissions demonstrate, it argues that G77/124 can be recommended for grant and L77/270 granted subject to conditions that ensure no program of works is approved without the Bungalbin Proposal receiving environmental approval:

> *"2. The Applicant, Polaris, seeks the following orders:*
>
> *In respect of the application for G77/124, the Warden make the following recommendation to the Minister for Mines:*
>
> *(a) That the Minister for Mines defers making any decision regarding the grant of G77/124 until he has considered a Ministerial Statement obtained from the Minister for Environment pursuant to the Environmental Protection Act 1986.*
>
> *(b) That, if the Minister for Mines determines to grant G77/124, the Minister for Mines:*
>
> *(i) imposes all standard environmental conditions; and*
>
> *(ii) imposes a further condition providing that no program of works or mining proposal for works within the J5 and Bungalbin East Iron Ore Proposal scope can be approved by the [Department of Mines Industry Regulations and Safety ("the DMIRS")] unless approval for those works have been obtained pursuant to Part IV of the Environmental Protection Act 1986.*
>
> *In respect of the application for L77/270, the Warden impose the following conditions:*
>
> *(a) all standard environmental conditions;*
>
> *(b) no program of works or mining proposal for works within the J5 and Bungalbin East Iron Ore Proposal scope can be approved by the [the DMIRS] unless approval for those works have been obtained pursuant to Part IV of the Environmental Protection Act 1986.*
>
> *3. The alternative position with respect of L77/270 that could be adopted by the Warden is that the grant of L77/270 be approved conditional upon the grant of G77/124 and the imposition of the conditions listed above".*

24 The Applicant says further that it is content for the Strategic Review to be provided to the Minister for Mines for his consideration.

The inter-relationship between the *Environmental Protection Act* and the *Mining Act*

25 Section 6 of the Act relevantly provides:

> *"***6. Operation of this Act**
>
> *(1) This Act shall be read and construed subject to the Environmental Protection Act 1986, to the intent that if a provision of this Act is inconsistent with a provision of that Act, the first-mentioned provision shall, to the extent of the inconsistency, be deemed to be inoperative.*
>
> *(1a) Notwithstanding subsection (1) and section 5 of the Environmental Protection Act 1986, in the case of an application for a mining lease accompanied by the documentation referred to in section 74(1)(ca)(ii) —*
>
> *(a) only the applicant can refer a proposal to which the application relates under section 38(1) of that Act; and*
>
> *(b) section 38(5) of that Act does not apply to such a proposal.*
>
> *(1b) In subsection (1a) —*
>
> **proposal** *has the meaning given to that term in section 3(1) of the Environmental Protection Act 1986.*
>
> *(1d) If a mining lease is granted on an application referred to in subsection (1a), nothing in that subsection affects the application of section 38 of the Environmental Protection Act 1986 to —*
>
> *(a) a programme of work lodged by the holder of the mining lease in compliance with the condition referred to in section 82(1)(ca); or*
>
> *(b) a mining proposal lodged by the holder of the mining lease in compliance with the condition referred to in section 82A.*

26 Section 5 of the *EP Act* states:

> *"Whenever a provision of this Act or of an approved policy is inconsistent with a provision contained in or ratified or approved by, any other written law, the provisions of this Act or the approved policy, as the case requires, prevails".*

27 Section 15 of the *EP Act* stipulates that it is the objective of the EPA to use its best endeavours –

(a) to protect the environment; and

(b) to prevent, control and abate pollution and environmental harm.

28 Section 16 sets out the functions of the EPA which includes advising the Minister for Environment on environmental matters generally and on any matter which he or she may refer to the EPA for advice including the environmental protection aspects of any proposal or scheme, and on the evaluation of information relating thereto.

29 Part IV of the *EP Act* is headed "Environmental Impact Assessment". Section 44(1) provides that if the EPA assesses a proposal it is to prepare a report on the outcome of its assessment of the proposal and give that report to the Minister for Environment.

30 According to s44(2) the report must set out –

(a) what the authority considers to be the key environmental factors identified in the course of the assessment; and

(b) the Authority's recommendations as to whether or not the proposal may be implemented and, if it recommends that implementation be allowed, as to the conditions and procedures, if any, to which implementation should be subject

31 The EPA may, if it thinks fit, include other information, advice and recommendations in the assessment report (see s 44(2a)).

32 Upon receiving the report the Minister for Environment is required to, inter alia, publish the report and provide a copy to any other Minister appearing to him or her to be likely to be concerned in the outcome of the proposal to which the report relates (see 44(3)). Self-evidently the Minister for Mines is likely to be concerned in the outcome of the Bungalbin Proposal.

33 Section 45(1)(a) casts an obligation on the Minister for Environment to consult that Minister or those Ministers likely to be concerned in the outcome of the proposal to whom a copy of the report has been provided as to whether or not the proposal to which the report relates should be implemented and if it is to be implemented to what conditions and procedures, if any, to which it should be subject.

34 In the event that the Minister for Environment and the other Ministers concerned (in this case the Minister for Mines) cannot agree, s 45(2) requires the Minister for Environment to refer matter or matters in dispute to the Governor (in practice, the Cabinet)[11] for a decision. The decision of the Governor on that matter or matters shall be final and without appeal.

35 Significantly, s41A specifies that if a decision of the EPA is that a proposal is to be assessed and has been set out in the public record under s39, a person who does anything to implement the proposal before a statement is published under s45(5)(b) or a notification is given under s45(8), commits an offence.

36 Section 45(5)(b) provides that if the decision is that the proposal may be implemented or may be implemented subject to implementation conditions, the Minister for Environment is to cause a statement to that effect to be served on, inter alia, the Minister for Mines and the proponent.

37 Section 45(8) sets out a similar process whereby in the event that the proposal is rejected, the Minister for Mines and the proponent are served with notification in writing to that effect.

38 Section 47(1) provides that a proponent who does not comply with a statement served under s 45(5) setting out conditions or procedures to which approval of the proposal is subject, commits an offence. Similarly, s 47(4) stipulates that a proponent that implements a proposal the subject of notification under s 45(8) that the proposal has been rejected, commits an offence.

[11] ***Re Warden Calder, Ex parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343 per Steytler J at p363.

39 Given the operation of s6 of the Act and ss5 and 47(4) of the *EP Act*, in my view where a mining application is part of a proposal considered by the EPA under Part IV of the *EP Act*, and that proposal is rejected in accordance with s 45(8), then neither the Minister for Mines nor the Warden can grant the mining application. Were the Minister for Mines or Warden to do so, it would be pointless as the proponent could not implement the proposal in any event.

40 In my view, the *EP Act* operates as a statutory fetter on the power vested in the Minister for Mines and the Warden to grant mining applications where a notification has been issued under s 45(8) of the *EP Act*.

The Role of the Warden with Respect to Objections on Environmental Grounds

41 Not surprisingly, having regard to the respective positions adopted by the parties, the significance of both the Bungalbin Proposal and the MMHARCP to the State, the function of the EPA and the application of the *EP Act*, questions arise as to the role of the Warden (depending on the nature of the application) with respect to objections on environmental grounds as both a decision-maker (L77/270) and in making a recommendation to the Minister for Mines (G77/124).

42 As matters currently stand with respect to the Applications, the Part IV proceedings under the *EP Act* are yet to be resolved.

43 In ***Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd*** [12] the Full Bench of the Supreme Court of Western Australia considered whether the Warden had the power to hear evidence or submissions from objectors to an application for a mining lease whose objections were based on environmental or other public interest considerations. The applicant argued that the Warden had no power to hear environmental objections and that ***Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers & Residents Association*** [13] wherein it was held the Warden was at least obliged to consider, but not necessarily hear

[12] (1998) 20 WAR 343
[13] (1994) 11 WAR 315

evidence or submissions on, objections to an application for a mining lease based on environmental issues, was wrongly decided.

44 In discharging the order nisi Steytler J [14] (as he then was) gave the most detailed analysis of the issue. His Honour held that even though it is the Minister for Mines who decides whether or not to grant a mining lease and that he or she may, under s111A of the Act take the public interest into account, that does not mean the Warden has no role to play in making a recommendation in that respect.[15]

45 His Honour went on to remark:[16]

> *"...[t]he mere fact that there exists a sophisticated mechanism for the protection of the environment under the Environmental Protection Act and that there is a large body of other legislation (much of it enacted after the enactment of the relevant provisions of the Mining Act) designed, also, to protect the environment, cannot, of itself, mean that the Warden has no role to play, at all, in considering objections to applications for mining leases based upon environmental or other public interest considerations".*

46 His Honour also considered the nature of the role the Warden has to play in considering environmental or other public policy objections:[17]

> *"...the Warden does not have to embark upon a full scale investigation into environmental or other public policy matters merely because an objection in that respect has been made. She or he may, for example, be satisfied that sufficient protection would be obtained by the application of the provisions of the Environmental Protection Act. In that event the Warden may do no more than make a recommendation as to the implementation of measures provided for by the Act. It is important to bear in mind, in this respect, that where a notice of objection has been lodged, the Warden is required to hear the application for the mining lease in open court but has a discretion whether or not to give any person who has lodged a notice of objection an opportunity to be heard (see s75(4))."*

47 Finally, His Honour commented:[18]

> *"I would add to this that it is especially important to bear in mind that the Warden's function, so far as a mining lease is concerned, is that of*

[14] With whom Kennedy, White and Wheeler JJ agreed (Pidgeon J dissenting)
[15] At p356-356
[16] At p 363
[17] At p364
[18] At p364-365

> *assisting the Minister to make a decision about whether or not to grant the lease and if so, on what conditions. The provision of such assistance from the warden may or may not require a full hearing in respect of public interest matters and the extent of any such hearing so embarked upon will vary from case to case depending upon all the prevailing considerations. It will in each case be open to the Warden to limit the scope of the inquiry should she or he consider that to be appropriate, leaving it to the parties to make fuller representations to the Minister himself or herself or, if that be appropriate, the Warden might as I have said, make recommendations as to the impositions of conditions which would require those parties to make their respective representations elsewhere".*

48 In ***Cable Sands***, the observations of Steytler J about the role of the Warden in considering environmental objections is prefaced on the fact that the Minister for Mines, as the relevant decision-maker with respect to an application for a mining lease, is obliged to refer to the EPA any proposal which appears likely, if implemented, to have a significant effect on the environment. His Honour goes on to say that the Warden's role in those circumstances is to alert the Minister to any such likely effect that arises as a consequence of an objection.

49 Steytler J also identified that the Warden has a role in considering objections that raise environmental issues which have not reached a stage where they can be said to be likely to have a significant impact on the environment. As I understand what His Honour is saying, environmental objections of that nature would not attract the attention of the EPA. Accordingly, if the Warden did not investigate the objection, the Minister for Mines would be required to consider the objection without the benefit of the Warden occupying a filtering role.

50 Two other decisions of this Court consider the role of the Warden with respect to objections on environmental grounds.

51 In ***Baxter v Serpentine-Jarradale Ratepayers and Resident's Association (Inc)*** [19] Warden Calder made a recommendation to the Minister that land in respect of which the mining leases should be granted not include certain lots and land included within Perth's Bush plan site 378 on site 77:

[19] (1999) unreported Perth Warden's Court AMPLA Vol 14 No 2

> *"... [o]r any land adjacent to or in the vicinity of those lots and those sites where it is the opinion of the EPA that the mining of such adjacent land or other land in the vicinity of those lots or sites could not be carried out without unacceptable impacts upon those lots and sites".*

52 After referring to ***Cable Sands***, his Honour said:

> *"I agree with the submission of the Objector that it is not appropriate for Wardens to adopt a 'blanket policy' as to whether sufficient protection is offered by the provisions of the EP Act and that an assessment of this issue will need to be made in the context of the facts of a particular case.*
>
> *In addition to the approach which may be taken by the Warden as indicated by Steytler J in re Calder in the passages which I have just quoted it is also important to keep in mind what was said by Franklyn J in ex parte Heaney and by Kennedy J in ex parte French concerning the "filtering" role of the Warden.*
>
> *It is my opinion that when a Warden is called upon to give consideration, in the context of objections to applications for the grant of mining tenements, to objections which raise matters concerning the "environment" as defined in the Environmental Protection Act section 3(1) and (2), and in the context of assisting the Minister for Mines in the performance of the Minister's duties pursuant to section 111A, the approach to be taken by the Warden is as follows. It is the policy and the objective of the Mining Act to encourage with orderly administration and with due regard to competing interests and values and objectives of other members of the community and other government authorities and agencies, the exploitation of the mineral resources of the State. Potentially competing interests and values and objectives are those concerning the protection and preservation of the environment. It is not the role of the Warden and, with respect, not that of the Minister for Mines in the context of the performance of their respective duties under the Mining Act to proceed upon the basis that the interests of the mining industry should, as a general principle, be given precedence over those whose primary interests or concerns are in respect of the environment. Nor is it the role of the Warden or the Minister to take the opposite view. In broad terms, I consider it to be the role of both the Warden and the Minister to endeavour to ensure that there is optimum exploitation of the mineral resources of the State within the framework laid down by the Mining Act and by all other relevant legislation including, in particular, the Environmental Protection Act. It is clear that it is the Environmental Protection Act which is the primary legislated means by which the environment is to be safeguarded. That is evidenced by the provisions of section 5 of the Environmental Protection Act and section 6 of the Mining Act. The primacy of the EP Act over the Mining Act is recognised by the MOU between the EPA and the DME.*
>
> *I am of the view that it will generally be more appropriate for a Warden*

> *to proceed upon the basis that if all of the provisions of the Mining Act have been complied with, and in some circumstances even where they have not been complied with in respect of applications for the grant of a mining lease, or where the applicant for a mining lease is the holder of a prospecting licence or an exploration licence and, therefore, the provisions of section 75(7) have application and, further, where there are apparently no other matters of "public interest" for the purposes of section 111A, that where "environmental" grounds have been the subject of objections to the grant of a tenement then, unless the Warden is able to conclude that the ground applied for is over land which is of significant environmental importance and that the land could not be the subject of the grant of a tenement with appropriate conditions being imposed which would protect the environment during the carrying out of the proposed activities and which would ensure the appropriate preservation and continuity of the environment after the cessation of those activities, the Warden should recommend the grant of the tenement subject to the Minister being satisfied that all relevant environmental matters have been properly investigated and that the terms and conditions of the grant will properly and appropriately safeguard the environment.*
>
> *I am of the opinion that the Warden does not have any option but to recommend either a grant or refusal of the mining tenement and that, in particular, the Warden does not have any discretion to not recommend at all. Section 75(5) of the Mining Act is expressed in mandatory terms, namely, that the Warden "shall" forward his report and recommendation to the Minister. It further directs that that is to be done "as soon as practicable after that; hearing of the application".*

53 In ***Poelina v Blackfin Pty Ltd*** [20], Warden Wilson stayed the hearing of applications for a mining lease and miscellaneous licence:

> *"... [u]ntil the earlier of the Minister for the Environment making a determination pursuant to s45 of the EP Act that the applications may or may not be implemented or the withdrawal of the application for approval pursuant to the EP Act".*

His Honour remarked: [21]

> *"The EPA is the body to whom the State and the warden must hold faith that it can properly investigate matters pertaining to the safeguard of the environment. It cannot be seen the conclusions reached by the EPA as a consequence of the PER can be challenged or re-argued before the warden ... at the hearing of the Applications and the Objections. It is not the role of the Warden to conduct a review or an appeal of any evidence or conclusions that may be reached by the EPA as a consequence of the PER. That does not mean issues of public interest that arise from the*

[20] [2012] WAMW 34 at [49]
[21] At [49]

conclusions reached by the EPA as a consequence of the PER may not be argued. However, in my opinion, the conclusion reached by the EPA as a consequence of the PER should not be challenged before the Warden".

54 Notwithstanding the guidance provided by ***Cable Sands***, ***Baxter*** and ***Poelina***, those cases do not address some of the features evident in this case. The question that remains is what is the role of the Warden, having regard to the prevailing circumstances of the Applications, which include:

(i) Neither the Applicant nor the Objectors, albeit for differing reasons, advocate that I should investigate the merits of the environmental matters to the subject of EPA Report 1599.

(ii) These proceedings concern only two applications arising out of the Bungalbin Proposal.

(iii) Both of these applications are peripheral to M77/1097 in that they enable support to be provided to mining activities to be carried out on M77/1097 in the event the Bungalbin Proposal is approved under Part IV of the *EP Act* and the Minister for Mines grants that application. It follows that if M77/1097 is not granted by the Minister, the Applications fall away.

(iv) For reasons of which I am unaware the Objectors did not object to M77/1097. As a consequence of that application presumably having met the formal requirements of the Act and Regulations it has been referred to the Minister for Mines with a recommendation it be granted. However, given it is the subject of proceedings under Part IV of the *EP Act* as a consequence of having been considered in EPA Report 1599, no decision has yet been made by the Minister for Mines.

(v) Having considered the objections lodged in these proceedings they are not directed specifically to the ground the subject of G77/124 or L77/270. All of the objections are in general terms and relate to the Bungalbin Proposal, notwithstanding that the entirety of Bungalbin Proposal and in particular one of its primary tenements (M77/1097) is not before me.

> Ordinarily, it is to be anticipated that if an objection had been lodged to M77/1097, that objection would have been heard together with objections to any other related applications such as G77/124 and L77/270. Had that occurred then any objections to M77/1097 would have been squarely before me.

55 It is apposite to observe that I am not bound by the approach taken by Warden Maughan as to the scope of the hearing. For the reasons I outlined in paragraph [20] it is clear that the landscape has changed considerably since his Honour's decision dismissing the Applicant's Interlocutory Application and setting the matter down for hearing.

56 The Objectors' primary submission is that once the EPA has concluded that a proposal should not be implemented, it is incumbent on the Warden to recommend to the Minister for Mines that any application under the Act that forms part of the proposal be rejected. In my view, this submission must be rejected.

57 As Part IV of the *EP Act* makes clear, it is not the EPA's report that determines whether a proposal cannot be implemented but a notification in accordance with s45(8) of the *EP Act*. Until such time as a notification is issued under s45(8) to that effect, there is no binding determination under the *EP Act*.

58 As I foreshadowed earlier, in the event that the Bungalbin Proposal does not receive approval under Part IV of the *EP Act*, then the Applications must be rejected. However, until such time as a decision is made in that regard there is no binding decision to that effect.

59 Traditionally, courts have taken the view that a decision-maker must personally exercise a discretion conferred by statute unless the statute conferring the power [or another statute] expressly or by implication authorises delegation of that discretion or confers power on another to give binding directions. [22]

[22] Acting Under Dictation and the Administrative Appeals Tribunal's Policy – Review Powers – How Tight is the Fit?, JM Sharpe, Federal Law Review 1984, Vol 15 109 at p110

60 Alternatively, were the Minister for Mines to only have regard to the findings of the EPA, he would arguably fetter his discretion. The EPA only considers the environmental impact of a proposal, it does not examine the range of other relevant considerations that the Minister ought to have regard to in deciding whether or not to grant a mining tenement. At its most general the rule has been stated as follows:

> *"... [t]hose exercising statutory discretionary power must never place fetters upon the factors they can properly consider when considering it in individual case."*[23]

61 In ***Lavender v Minister for Housing***[24] the question was whether the Minister for Housing had acted under dictation of the Minister for Agriculture. The Minister for housing had made a rule to refuse planning permissions for gravel working on top class agricultural land whenever it was opposed by the Minister for Agriculture. In setting aside the Minister for Housing's decisions, Willis J held that although the Minister could consider the views of other Ministers, he must be open to persuasion in relation to the decision and the application of policy. Whilst the decisions of the Minister for Agriculture might be a decisive factor for the Minister for Housing when taking into account all relevant considerations, a policy could not be applied in such a way that it was the only consideration.

62 While there is no question that EPA Report 1599 warrants serious consideration and may prove decisive, it is not the only consideration. To simply adopt a policy whereby if the EPA does not support a proposal, it is rejected without considering the merits of the Application itself would, in my view, involve an abrogation of the responsibility to personally exercise the discretion regarding L77/270. So far as G77/124 is concerned, were I to recommend to the Minister for Mines that he adopt the same course, that would lead the Minister into error. Notwithstanding the EPA's specialist expertise in environmental matters, s45(1) and (2) of the *EP Act* acknowledges that the

[23] Judicial Review of Administrative Action, 3rd Ed, 2004, Arsnson, Dyer & Groves p275
[24] [1970] 1 WLR 1231

Minister for Mines (and the Minister for Environment and the Governor (i.e. Cabinet)) may not agree with the EPA.

63 To follow the course advanced by the Objectors absent a notification issued under s45(8) of the *EP Act,* would constitute acting under dictation. It is the notification that is binding, not EPA Report 1599. To the extent that the Objectors rely on the terms of the recommendation in ***Baxter*** that the Minister for Mines accept the EPA's opinion, Warden Calder's remarks need to be considered in a context where His Honour had recommended the application be granted:

> *"... [s]ubject to compliance with the provisions of the Environmental Protection Act".*

64 To the extent that his Honour suggests the Minister for Mines should defer to the opinion of the EPA, I do not understand the terms of the recommendation to convey that the Minister is bound to do so.

65 The Objectors rely on ***Baxter*** and ***Poelina*** together with ***Darling Range South Pty Ltd v Ferris*** [25], ***Prima Resources Pty Ltd v Bartholomaeus & Sharp*** [26] and ***Boadicea Resources Ltd v Sharp & Ors*** [27] as authority for the following proposition [28]:

> *"A conditional grant of the type the Applicant proposes would effectively mean no role for the warden's assessment and recommendation regarding environmental issues. To make orders of conditionality contradict the approach of the Warden's Court in numerous previous decisions where the recommendation has been no mining in areas because of environmental impacts".*

66 In my view, the aforementioned authorities do not support the broad proposition advanced by the Objectors. Putting ***Poelina*** to one side, the fact that the objections on environmental grounds were upheld in those cases without conditions, is not authority for the proposition that environmental

[25] (2012) WAMW 12
[26] (2015) WAMW 11
[27] (2016) WAMW 6
[28] Objector's Written Submissions at [29]

objections are always to be upheld and conditions are not appropriate. Those cases turn on their factual circumstances.

67 The Objectors' argument is also based on the premise that the Warden is obligated to investigate objections based on environmental grounds in every case. Furthermore, it assumes that the Warden is required to make a recommendation as to the merits of the environmental objections.

68 As I observed earlier, Steytler J in ***Cable Sands*** identified two situations in which the Warden had a role to play in assisting the Minister. The first involved alerting the Minister that a proposal is likely to have a significant effect on the environment thereby obligating the Minister to refer it to the EPA. The second is where the objections raise environmental issues that are not likely to have a significant effect on the environment and therefore are not being reviewed by the EPA.

69 Neither of the two situations whereby the Minister would benefit from the Warden's assistance as identified by Steytler J arise in this case. As the Bungalbin Proposal has already attracted the attention of the EPA, its significance is self-evident and in a practical sense the time has now passed to alert the Minister that the objections raise environmental issues that ought to be referred to the EPA.

70 As I understand ***Cable Sands***, it is legitimately within the Warden's discretion to refuse to investigate environmental objections that are or have been considered under the *EP Act*. One such example is where the Minister for Mines will receive or already has received a report prepared by the EPA and therefore does not require the Warden to undertake a filtering role with respect to environmental matters. As Kennedy J [29] observed given the *EPA Act* is a sophisticated piece of legislation there is a likelihood that there will be significant duplication of functions if the Warden is to hear environmental objections.

[29] ***Cable Sands*** at p345

71 In those circumstances any recommendation by the Warden does not involve the Warden expressing a view of the EPA's report as the Warden is not required to consider it. In effect, the Warden's function in assisting the Minister has been carried out by the EPA, thereby relieving the Warden of that obligation. What the Minister for Mines makes of the EPA's report is a matter for him or her.

72 In my view, it is telling that ***Cable Sands*** refers to the Warden being satisfied that the sufficient protection would be obtained by the applications of the provisions of the *EP Act* and, in that event, the Warden doing no more than making a recommendation as to the implementation of measures provided for by the *EP Act*.

73 The language used in ***Cable Sands*** does not support the contention that the Warden is required to consider the EPA's report and make a recommendation to the Minister to accept or reject its findings. Nothing in ***Cable Sands*** suggest that once the Warden recommends to the Minister *"as to the implementation of measures provided for by the EP Act"*, that upon preparation of a report by the EPA, the matter is then returned to the Warden for his or her consideration.

74 It is significant that, except for ***Poelina*** (where a stay was granted pending proceedings under Part IV of the *EPA Act*), none of the cases relied on by the Objectors involved a proposal that was already being considered by the EPA. The approach adopted in those cases is consistent with what Steytler J said in ***Cable Sands*** concerning the Warden assisting the Minister given the EPA was not involved.

75 In my view, nothing said in ***Baxter*** or ***Poelina*** requires that the Warden express a view about the environmental objections when making a recommendation to the Minister. In fact both cases contemplate that the Minister for Mines will consider the report from the EPA.

76 The Objectors also place particular emphasis on ***Ferris*** wherein Warden Wilson recommended that an application for an exploration licence be refused because the standard conditions imposed by the DMIRS failed to provide adequate protection of the environment.

77 The "standard conditions" imposed by the DMIRS that were found in ***Ferris*** to be inadequate in protecting the environment are not representative of the conditions advanced by the Applicant in this case. The conditions in ***Ferris*** [30] were directed to enabling the application to be granted on the basis that the environmental issues would be managed or ameliorated.

78 The conditions advanced by the Applicant in this case acknowledge that if the Bungalbin Proposal is not approved under Part IV of the *EP Act*, the Applications cannot be granted. There is, in reality, no comparison between the conditions referred to in ***Ferris*** and those put forward by the Applicant in this case.

79 The Objectors' submissions fail to appreciate that the Applications cannot be implemented at all if, ultimately, a notification is issued under s45(8) of the *EP Act*.

80 The Objectors also contend that:

> *"If the Warden recommends that an application be granted with conditions, the Warden will have effectively ignored that the EPA has examined the proposal in extensive detail and recommended that the project should not be implemented".*

81 The Objectors' contentions are predicated on the notion that any recommendation to the Minister for Mines to grant an application subject to conditions, invariably means that the EPA's findings have been ignored.

82 A recommendation that an application be granted subject to Part IV proceedings under the *EP Act* does not amount to a recommendation that the

[30] At [63]

application should ultimately be granted or involve the Warden or the Minister for Mines ignoring the EPA's findings.

83 A recommendation in those terms means only that the application is compliant with the formal requirements in the Act and Regulations. Moreover, contrary to the Objectors' interpretation, the Warden is informing the Minister for Mines that he is required to give due consideration to the EPA's report as part of the Part IV proceedings under the *EP Act*.

84 Underpinning the Objectors' submissions is the belief that a recommendation to the Minister to grant an application subject to conditions necessarily involves the Minister being encouraged to grant the application on the basis that the conditions imposed will enable the application to proceed whilst minimising any environmental damage.

85 There is a material difference between a recommendation to grant an application with conditions designed to limit the environmental impact of that application and a recommendation that, in effect, encourages the Minister to comply with the process set down in Part IV of the *EP Act*. This is particularly so where one potential outcome of the Part IV proceedings is a notification under s45(8) of the *EP Act* that the proposal cannot be implemented.

86 Two further issues require consideration. The first concerns the status of objections that touch on environmental matters but, according to the Objectors, are outside the remit of the EPA. The Objectors point to the Strategic Review in particular. According to the Objectors, the Strategic Review involves a broader investigation than that considered by the EPA. However, the Objectors concede that the matters referred to in it must invariably be balanced against the environmental issues.

87 Having considered the Objectors' Particulars of Objection arising from the agreed issues, it is apparent that neither the Strategic Review nor any of the other documents listed in paragraph 2 could be characterised as discrete grounds of objection. The documents listed therein are referred to in support of

the general proposition that the grant of the applications is not in the public interest. Some of the documents enumerated therein have been prepared by the EPA or considered by the EPA in the preparation of Report 1599. Notably, the Strategic Review is listed in the reference material considered in the preparation of EPA Report 1599.

88 The Strategic Review, as the title suggests, involves a consideration of the conservation and resource values of the banded iron formation of the Yilgarn Craton. The Objectors contend that the Strategic Review involves a balancing of those conservation and resource values.

89 I agree with the Objectors' contention that it is not the function of the EPA to determine whether the economic value of a proposal takes precedence over the environmental issues.[31] That decision is a matter for the Minister for Environment and other relevant Ministers including the Minister for Mines after considering any report provided by the EPA.

90 To the extent that the Strategic Review and any other material or submissions upon which the Objectors rely touch upon that issue, these are matters best left to the Minister for Mines.

91 As the passages from ***Cable Sands*** [32] to which I referred earlier make clear even though the Warden has a role to play in assisting the Minister, in appropriate circumstances it is open to the Warden to leave it to the parties to make further representations to the Minister. Were that course to be followed, in this case, the Minister for Mines will then receive those representations in circumstances where he is already obligated, in accordance with s45(1)(a) of the *EP Act,* to consider EPA Report 1599 into the Bungalbin Proposal and whilst M77/1097 is already before him.

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[31] See ***Coastal Waters Alliance of Western Australia Incident v Environmental Protection Authority; Ex parte Coastal Waters Alliance of Western Australia Incident*** (1996) 90 LG ERA 136 at p158

[32] per Steytler J at p365

92 In ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum***[33] the Court of Appeal, whilst acknowledging that the Warden has a filtering role, observed that the Minister's power is broader than that of the Warden. The Minister's discretion extends to questions of policy and principle governing the exploration of mineral deposits in the State, which the Warden does not address in making recommendations. Relevant matters of policy and principle include:

(a) the promotion of a strong and stable mining industry and economy generally;

(c) the reconciliation of exploration of mineral deposits with the protection and encouragement of competing land uses;

(d) environmental considerations; and

(e) any other matters that are in the public interest.

93 The Court went on to remark that where some issues of policy and principle conflict, it may be necessary to reconcile competing issues or to accord precedence to one factor over another.

94 In my view, it is clearly the case that questions of policy that involve a determination as to whether or not the State's interests are best served by giving greater weight to the resource value derived from a proposal that any environmental detriment likely to be sustained if it proceeds are matters for the Minister for Mines.

95 As Ipp J said in ***Re Warden French***:

> *"The Warden, in making recommendations to the Minister concerning mining lease applications, does not exercise discretion as to questions of policy and principle governing the exploration of mineral deposits in this State. That is a matter within the province of the Minister."*[34]

[33] [2017] WASCA 153 at [97]-[98], see also ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd and Another*** [2007] 34 WAR 403 at [72]
[34] At p328

96 The process set down in the *EP Act* for the Governor to consider matters in the event that the Minister for Environment and other relevant Ministers cannot agree, is indicative of the facts that decisions of this kind involve a political determination. As Murphy J remarked in ***FAI Insurances Ltd v Winneke*** [35] when Parliament authorises the Governor (i.e. cabinet) to make a decision it is because Parliament considers the decision warrants a political determination.[36]

97 In ***DFD Rhodes Pty Ltd v FMG Pilbara Pty Ltd*** [37] Warden Calder remarked:

> *"It is not the role of the Warden to purport to direct or to advise the Minister in the form of a report and recommendation or otherwise, upon matters such as the implementation of government policy".*

98 The EPA has now twice considered the environmental impact of the Bungalbin Proposal. Significantly, the second occasion was a PER which involves a more detailed analysis than an API and enables an opportunity for proponent and public input. Clearly, both the Applicant and the Objectors have taken the opportunity to make submissions to the EPA. This much is evident from the fact that both parties have appealed EPA Report 1599.

99 Accordingly, I am satisfied that sufficient protection so far as environmental matters are concerned is to be afforded by the application of the provisions of the *EP Act* and propose to recommend to the Minister that G77/124 be granted subject to proper consideration being given to EPA Report 1599 in accordance with Part IV of the *EP Act* and any further materials and submissions provided by the Applicant and Objectors. The Strategic Review will accompany the report to the Minister as it forms part of the documents referred to in s75(5) of the Act.

100 The second and final issue requiring consideration is L77/270. The arguments advanced by the Applicant and the Objectors mirror those made with respect to G77/124. While for present purposes the only difference between the two applications is that the Warden determines L77/270, given the particular

[35] (1981-1982) 151 CLR 342 at p374
[36] See also ***Hot Holdings Pty Ltd v Creasy*** [2002] 210 CLR 438 at p455 per Gaudron, Gummow and Hayne JJ
[37] [2005] WAMW 23 at [17]

circumstances of this case and the state of the law, the role of the Warden is by no means clear. Notably, ***Cable Sands*** does not directly address what is the role of the Warden in resolving public interest objections to a miscellaneous licence.

101 The Applicant says that as the Minister for Mines will, in the course of the Part IV proceedings pursuant to the *EP Act*, consider the objections, there is no need for me to do so.

102 ***Tortola v Saladar Pty Ltd*** [38] concerned the factors a Warden is required to consider in determining whether to grant a prospecting licence. Brinsden J[39] held:

> *"A miscellaneous licence lies in the grant of the warden to the holder of a prospecting licence, exploration licence or mining lease and that type of licence seems to be ancillary to these tenements. In summary, then, ignoring these minor leases and licences, a gradation of significance of the main privileges and burdens can be seen as between, on the lower end of the scale, a prospecting licence, and on the higher end of the scale, a mining lease. The differences appear to lie in the right to take ore, the length of the term, the area of land as between the two types of licence, and the increasing amount of the expenditure condition applicable to each form of holding. It perhaps is not unfair to say the prospecting licence is the junior while the exploration licence and the mining lease are the more senior type. It is, therefore, not unexpected to observe the grant of a mining tenement which involves more land in the case of an exploration licence a much longer period of time in respect of both tenements is given to the Minister while the other lies in the grant of the warden. even without reference to the provisions of s 105A I would have thought that the object of the Act is not to entrust questions of policy and principle governing the exploration of mineral deposits in this State to the discretion of a warden upon an application for a prospecting licence: cf Ex parte New South Wales Rutile Mining Co Pty Ltd; Re Burns (supra) at 556. Those questions, I think, are reserved for consideration of the Minister at the stage where the application involves a more significant mining tenement than a prospecting licence. I believe the warden's functions upon an application for a prospecting licence are confined to the limited range of questions necessarily involved in discovering whether the application complies with the requirements of the Act."*

[38] [1985] WAR 195
[39] At p204

103 His Honour goes on to say that he reached this conclusion by discerning the object and intention of the Act from a reading of its principal provisions.

104 As a miscellaneous licence is an ancillary tenement that is determined by the Warden, there is some force to the argument that the observations of Brinsden J about prospecting licences are equally applicable to miscellaneous licences.

105 ***Tortola*** was considered by the Full Court of the Western Australian Supreme Court in ***Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Co Pty Ltd***.[40] The Court held, distinguishing ***Tortola***, that the manner in which the Warden should exercise his or her discretion with respect to a prospecting licence did not apply to a miscellaneous licence. ***Tortola*** was decided on the basis that the Warden was only required to determine if a prospecting licence met the requirement of the Act and Regulations. In ***Western Reefs*** the Court held that the Act provides that a miscellaneous licence can be granted over land already subject to a mining tenement. Accordingly, the Warden was required to consider whether the grant could injuriously affect or obstruct or hinder an existing tenement holder. The questions as to whether a prospecting licence or a miscellaneous licence required the Warden to consider the public interest did not arise. Nor did ***Western Reefs*** raise any questions concerning the correctness of ***Tortola***. [41]

106 ***Tortola*** was again considered by the Full Court in ***Re Warden French***. Ipp J[42] distinguished ***Tortola*** on the basis that the power of the Warden to grant a prospecting licence is fundamentally different to powers of a Warden conducting a hearing for the purpose of recommending to the Minister whether or not to grant a mining lease.

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[40] (1990) 1 WAR 546
[41] Per Malcolm CJ at p554
[42] At p328

107 However, his Honour [43] expressly endorsed the key proposition for which ***Tortola*** is authority:

> *"It is the Warden who decides whether or not to grant a prospecting licence and the public interest plays no part in that decision, the public interest not being a criteria which the Warden may take into account."*

Kennedy J[44] while agreeing with Ipp J that ***Tortola*** was distinguishable, remarked that he was in some doubt as to whether it should now be followed but as the matter has not been argued declined to express any concluded view.

108 Pidgeon J in dissenting impliedly agreed with what Brindsden J said in ***Tortola***:

> *"There is no express power under the current Act to consider questions of this nature [environmental considerations other than those raised by owners or occupiers of land] and historically it has not been the function of the Warden."*[45]

109 ***Tortola*** was also considered by Steytler J in ***Cable Sands***. His Honour suggests that in considering an application for a prospecting licence, the conditions to be imposed may involve a consideration of the public interest:[46]

> *"While it may be so that the public interest is not a criterion which the Warden may take into account in deciding whether or not to grant a prospecting licence, the criterion may well be taken into account ... in considering what conditions should be imposed by the Warden under s46A for the purpose of preventing or reducing, or making good, injury to the natural surface of the land in respect of which the licence is sought or was granted, or injury to anything on the natural surface of that land or consequential damage to any other land."*

Significantly, s46A was inserted in the Act[47] after ***Tortola*** was decided but before the decision ***Re Warden French*** in which Pidgeon J and Ipp JJ made the comments referred to earlier. In considering ***Tortola*** neither Pidgeon J nor Ipp JJ makes reference to s46A.[48]

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[43] At p328
[44] At p317
[45] At p317
[46] At p 360
[47] S12 *Mining Act Amendment Act 1990*
[48] S46A is picked up by s92 of the Act and therefore applies to a miscellaneous licence

110 Steytler J observes that as the Warden already considers matters of public interest pursuant to s46A, then this supports the conclusion that the Act contemplates that the Warden ought to do likewise in making a recommendation to the Minister in relation to a mining lease.

111 On a strict reading of what was said by Steytler J, the Warden's considerations of the public interest only arises once a decision has been made to grant a prospecting licence, it playing no part in the decision to grant or refuse the application.

112 That being the case, the only question that arises under s46A, is what conditions ought to be imposed with a view to protecting the land the subject of the application. That is a fundamentally different question from whether the application should be granted or refused having regard to environmental objections and in particular, given the circumstances of this application, whether the State's interests are best served by giving precedence to either the resource value or environmental value of the MMHARCP.

113 Even though the Warden has a role to play in assisting the Minister by giving consideration to environmental objections to a mining lease, it stops short of recommending to the Minister what is in the State's best interests. Nothing said in ***Cable Sands*** supports the view that the Warden's role extends to making a recommendation of that kind. It must also be remembered that the Warden only makes a recommendation to the Minister with respect to a mining lease. Accordingly, even if the Warden purported to make a recommendation in those terms, the Minister is free to ignore it.

114 It would seem odd that it is not part of the Warden's function to recommend to the Minister what is in the State's best interests yet the Warden should nonetheless make such a determination with respect to a miscellaneous licence.

115 Moreover, if the legislature had intended the Warden to consider the public interest in granting or refusing a prospecting licence, why is s46A confined to conditions attached to the grant of the application?

116 Notwithstanding that the passage from Steytler J quoted earlier may have seemed equivocal when his Honour's judgment is considered in its totality, it is apparent his Honour disagrees with ***Tortola***:[49]

> *"... [i]t seems to me that, to the extent that this reasoning is inconsistent with what was said in Tortola, that case should no longer be followed."*

117 As I observed earlier there are obvious parallels between a prospecting licence and a miscellaneous licence. Nonetheless, none of the authorities to which I have referred are binding as they do not deal directly with the situation so far as it relates to a miscellaneous licence.

118 In ***Striker Resources NL v Benrama Pty Ltd and Bruce Ellison and Robyn Ellison*** [50]Warden Calder gave detailed reasons for concluding that the Warden's function is to consider public interest objections when determining a miscellaneous licence.

119 The issue arose again in ***FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation*** [51] wherein Warden Wilson said:

> *"Despite the decision of Warden Calder in* ***Striker Resources*** *differing opinions still exist as to whether a warden has or does not have the power to hear objections based on public interest grounds in applications for miscellaneous licences and prospecting licences. Accordingly, this issue remains for all intents and purposes unresolved."*

120 Ultimately, Warden Wilson proceeded on the basis that ***Striker Resources*** was correct in light of a submission from the applicant that the objections were unlikely to excite the interest of the Minister in any event. Accordingly, I do not read ***Yindjibarndi Aboriginal Corporation*** as affirming ***Striker Resources***.

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[49] ***Cable Sands*** at p365
[50] [2001] WAMW7
[51] [2011] WAMW13

121 In ***Hunt on Mining Law of Western Australia*** [52] the following statement appears:

> *"In relation to grounds of objection, in hearing an application for a prospecting licence and an objection to it, it seems that the warden's powers are limited to ruling on compliance with formal requirements such as whether the ground is open for mining whether it has been correctly marked out, issues of priority between competing applications and other express requirements of the Mining Act.*
>
> *However, it is clear that the warden's role in relation to a miscellaneous licence application and objection is much wider and can include an assessment of the 'equities' of the situation."*

122 The observation that the role of Warden with respect to a miscellaneous licence is much wider is a reference to what was said in ***Western Reefs***, which does not suggest that the public interest is to be considered. The learned authors [53] in referring to ***Striker Resources*** and ***Yindjbarndi Aboriginal Corporation*** comment that they are not sure these decisions can be reconciled with the passage from Ipp J in ***Re Warden French*** quoted earlier at [95].

123 Having considered ***Striker Resources*** I agree with the observations made in ***Hunt***. However, as neither party referred to ***Tortola*** or made submissions on the issue, I do not propose to offer a concluded view.

124 As will become apparent, even if I were to follow Warden Calder in ***Striker Resources***, having regard to the particular facts of this case, the outcome would be no different.

125 As L77/270 forms part of the Bungalbin Proposal, the objections on grounds of public interest so far as they relate to the Bungalbin Proposal incorporate the ground the subject of L77/270. In other words there is no specific ground of objection that singles out L77/270 from the rest of the Bungalbin Proposal. Inexorably, the fate of L77/270 is allied to the outcome of the Part IV proceedings under the *EP Act* with respect to the Bungalbin Proposal

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[52] 5th Ed, 2015, Hunt, Kavanagh and Hunt pg 222
[53] At p234

126 As a consequence of the Part IV proceedings, the Minister for Mines will consider all of the environmental issues related to the Bungalbin Proposal (including L77/270) as set out in EPA Report 1599. In the event the Minister for Mines has not already seen the Strategic Review and related materials and submissions relied on by the Objectors, the Minister will also receive that material when G77/124 is referred to him. This material includes representations directed to balancing the resource and environmental values of the Bungalbin Proposal.

127 Ultimately, the Minister for Mines, together with the Minister for Environment and Cabinet, if need be, will be required to determine whether the resource value of the Bungalbin Proposal takes precedence over the environmental value of the MMHARCP.

128 Notwithstanding that pursuant to the Act the decision to grant or refuse L77/270 falls to the Warden, the fact remains that L77/270 is part of a much bigger proposal that is subject to Part IV of the *EP Act*. Moreover, the question as to whether the Bungalbin Proposal receives approval under the *EP Act* is a decision for government, not the Warden.

129 The way the Act is structured it leaves decisions as to the granting of applications for mining leases, exploration licences and general purpose leases, to the Minister for Mines. The reason that is so is because these tenements generally involve greater areas of land, longer periods of time and are more invasive. Questions of policy more readily arise in applications of this kind.

130 As a general rule, although applications for prospecting licences and miscellaneous licences may give rise to questions of competing land usage and the imposition of conditions under s46A (when read with s92), because of their scale they do not involve the Warden being called upon to balance whether an application's resource value to the State should prevail over its environmental value.

131 Such are the peculiar circumstances of this case, that because L77/270 is part of a much bigger proposal and that proposal has significant resource and environmental implications for the State, it is inevitable that if I hear the objections in this case I will be required to resolve that issue.

132 In ***Re Ward and Heaney; ex parte Serpentine-Jarrahdale Ratepayers' Association,*** [54] Franklyn J confirmed that whether an objector is given the opportunity to be heard is a matter for the exercise of discretion by the Warden.

133 In ***Cazaly Iron Pty Ltd v Hamersley Resources Limited and others***, [55] Warden Calder observed:

> *"A Warden may refuse to give an Objector an opportunity to be heard in circumstances where the Warden considers that no purpose would be served by doing so. That there is no purpose to be served may arise in many circumstances, including, but not only, the circumstance where the refusal to allow the opportunity to be heard is in respect of matters or issues which have no relevant merit or in respect of which, even if they had merit, no purpose would be served. An example of the latter would be where the same issues and matters have already been adequately put before the Warden by other means".*

134 Although I have not come to the view that the objections are without merit, for the following reasons I have concluded, having regard to the particular circumstances of this case, that I should not further consider the objections as to do so would serve no purpose:

i) All of the same issues, materials and submissions, concerning the grounds of objections to L77/270 are already or about to be before the Minister for Mines as part of the Part IV proceedings and the Minister's consideration of G77/124.

ii) Not only has the Warden no role to play in the resolution of the Part IV proceedings under the *EP Act* but the central issue in those proceedings will involve balancing the resource value against the environmental value

[54] (1997) 18 WAR 320 at p331B
[55] (2008) WAMW9

of the MMHARCP. Policy decisions of this kind are properly matters for the Minister for Mines.

iii) As L77/270 is part of the Bungalbin Proposal and the grounds of objection are indivisible, it is inevitable, were I to hear the objection, that I would be confronted with the same balancing exercise. The Objectors' submissions support this conclusion. The Minister for Mines is already considering those issues and the Act and the *EP Act* contemplates that he, not the Warden, is the appropriate person to do so.

135 I have given consideration to whether to adjourn the hearing of L77/270 until the Part IV proceedings under the *EP Act* are resolved. In the event that the Bungalbin Proposal is the subject of a notice (of rejection) in accordance with s45(8) of the *EP Act*, that will be the end of the matter.

136 If, however, the Bungalbin Proposal receives approval, then I would be required to consider the grounds of objection, notwithstanding that the government will already have approved the proposal. Any enquiry I hold would be confined to the ground the subject of L77/270 as that is the only application before me. In circumstances where the Minister will have already approved the mining lease (M77/1097) that L77/270 is intended to service as part of a decision having been made to approve the Bungalbin Proposal, there would be no basis for me to consider issues other than those relating to the land the subject of L77/270. In my view, given the issues related to L77/270 are indivisible from the rest of the Bungalbin Proposal, that would give rise to an untenable situation.

137 Accordingly, L77/270 have met the formal requirements of the Act and Regulations I propose to grant the application subject to Part IV proceedings under the *EP Act* and M77/1097 receiving approval.

138 Having regard to the role of the Minister for Mines and what was said in ***Cable Sands***, I am satisfied that sufficient protection is afforded to the environmental

issues that arise in relation to L77/270 by the institution of Part IV proceedings under the *EP Act*.

139 I have given consideration to whether in electing not to further consider the objections, that gives rise to a concern that I have in effect delegated the statutory power to grant or refuse the L77/270 to the Minister for Mines. However, given the Bungalbin Proposal, of which L77/270 is a part, is the subject of Part IV proceedings pursuant to the *EP Act* and those proceedings as a matter of law determine whether L77/270 can proceed, no issue of delegation arises.

Conclusion

140 Having regard to the reasons set out above I:

1) recommend that the Minister for Mines grant G77/124 subject to him giving consideration to EPA Report 1599 together with any further materials and submissions provided by the Applicant and Objectors and the resolution of proceedings under Part IV of the *EP Act*, and

2) grant L77/270 subject to proceedings under Part IV of the *EP Act* and the Minister for Mines granting M77/1097.

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Warden J O'Sullivan

20 October 2017