

**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : **MT ROE MINING PTY LTD v PILBARA ENERGY COMPANY PTY LTD & ORS [2024] WAMW 41**

**CORAM** : WARDEN T MCPHEE

**HEARD** : ON THE PAPERS

**DELIVERED** : 10 October 2024

**FILE NO/S** : Objection 684330, 684326 & 684846

**TENEMENT NO/S** : Application for E45/6645

**BETWEEN** : **MT ROE MINING PTY LTD**  
(Applicant)

AND

**PILBARA ENERGY COMPANY PTY LTD**  
(Objection 684330)  
(First Objector)

**THE PILBARA INFRASTRUCTURE PTY LTD**  
(Objection 684326)  
(Second Objector)

**PILBARA WATER AND POWER PTY LTD**  
(Objection 684846)  
(Third Objector)

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*Catchwords: MOPD, consideration of a proposed “No Mining” condition, Regulation 68 Report, Departmental view.*

***Legislation:***

***Mining Act 1978 (WA): -***

***Mining Regulations 1981 (WA): Regulation 68***

***Result:*** ***Recommendation for grant, on terms of MOPD dated 30 May 2024, inclusive of proposed “No Mining” condition with some amendments.***

***Representation:***

***Counsel:***

Applicant	:	Mr T Kavenagh
Objector	:	Mr Masson

***Solicitors:***

Applicant	:	Kavenagh Legal
Objector	:	Ensign Legal

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***Cases referred to:***

- ***Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd*** [2022] WASC 362 (31 October 2022)
- ***Pilbara Energy Company Pty Ltd v Hamersley Iron Pty Ltd*** [2024] WAMW 20
- ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Limited (Formerly, Pearl Gull Pty) And Silver Gull Iron Pty Ltd*** [2022] WAMW 5
- ***In Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd*** [2007] WASCA 175; 34 WAR 403
- ***Nova Resources NL v French*** (1995) 12 WAR 50

## **Introduction**

1 In *Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd* [2022] WASC 362 (31 October 2022) (*Blue Ribbon*), his Honour the Chief Justice said at [208 – 209]:

- a. *“Nevertheless, in my view, it is sufficient, for the purposes of answering Question 3 of the special case, that I can say that there is nothing in the text or purpose of the Mining Act that would necessarily prohibit the kind of ‘no mining’ conditions that are proposed in the minutes of programming directions.*
- b. *In my view, depending upon the circumstances of a particular case, it may be open to the Minister to impose a condition that prohibits mining activity over specific areas that are the subject of an exploration licence. In particular, in light of the decision in Western Reefs, a condition to that effect may well be the appropriate mechanism for preventing injurious affection of another mining tenement. It might also, for example, be justified in particular circumstances by other considerations. There might, for example, be a specific area of environmental or heritage significance within the area of an exploration licence, in relation to which it would be appropriate by the imposition of conditions to ensure that that specific area remains undisturbed.”*

2 Later in those same reasons, his Honour said at [213 – 214]:

- a. *“For these reasons, in my view, and subject to the conditions otherwise being validly imposed in accordance with, and for the purposes of, the Mining Act, the Minister would have power to impose conditions that would prevent mining or exploration activities on discrete areas within an exploration licence.*

*b. Of course, it would be a matter of fact and degree whether, in the particular case presenting, such a condition would be so extensive as to go beyond that which is reasonably capable of being regarded as related to the legitimate purposes of the Mining Act. Nevertheless, while it is ultimately a matter for the discretion of the Minister, in my view, on the face of them the kind of 'no mining' conditions proposed by the minutes of programming directions do not appear to go beyond those limits.”*

3 It necessarily follows without the possibility of sensible dispute, that it is permissible for the Minister to impose a ‘No Mining’ condition upon an exploration licence.

4 The pertinent question is whether the imposition of such a proposed condition and its terms, may be said to be in accordance with and for the purposes of the Act in any particular case.

5 In respect of any particular proposed ‘No Mining’ conditions under consideration, the question to be asked, as I consider falls from his Honour the Chief Justice’s reasons, is:

a. Is the proposed condition framed in a manner which does not go beyond that which is reasonably capable of being regarded as related to the legitimate purposes of the Mining Act?

6 In this case before me now, the parties jointly seek a number of ‘No Mining’ conditions, in respect of each of the Objections. The Applicant seeks a recommendation for the grant of an exploration licence. The Objectors, all related entities, largely agree to allow the Applicant to proceed, with the qualification of the requirement of the imposition of the ‘No Mining’ conditions.

7 In broad terms, each of those proposed ‘No Mining’ conditions seeks to protect an established piece of infrastructure, owned and operated by the Objector. They are respectively and in broad terms, a railway line, a number of pipelines and power lines with associated infrastructure.

- 8 In summary, and on the materials before me, the proposed conditions are lawful, and in my view, appropriate in the circumstances.
- 9 Subject to my proposed addition, they do not go beyond that which is reasonably capable of being regarded as related to the legitimate purposes of the Mining Act.
- 10 It follows that in summary, my view is that there should be a recommendation largely in terms consistent with the MOPD.
- 11 I have said largely, as I consider it appropriate to depart from the proposed wording of the parties in terms of the proposed “No Mining” conditions for reasons set out in more detail below.
- 12 I consider the proposed wording ought be amended to include words to the effect of:
- a. *“There be no mining on or under the ground within the Exclusion Zones as referred to above in [], of all of the ground in grant of tenure in Miscellaneous Licence [X], for the duration of the currency of (current or extended) the grant of tenure in Miscellaneous Licence [X].*
  - b. *Upon the provision of written consent by the [Objector], or otherwise the demise, forfeit or surrender of the tenure in Miscellaneous Licence [X], this condition ceases to have effect.”*
- 13 In light of my view as expressed immediately above, it is appropriate to hear further from the parties as to whether they have any difficulty in the provision of a recommendation to the above effect, on the matters in dispute, and the form of the final orders and recommendation to be made.
- 14 If the parties are content with my proposed amendment, I invite them to provide a consent Minute to that effect.

### **Further Background**

15 His Honour the Chief Justice, in *Blue Ribbon*, expressed the view that the proposed conditions in that *Blue Ribbon* matter, likely did not go beyond those limits he referred to.

16 The proposed condition in that *Blue Ribbon* matter were referred to at paragraph [35] of *Blue Ribbon*. Most relevantly:

*a. (b) No mining on any land the subject of LASA or within 60 meters of LASA (Exclusion Zone).*

17 When regard is had to the totality of the reasons of the learned Chief Justice, and the facts of the matter before him, the view expressed was that the above mentioned condition was theoretically lawful, and seemingly within the scope of the permissible pursuant to the Act and may be considered to be a valid exercise of the Ministers discretion.

18 I have before me now, the next incremental step (or question) in respect of the application of the principles as expressed by the learned Chief Justice.

19 That question being, in what circumstances should a ‘No Mining’ condition actually be considered to be appropriate in a matter before me, rather whether it is permissible on a theoretical basis.

20 The parties in this matter, jointly ask me to make a recommendation featuring three ‘No Mining’ conditions.

21 The ‘No Mining’ condition is found in the MOPDs filed. They are as follows, referring to each of the objectors (all related parties) individual pieces of infrastructure sought to be protected:

22 The MoPD in respect of TPI's objection provided for the following condition:

*a. No mining or any other activities within the land:*

*i. the subject of LISA;*

*ii. extending 50 metres either side of LISA; and*

*iii. that is situated below the land described in paragraphs (i) and (ii) above.*

*(Exclusion Zone)*

23 The MoPD in respect of PEC's objection provided for the following condition:

*a. No mining or any other activities within the land:*

*i. extending 50 metres from the infrastructure constructed on the land;*

*ii. the subject of miscellaneous licences 45/469 and 45/470; and*

*iii. that is situated below and the airspace above the land described in paragraphs (a) and (b) above).*

*(Exclusion Zone).*

24 The MoPD in respect of PWP's objection provided for the following condition:

*a. No mining or any other activities within the land:*

*i. extending 50 metres from the infrastructure constructed on the land;*

*ii. the subject of miscellaneous licences 45/318 and 45/319; and*

*iii. that is situated below and the airspace above the land described in paragraphs (a) and (b) above).*

*(Exclusion Zone).*

- 25 In passing, I note this matter is a related matter to the matter in ***Blue Ribbon***. It ought not be surprising therefore, that the proposed ‘No Mining’ conditions sought by the parties in this matter, are reflective of that referred to in paragraph [35] of the reasons of ***Blue Ribbon***.
- 26 The difficulty encountered and the issue to be determined may be articulated in the following manner.
- 27 On 30 May 2024, the parties agreed a number of MOPDs. A copy of one those MOPDs is annexed hereto as Schedule 1. Save where referring to the specific infrastructure sought to be protected, the other two MOPDs are effectively the same.
- 28 The MOPD was subject to the now common practice (see for example: ***Pilbara Energy Company Pty Ltd v Hamersley Iron Pty Ltd*** [2024] WAMW 20) of a referral to the Department for consideration of the position proposed by the parties.
- 29 In the manner the practice has now developed, the Department provided a Regulation 68 Report in response to that request on 24 April 2024 (the Report).
- 30 The portion of that Report which is most relevant was as follows:
- a. This is effectively a no mining condition to an unlimited depth. DEMIRS does not support the application of such no mining conditions being imposed on exploration licences for ground included in miscellaneous licences (such as LISA), as it has the effect of sterilising the subject land and does not allow for any mining or other activities from the surface to the centre of the earth.*
  - b. DEMIRS believes that suitable protection can be provided through the application of relevant standard conditions and existing legislative frameworks such as, but not limited to, the Rail Freight Systems Act 2000, Rail Safety National Law (WA) Act 2015 and the Railways (Access) Act 1998.*



- 31 In the final part of the Report the Department indicates a preference for the parties to reach an agreement in respect of the contentious matters.
- 32 In short terms, the Department has provided advice to the parties, and to me, in the form of a Report, that the imposition of a ‘No Mining’ condition is not supported.
- 33 The Department also suggests the parties would be better served by a private agreement.
- 34 It is not entirely clear what is meant by that phrase, “*not supported*”, though in my view it is tolerably clear that the subsequent reference to sterilization of the ground, is sufficient to support a view that the Department may well consider ‘No Mining’ conditions to be unable to be practically imposed as a matter of discretion, as a result of their inevitable sterilization effect upon the ground in question.
- 35 That view it seems, appears to inform the Departments view of the required exercise of discretion.
- 36 In essence, the view being expressed appears to be that the imposition of the ‘No Mining’ condition acts to close ground open for mining, and is therefore impermissible in a practical sense.
- 37 I say practical sense, as the Department is bound by ***Blue Ribbon***, and the determination therein that a ‘No Mining’ condition (in theory) is lawful.
- 38 I note the State (via the office of the Attorney General) intervened in ***Blue Ribbon*** and did not appeal. Clarity in the law was achieved.
- 39 As indicated, in this case, the parties seek ‘No Mining’ conditions be imposed, over portions of the ground in the Application, as those portions overlaps a number of existing miscellaneous licence held by the Objector, upon which significant infrastructure exists.

**The Key Consideration in Respect of the Exercise of Discretion as required by *Blue Ribbon***

- 40 Having regard to my comments above, and the reasons in *Blue Ribbon*, in my view it is important to state that I do not consider that it is possible to come to a view as to the appropriateness or otherwise of a ‘No Mining’ condition in the absence of a sufficient evidentiary basis.
- 41 That is because an evidentiary basis is necessary for the proper and informed exercise of the relevant discretion as set out in *Blue Ribbon* and as I have referred to above in these reasons.
- 42 In this case the parties proffered a Statement of Agreed Facts as to the fundamental factual position. The content of that Agreed Statement of Facts (ASOF) may be found as an annexure to the MOPD in Schedule 1. I take into evidence and mark as Exhibit 1, that ASOF.
- 43 Where there ASOF refers to actual matters of fact, I find those facts as established.
- 44 An agreed statement of facts is one manner in which the parties can seek to adduce the necessary evidentiary basis for a Warden to either give a recommendation as to the appropriateness of a ‘No Mining’ condition or no, in any given circumstances.
- 45 However, and as may be seen from the ASOF sought to be relied upon in this matter, care must be taken to ensure that the evidence advanced meets the evidentiary burden upon a party (or parties) seeking to impose a ‘No Mining’ condition on a tenement.
- 46 Having regard to the ASOF in isolation, and at its most simplistic, the Departmental concern in this respect may be seen to be entirely valid, in theory at least.

- 47 The imposition of a ‘No Mining’ condition has the effect of closing ground to mining. That step ought not be taken lightly, as it is inconsistent with the fundamental purposes of the Act.
- 48 It follows, that in order to meet the requirements of the purposes of the Act as described by the learned Chief Justice in **Blue Ribbon**, it is necessary for a party or parties, to establish that the imposition of a ‘No Mining’ condition on the ground in question will still be able to be considered to be consistent with the overall purposes of the Act, notwithstanding that it involves the closure of a portion of ground to mining, for at least a lengthy period.
- 49 That, in my view, is a rather high bar. Such a request is not to be treated as a fait accompli, to be granted at the request of the parties.
- 50 Having regard to the ASOF it will be immediately apparent that the ASOF initially relied upon in this case was heavy on conclusions, and predictions as to future events, which were relied upon as to why it was appropriate to impose a ‘No Mining’ condition over the portions of the ground identified.
- 51 Further, it will be seen that the ASOF makes a number of comments to the effect that “*it is a matter of common knowledge . . .*”.
- 52 In **Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Limited (Formerly, Pearl Gull Pty) And Silver Gull Iron Pty Ltd** [2022] WAMW 5, I made a number of comments as to the manner in which judicial notice may be taken of factual matters.
- a. At [392] I said: *In order to take judicial notice of a fact, it should be of a class that is so generally known as to give rise to a presumption that all persons, or all persons in a relevant locality, are aware of it: **Holland v Jones** [1917] HCA 26; (1917) 23 CLR 149 at 153 per Isaacs J.*

- 53 Suffice to say that the matters referred to in the ASOF in this case as based on what was said to be ‘common knowledge’, or matters of prediction, are not matters in respect of which it is appropriate to take judicial notice.
- 54 They are not facts commonly known, though may well be commonly known within a portion of the mining industry.
- 55 Noting that this matter was the first matter in which has advanced to the point where I have been asked to give consideration to the appropriate manner in which to address ‘No Mining’ conditions by way of an MOPD, and that it is something of a novel process, I made a determination on the papers that the evidentiary basis was, relying on the MOPD and ASOF, largely insufficient to meet the requisite standard.
- 56 In accordance with the terms of the MOPD, I advised the parties as to my evidentiary concerns.
- 57 In this matter, the parties then buttressed their evidentiary position in the matter, by way of an Affidavit of Ms Rebekah Louise Jenaway sworn 13 September 2024 (Ms Jenaway’s Affidavit). For the purpose of these reasons, I receive into evidence as Exhibit 2, Ms Jenaway’s Affidavit.
- 58 Ms Jenaway’s Affidavit provided further details of the factual matters relied upon. It set out, in some detail which was most welcome, the complete extent of the infrastructure of the Iron Bridge mine, some of the associated infrastructure of which was sought to be protected by the imposition of the ‘No Mining’ conditions.
- 59 In particular, I note the following matters were deposed to:
- a. In respect of the Iron Bridge Project:
    - i. *The Iron Bridge Project is an unincorporated joint venture between FMG Magnetite Pty Ltd (69 per cent) and Formosa Steel IB Pty Ltd (31 per cent). The Iron Bridge Project*

*produces high grade iron ore magnetite from the North Star and Glacier Valley ore bodies. Please see the FY24 Annual Report at page 21 under the heading 'Iron Bridge'.*

ii. . . .

iii. *The Iron Bridge Project commenced operational production in August 2023. In the 2023-24 Financial Year, it produced 13.0Mt of ore. When operating at full capacity, the Iron Bridge Project aims to deliver 22Mt of ore per annum. Please see the FY24 Annual Report at page 30.*

b. In respect of the 'railway line' Exhibit 1 refers to:

i. *The Project's transmission corridor follows the existing Fortescue rail alignment from Port Hedland and then divides into two to enable the servicing of Fortescue's Chichester, Eliwana, Port and Solomon Mining Hubs.*

c. In respect of the 'slurry pipeline' the Affidavit deposed that:

i. *The Iron Bridge Project is located 145 kilometers south of Port Hedland. It produces a wet concentrate product which is transported to Port Hedland through a 135 kilometer long specialist slurry pipeline. The northern end of the pipeline is where dewatering and materials handling occurs. It also includes a water return pipeline. Please see the FY24 Annual Report at page 21 under the heading 'Iron Bridge'.*

d. In respect of the 'power line and associated infrastructure' the Affidavit deposed that:

i. *Through the Pilbara Energy Connect Project, Fortescue has integrated its stationary energy requirements in the Pilbara into an efficient network. This included the construction of a*

*100MW solar farm at the North Star Junction which services the Iron Bridge Project. Fortescue has also constructed 500 kilometers of transmission lines and associated substations. Please see the FY24 Annual Report at page 22 under the heading 'Renewable Power at our Mining Operations' and page 72 under the heading 'Green Energy Supply'.*

- 60 I find as facts the above matters. The detailed Affidavit was necessary so as to enable me to exercise the necessary discretion which I have described above.
- 61 Parties seeking a recommendation from the Warden as to the imposition of a 'No Mining' condition ought provide the sort of detailed consideration described above, to inform the necessary discretionary exercise.

**This Matter**

- 62 Upon that one of the Miscellaneous Licences sought to be protected, sits a railway line. It is eerily and unsurprisingly familiar to the dispute in ***Blue Ribbon***.
- 63 In ***Blue Ribbon***, his Honour said:
- a. *[17] Miscellaneous licence L4SA was granted pursuant to the Mining Act and the Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 (WA). Roy Hill has constructed a substantial railway line on the land the subject of miscellaneous licence L4SA, as well as associated infrastructure, including a rail access road, level crossings and signaling and communications equipment.*
- 64 Having regard to Exhibits 1 and 2, the railway line is a high value, fixed piece of infrastructure, which in this case, is put (and not open to dispute) as being integral to the operation of the Objectors mineral extraction business.

- 65 Further, and having regard to Exhibits 1 and 2, mining operations or access to that ground potentially creates risk to the structures concerned, as well as potentially safety hazards.
- 66 Those risks have the potential to cause significant harm to the commercial interests of the Objector, and potentially the State of Western Australia as well, though that matter is not properly able to be the subject of evidence from the Objector, save to the most basic notion of a potential decline in gross royalties. That however, is not the only measure of State interest.
- 67 I will add that in my view, precisely the same conclusion may be reached in respect of the slurry pipeline, and power line complexes and their associated infrastructure.
- 68 Noting that following **Blue Ribbon** it is not permissible to excise parts of blocks of an exploration licence, the approach sought to be taken to impose a ‘No Mining’ condition on a portion of the grants referred to, appears at first glance, to be a logical and sensible solution to the difficulty presenting from the need to protect the railway line, and other pieces of fixed infrastructure referred to.
- 69 The Department’s response as shown in this case, appears focused on some practical concerns.
- 70 **Blue Ribbon** itself occurred, in circumstances where the Department had, after a long period of granting excisions, formed the view that it would no longer grant excisions from exploration licenses. That created a dispute before me.
- 71 The dispute before me included an application by all of the parties to refer the matter as a question of law to the Supreme Court. The **Blue Ribbon** reasons followed. As indicated those reasons now fall to be applied.
- 72 As indicated above, in this matter I called for and received the Report from the Department, as to whether there was any difficulty presenting. I said in **Pilbara Energy Company Pty Ltd v Hamersley Iron Pty Ltd** [2024] WAMW 20, that it

(the Regulation 68 report) is a useful mechanism to bring to light any difficulty presenting on an MOPD type matter, which the parties had not considered.

73 I remain of the views expressed there as to the utility of the Regulation 68 Report process described in *Pilbara Energy Company Pty Ltd v Hamersley Iron Pty Ltd* [2024] WAMW 20.

74 Subsequent to the provision of the Report, my chambers received a communication from the Department, indicating a desire to provide further information.

75 I have made a determination to decline that request.

76 In this matter, I do not consider there is any difficulty in me determining it without hearing from the Department further, in the circumstances presenting in this case.

77 There are limits to the Regulation 68 Report process, and it ought not be treated as a de facto mechanism for the Department to make ongoing submissions to the Warden.

78 In the event the Department wishes to express firmer views at this stage, having brought such matters of concern to the attention of the Warden, the Department ought seek leave to formally intervene.

79 In my view, the binding statements of the learned Chief Justice are clear.

80 **Blue Ribbon** is authority for the proposition that ‘No Mining’ conditions are entirely within the power of the Minister to grant. The relevant question is whether, in the circumstances of the case as it presents, one should be imposed.

81 An example used by the learned Chief Justice to illustrate his Honour’s view, was by way of a reference to environmental or heritage concerns as areas, which might be appropriately protected from mining exploration activities, by the use of an appropriately framed ‘No Mining’ condition.



- 82 Further, the learned Chief Justice, when referring to a proposed condition in largely identical terms to the one before me now, indicated a view that it would not be beyond the scope of the Act in the circumstances.
- 83 It is noted that the proposed ‘No Mining’ conditions in this case do not cover the entirety of the ground of the Application. Rather, they operate to exclude ground upon which the previously described significant infrastructure sits and some ground immediately adjacent to that.
- 84 The view expressed by the Department in the Report appears to have echoes of the position argued unsuccessfully in *Blue Ribbon*, or at the least, reveals a generic reluctance to give consideration to the merits of the proposed conditions. Rather, the response appears to involve the adoption of a broader policy view of the Department which may have been held at one point (as at the date of the Report at least), and a reluctance to embrace the proposed conditions.
- 85 As I have indicated, some of those concerns, in the abstract, are valid, however what is required is consideration of all of the facts and circumstances presenting.
- 86 In this case, the Report may be properly characterized in this respect, in my view, as a request by the Department to the parties to have them reconsider the ‘No Mining’ condition approach, and rather approach such questions by way of separate commercial agreements, leaving the grant of licences undisturbed by the proposed conditions, but presumably subject to the private agreements.
- 87 Whilst that later approach may be open, it is not the one advocated for here by the parties.
- 88 It is not, in my view, for the Department to seek to dictate to the parties to such a dispute as to how the Department prefers it be resolved, rather, the Department ought consider the proposed MOPD and my recommendation on its merits, in respect of the associated request to grant relevant mining tenure.

- 89 Upon receipt of the Report, the parties expressed a view that they were desirous of expedition of the matters remaining in dispute. The parties indicated there were no matters remaining in dispute between them, however that is not strictly speaking accurate.
- 90 The Objector would not acquiesce to a circumstance where the No Mining condition was not imposed.
- 91 Its consent to the MOPD process was preconditioned on the imposition of the ‘No Mining’ condition. It is easy to understand why. The Objector, having invested in the construction of a railway line and the other infrastructure, seeks the formalized protection of a condition upon the Applicants grant in an unambiguous fashion, presumably to enable prompt and vigorous steps to be taken should any encroachment or non-conforming conduct occur.
- 92 The Applicants position is that it agrees it will not encroach, and simply wishes to advance its Application.
- 93 As a result of those circumstances presenting, I have arrived at a view that there is nothing to be gained by calling on the Department further.
- 94 That is for the following reasons:
- a. Prior to **Blue Ribbon**, there was a relative absence of authority on the legal question put. That is not the case now. The effect of **Blue Ribbon** is clear. The Department’s view of the effect of **Blue Ribbon** is not relevant to me in this case. The Department is not a party, nor has sought to be joined, nor intervened. The Report is exceptionally useful to me to identify issues, however if the Department is not a party, the use beyond the point of identifying issues (which may be then taken up by the parties, adversarially if necessary) is limited.
  - b. In the event the Department is prepared to make a stand on the issue, for a legal reason (as distinct for the exercise of a discretion in the

circumstances), it will presumably provide advice to the Minister to make that determination. The content of that advice (and how it might be provided) to the Minister is a matter for the Department. The view that the Minister takes in respect of any such advice, and my recommendation and any difference between them, is a matter for him. It seems to me that the Minister is no more bound by the Departmental recommendation or advice, than he is bound by my recommendation.

- c. As I have mentioned, in this matter, the parties have proffered an evidentiary basis for the exercise of the required discretion. That provides a factual basis for the required assessment as to the appropriateness of the ‘No Mining’ condition, as required by **Blue Ribbon**, in this case. The provision of a recommendation in this case, arising from the exercise of discretion upon the evidence led, is my statutory function following the fact of the objection. I will fulfill it.

### **Analysis**

95 I turn to a more detailed consideration of the matter itself.

96 The Applicant’s position is really rather simple.

97 The parties have agreed that the Applicant may explore those parts of the blocks of the proposed exploration licence, which are sufficiently distal from the railway line and other established infrastructure, so as to provide the Objector with satisfaction that there will be no adverse impact upon it.

98 Prior to **Blue Ribbon**, the same result would have been achieved by the Department on a consent MOPD, by way of excision from the grant of those parts of a proposed exploration licence which caused concern to objectors. Following **Blue Ribbon**, that course is no longer open.

- 99 The Department says it does not support the grant of a ‘No Mining’ condition, in respect of the safe zone around the miscellaneous licenses, as to do so would sterilize the ore body which may be there.
- 100 It seems to me uncontroversial to express a view, that the prospects of any mining or exploration occurring on ground the subject of the railway line, the pipeline or the power lines, or immediately adjacent to them, is really rather remote for the foreseeable future in any event.
- 101 Considering the position objectively on the materials before me, it appears from the facts presenting is that the Department will not support mining operations occurring on any part of a block of a proposed exploration licence, upon which significant infrastructure (or anything else of such significance to prevent mining on that ground) might sit.
- 102 That view may have arisen as a result of a degree of caution as to how **Blue Ribbon** might be properly applied, and the practical implications of a proliferation of no mining conditions on all manner of ground sought to be protected for one reason or another. That caution is understandable, and indeed laudable.
- 103 Necessarily though, that view or caution, actually results in the sterilization of ground, of a potentially greater area than is necessary to protect the subject infrastructure which may be located on parts of the ground in question, were an appropriate tailored ‘No Mining’ condition is able to be imposed.
- 104 Given exploration licence blocks are well, blocks, they largely cannot be made contiguous to the existence or location of significant infrastructure, environmental sites, or heritage sites, which are not generally speaking, universally square. Regrettably, WA is not part of the Minecraft world, where such an approach may in fact be possible.
- 105 The purpose of the Act are well known and not open to dispute.

106 In *Re Minister for Resources; Ex Parte Cazaly Iron Pty Ltd* [2007] WASCA 175; 34 WAR 403, Buss P referring to *Nova Resources NL v French* (1995) 12 WAR 50 at [122]:

a. "In *Nova Resources*, Rowland J said, at 57 - 58:

*"The primary object [of the Act], so far as it impacts on this case, is to ensure as far as practicable that land which has either known potential for mining or is worthy of exploration will be made available for mining or exploration. It is made available subject to reasonably stringent conditions and if these, including expenditure conditions, show that the purposes of the grant are not being advanced, then the Act and regulations make provision for others who have an interest in those purposes on that land to apply for forfeiture so they may exploit the area."*

107 It follows that in my view the determination in *Blue Ribbon*, coupled with the general principles falling from those matters referred to immediately above, require the Department, the Wardens and the Minister to approach the consideration of the manner and form of proposed conditions in a facilitative fashion, with the intent to foster the general purposes of the Act, whilst ensuring compliance with requirements of the Act.

108 Necessarily, all things being equal, an approach which opens more ground for mining is to be preferred to an alternative, opening less.

109 There may be occasions where the evidence presenting does not support the imposition of a 'No Mining' condition for a range of reasons.

110 Each case ought be considered on its merits, and the materials provided. It may be, in some matters, that it is inappropriate to proceed by consent, and a more detailed hearing is required.

- 111 Whilst the caution of the Department on the application of *Blue Ribbon* is understandable, in my view a path ought be found to enable the implementation of the binding determination of the learned Chief Justice, without losing the efficiency benefits of a consent based approach in clear cases.
- 112 The necessary next step for me then, is to formally express a view, that applying *Blue Ribbon*, these parties (and all others) are entitled to have the Mining Registrar, the Warden and or the Minister (as the case may require) consider ‘No Mining’ conditions as being potentially valid, and able to be applied subject to the facts and circumstances of the case presenting.
- 113 My view as regards to this case are:
- a. The matter presenting involves a request to impose a condition (being the no mining condition) which is lawful;
  - b. I consider in addition, that the condition is consistent with the purposes of the Act and its intent, and is an entirely sensible manner in which to conduct exploration upon the ground in question. On the evidence filed, it should be supported in this case. The concern expressed by the Department, which is valid in the abstract, does not move me from a view as to the appropriateness of the proposed condition, when regard is had to the actual facts and circumstances presenting in this matter in evidence.
  - c. Subject to my comments below about the drafting of the ‘No Mining’ condition, a recommendation should follow to enable that to occur.

#### **The Appropriate form of the No Mining Condition**

- 114 In these reasons above, I have stated that the appropriate framing of the ‘No Mining’ condition ought be:
- a. *“There be no mining on or under the ground within the Exclusion Zones as referred to above in [], of all of the ground in grant of tenure in*

*Miscellaneous Licence [X], for the duration of the currency of (current or extended) the grant of tenure in Miscellaneous Licence [X].*

- b. *Upon the provision of written consent by the [Objector], or otherwise the demise, forfeit or surrender of the tenure in Miscellaneous Licence [X], this condition ceases to have effect.”*

115 It is appropriate that I provide further reasons for this view. The ‘No Mining’ conditions are to sit upon the exploration licence of the Applicant, however in substance, have their roots in the need to protect infrastructure on the (completely separate) tenements of the Objector.

116 The reason for my proposed addition, is to ensure that in the event of the future demise of the Objectors tenement (for whatever reason), that the No Mining condition will no longer operate to sterilize the land on the exploration licenses.

117 The final point to note is that subject only to my proposed amendment, the proposed ‘No Mining’ condition is an absolute prohibition. It contains no rider, to the effect that the No Mining condition is subject to possible change in the future at the discretion of the Minister (or words to that effect).

118 I expressly add that I have further considered, in light of the content of the evidence, whether that absolute prohibition is appropriate in this case.

119 In my view it is, for the following broad reasons:

- a. The infrastructure sought to be protected is significant. It is a railway line, and associated fixed infrastructure of pipelines and power infrastructure relating to a project with a proposed lifespan of many years. Noting the nature of it, there is no sensible prospect of any mining occurring in the foreseeable future on the relevant ground without the concurrence of the Objector, and the conditions to be imposed ought reflect that.
- b. Further to ‘a’, in my view the Minister ought not be burdened with any future request to alter that condition in all of the circumstances. Given the

nature of the infrastructure sought to be protected, absent the consent of the Objector, any such future request would very likely be frivolous and vexatious on its face. I consider that any grant of tenure ought reflect the absolute nature of the prohibition to avoid that occurring.

- 120 In light of my comments above, it is appropriate to hear from the parties in respect of these reasons, and the final form of the 'No Mining' condition to be included in the recommendation to be provided to the Minister.
- 121 To that end, I note the matter is listed for mention on 25 October 2024. I will maintain that listing. The parties ought provide a final Minute of proposed orders, taking into account the content of these reasons, to be the recommendation.
- 122 In the event there is a difficulty with my proposed amendment that I have not considered, I will also invite the parties to file a short submission highlighting that concern and proposing a solution.



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Warden T W McPhee

10 October 2024



BEFORE THE WARDEN  
AT PERTH

Application for Exploration Licence 45/6645  
Objection 684330

BETWEEN:

**MT ROE MINING PTY LTD**

Applicant

and

**PILBARA ENERGY COMPANY PTY LTD**

Objector

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**MINUTE OF PROGRAMMING DIRECTIONS BY CONSENT**

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Date of Document: 30 May 2024

Filed on behalf of: The Parties

Date of Filing: 30 May 2024

Prepared by:  
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Ref: 7644

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BY CONSENT the parties seek the following orders:

1. Subject to clauses 2 and 5 below, application for Exploration Licence (**E45/6645** or **the Application**) is to be determined in chambers without further evidence or submissions from either the Applicant or Objector in relation to Objection 684330.
2. For the purposes of these directions the Applicant and Objector agree to the following facts and assumptions:
  - (a) The Application encroaches to the extent of:

- i 12.4044 hectares onto the area covered by miscellaneous licence 45/469; and
  - ii 10.4724 hectares onto the area covered by miscellaneous licence 45/470;
- held by the Objector.
- (b) The Applicant has in all aspects complied with the provisions of the *Mining Act 1978* (WA) (***Mining Act***) and the *Mining Regulations 1981* (WA) (***Regulations***) in respect of the Application.
- (c) The exercise of rights upon the grant of the Application (including under section 66 of the *Mining Act 1978* (WA)) will, but for the imposition of the Further Conditions at Schedule 3, have the effect of revoking or injuriously affecting miscellaneous licences 45/469 and 45/470 contrary to the express reservation of the rights to which the Objector is entitled as the holder of miscellaneous licences 45/469 and 45/470 pursuant to section 117 of the *Mining Act 1978* (WA) as set out in **Schedule 1**.
- (d) The miscellaneous licences have been granted for various purposes including the construction of a pipeline. Specific conditions are required to protect any pipeline (present or future) constructed on the miscellaneous licences.
- (e) The Further Conditions at Schedule 3 are necessary for the safe operation of a pipeline including to ensure compliance with the *Work Health and Safety Act 2020* or any other applicable legislation governing the safe operations of a pipeline.
- (f) There would be safety implications resulting from the Applicant conducting exploration activities on the land the subject of the miscellaneous licences 45/469 and 45/470 and within the Exclusion Zone (as defined below).
- (g) If the Applicant were to access the area the subject of the miscellaneous licences 45/469 and 45/470 for the purpose of conducting exploration activities, this would pose significant safety concerns for both the Applicant and Objector.


- (h) Exploration activities on or around the pipeline (including excavating, extracting, or removing land, taking or diverting water, sinking a well or bore) from or around any pipeline, could cause issues including, but not limited to:
    - (i) potentially undermining pipeline foundations;
    - (ii) impact the structural integrity of the pipeline;
    - (iii) impact the transportation of solid, liquid or gaseous product through the pipeline; and
    - (iv) increased safety risk to personnel.
- 3. The Mining Warden will give consideration to recommending the imposition of the Department of Mines, Industry Regulation and Safety Standard Conditions / Endorsements, which the parties agree ought to be imposed (the *Standard Conditions*), and a copy of which are annexed hereto as Schedule 2.
- 4. Further, the Mining Warden will give consideration to recommending the imposition of the further conditions which the parties agree ought to be imposed (the *Further Conditions*), and a copy of which are annexed hereto as Schedule 3.
- 5. The Mining Warden will forthwith provide a copy of this Minute with the proposed Further Conditions to the Department of Energy, Mines, Industry Regulation and Safety, with a direction that any view held by the Department of Energy, Mines, Industry Regulation and Safety as to the lawfulness or otherwise of any of the said Further Conditions is to be provided in a written report to the Warden, and the parties, within 14 days of the date of this Minute.
- 6. If the Mining Warden determines that the Application is to be recommended for grant with a recommendation that those Standard Conditions set out in Schedule 2 and the Further Conditions set out in Schedule 3, be imposed, no further hearing is required, and the matter may be determined accordingly.
- 7. If the Mining Warden forms a preliminary view that the Warden may:
  - (a) not recommend the grant of the Application; and, or
  - (b) recommend the grant of the Application without the imposition of one or more of the Standard Conditions set out in Schedule 2; and, or

- (c) recommend the grant of the Application without the imposition of one or more of the Further Conditions set out in Schedule 3: and, or
- (d) to recommend the grant of the Application but with a condition or endorsement being imposed that is not a Standard Condition as set out in Schedule 2, or Further Schedule as set out in Schedule 3: or
- (e) to list the Application for hearing in relation to any objection associated with it for any other reason;

then in any such case the Mining Warden will give the Applicant and Objector notice, and an opportunity to be heard prior to the Mining Warden making a determination or providing any such recommendation to the Minister, or taking any further step.

- 8. Subject to clause 6, the Objector is excused from further attendance at any listing of the Application.
- 9. In the event that the Mining Warden makes a recommendation pursuant to this Minute of Programming Directions, notice will be provided to the parties.
- 10. In the event that the Mining Warden makes a recommendation pursuant to this Minute of Programming Directions, the matter will be determined accordingly, with no order as to costs and the objection dismissed.

  
Kavenagh Legal  
Solicitors for the Applicant

  
Ensign Legal  
Solicitors for the Objector

**SCHEDULE 1**

BEFORE THE WARDEN  
AT PERTH

Application for Exploration Licence 45/6645  
Objection 684330

BETWEEN:

**MT ROE MINING PTY LTD**

Applicant

and

**PILBARA ENERGY COMPANY PTY LTD**

Objector

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**AGREED FACTS**

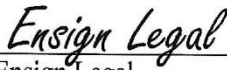
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For the purpose of this proceeding, the Applicant and the Objector agree the following facts:

1. Pilbara Energy Company Pty Ltd (PEC) is a subsidiary of Fortescue Ltd (**Fortescue**).
2. Fortescue is developing the Pilbara Energy Connect Project for the specific purpose of decarbonisation and supplying electricity to Fortescue's mining operations and projects in the Pilbara region of Western Australia (Project).
3. The Project comprises power generation, including renewable energy power generation, which are connected into Fortescue's operations via 220 kilo-volt overhead transmission lines with terminal and substation infrastructure.
4. The Project's transmission corridor follows the existing Fortescue rail alignment from Port Hedland and then divides into two to enable servicing of Fortescue's Chichester, Eliwana, Port and Solomon Mining hubs.
5. PEC has a network of miscellaneous licences that combine to form part of the transmission corridor that does or will provide power to Fortescue's operations.
6. The installations constructed on miscellaneous licences 45/469 and 45/470 (present or future) is infrastructure essential to all mining operations conducted by Fortescue in the Pilbara.

7. There would be significant financial harm to Fortescue and the State if the infrastructure on miscellaneous licences 45/469 and 45/470 was damaged or otherwise became inoperable for any period of time.
8. It is in the public interest to prevent injurious affection to Fortescue's activities on miscellaneous licences 45/469 and 45/470 that could result from the grant of the Application.
9. There would be safety implications resulting from the Applicant conducting exploration activities on the land the subject of miscellaneous licences 45/469 and 45/470 and within the Exclusion Zone.
10. If the Applicant were to access the area the subject of miscellaneous licences 45/469 and 45/470 for the purpose of conducting exploration activities, this would pose significant safety concerns for both the Applicant and Fortescue.
11. Exploration activities (including but not limited to excavating, extracting, or removing land, taking or diverting water, sinking a well or bore) from or around powerline infrastructure, could give rise to issues including, but not limited to:
  - (a) Blasting, or excessive vibration in proximity to transmission infrastructure causing damage to power lines, civil foundations or electrical equipment.
  - (b) Vehicle and machinery collisions with power lines or poles, leading to power outages.
  - (c) Excessive dust generation, leading to electrical flash over and power outage.
  - (d) Bush fire caused by exploration activities, leading to electrical flash over and power outage.

  
Kavenagh Legal  
Solicitors for the Applicant

  
Ensign Legal  
Solicitors for the Objector





Government of Western Australia  
Department of Mines, Industry Regulation and Safety



## Schedule 2

### DRAFT Tenement Endorsement and Conditions Extract

Tenement: E 45/6645

#### # ENDORSEMENTS

		Status	Start Date	End Date
1	The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972.	Draft		
2	The Licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.	Draft		
3	The Licensee's attention is drawn to the provisions of section 55 of the Land Administration Act 1997.	Draft		
4	The attention of the Licensee is drawn to the provisions of the Work Health and Safety Act 2020 (WHS) and Work Health and Safety (Mining) Regulations 2022 (Regulations), and the requirement for the licensee to comply with the requirements of the WHS and Regulations prior to any ground disturbing activities being undertaken within L1SA, L4SA and I154279.	Draft		
	<b>In respect to Water Resource Management Areas (WRMA) the following endorsements apply:</b>	Draft		
5	The Licensee's attention is drawn to the provisions of the: <ul style="list-style-type: none"> <li>Waterways Conservation Act, 1976</li> <li>Rights in Water and Irrigation Act, 1914</li> <li>Metropolitan Water Supply, Sewerage and Drainage Act, 1909</li> <li>Country Areas Water Supply Act, 1947</li> <li>Water Agencies (Powers) Act 1984</li> </ul>	Draft		
6	The rights of ingress to and egress from, and to cross over and through, the mining tenement being at all reasonable times preserved to officers of Department of Water and Environmental Regulation (DWER) for inspection and investigation purposes.	Draft		
7	The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the Department of Water and Environmental Regulation (DWER) relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.	Draft		
8	The taking of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless current licences for these activities have been issued by Department of Water and Environmental Regulation (DWER).	Draft		
9	Measures such as drainage controls and stormwater retention facilities are to be implemented to minimise erosion and sedimentation of adjacent areas, receiving catchments and waterways.	Draft		
10	All activities to be undertaken so as to avoid or minimise damage, disturbance or contamination of waterways, including their beds and banks, and riparian and other water dependent vegetation.	Draft		
	<b>In respect to Proclaimed Surface Water Areas, Irrigation District Areas and Rivers (RIWI Act) the following endorsements apply:</b>	Draft		
11	The taking of surface water from a watercourse or wetland is prohibited unless a current licence has been issued by the Department of Water and Environmental Regulation (DWER).	Draft		
12	Advice shall be sought from the Department of Water and Environmental Regulation (DWER) and the relevant water service provider if proposing exploration activity in an existing or designated future irrigation area, or within 50 meters of a channel, drain or watercourse from which water is used for irrigation or any other purpose, and the proposed activity may impact water users.	Draft		
13	No exploration activity is to be carried out if: <ul style="list-style-type: none"> <li>it may obstruct or interfere with the waters, bed or banks of a watercourse or wetland</li> <li>it relates to the taking or diversion of water, including diversion of the watercourse or wetland</li> </ul> unless in accordance with a permit issued by the Department of Water and Environmental Regulation (DWER).	Draft		
	<b>In respect to Proclaimed Ground Water Areas the following endorsement applies:</b>	Draft		
14	The taking of groundwater and the construction or altering of any well is prohibited without current licences for these activities issued by the Department of Water and Environmental Regulation (DWER), unless an exemption otherwise applies.	Draft		

#### # CONDITIONS

		Status	Start Date	End Date
1	Exploration and prospecting disturbances, excluding supporting infrastructure, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety. Backfilling and rehabilitation being required no later than 12 months after completion of the activity unless otherwise approved in writing by the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety.	Draft		
2	All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.	Draft		
3	Unless the written approval of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface	Draft		

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Requested By: Geoff BENSON /Page 1 of 2

Schedule 2		Status	Start Date	End Date
#	CONDITIONS			
	disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.			
4	The Licensee making verbal or written contact with the holder of any underlying pastoral or grazing lease within a reasonable time prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.	Draft		
5	The Licensee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:- <ul style="list-style-type: none"> <li>the grant of the Licence; or</li> <li>registration of a transfer introducing a new Licensee;</li> </ul> advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.	Draft		
6	The rights of ingress to and egress from Miscellaneous Licence 45/318, 45/319, 45/469, 45/470, 1SA and 4SA being at all times preserved to the licensee and no interference with the purpose or installations connected to the licence.	Draft		
7	No interference with Geodetic Survey Station F 16 and F 19 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.	Draft		
8	All supporting infrastructure for exploration and prospecting including core yards, laydowns, camps, and access tracks (excluding drill lines), being rehabilitated to the satisfaction of the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety. Rehabilitation being required by the earlier of 12 months from the infrastructure being no longer required to support exploration, or 12 months from the relevant programme of work expiring, unless otherwise approved in writing by the Environmental Officer, Department of Energy, Mines, Industry Regulation and Safety.	Draft		
9	The tenement holder must maintain appropriate records of exploration/prospecting activities, and associated rehabilitation undertaken, in order to demonstrate compliance with all conditions and environmental management and rehabilitation practice commitments. These records to be made available to the Department upon request.	Draft		
10	All exploration and prospecting operations to comply with the environmental management and rehabilitation practice commitments provided in the approved programme of work.	Draft		
	<b>In respect to the rail corridor land L4SA the following conditions apply;</b>	Draft		
11	No mining on any land the subject of L4SA or within 100 metres of L4SA (Exclusion Zone).	Draft		
12	No surface excavation approaching closer to the boundary of the Exclusion Zone than a distance equal to three times the depth of the excavation.	Draft		
13	No interference with the drainage pattern, and no parking, storage or movement of equipment or vehicles used in the course of exploration activities within the Exclusion Zone.	Draft		
14	The Licensee not excavating, drilling, installing, erecting, depositing or permitting to be excavated, drilled, installed, erected or deposited within the Exclusion Zone any pit, well, pavement, foundation, building, or other structure or installation, or material of any nature whatsoever.	Draft		
15	No explosives being used within 500 metres or stored within 1 kilometre of the land the subject of L4SA.	Draft		
16	The rights of ingress to and egress from L4SA at all times preserved to the employees, contractors and agents of the operator of the railway on the land the subject of L4SA.	Draft		

-- End of Report --



**SCHEDULE 3****FURTHER CONDITIONS**

1. No mining or any other activities within the land:
  - (a) extending 50 metres from the infrastructure constructed on the land;
  - (b) the subject of miscellaneous licences 45/469 and 45/470; and
  - (c) that is situated below and the airspace above the land described in paragraphs (a) and (b) above,  
  
(Exclusion Zone).
2. No excavation approaching 200 metres either side of the Exclusion Zone without the prior written consent of the holder of miscellaneous licences 45/469 and 45/470 with respect to that excavation [Modified Standard Condition 431].
3. No interference with the drainage pattern within miscellaneous licences 45/469 and 45/470 without the prior written consent of the holder of miscellaneous licences 45/469 and 45/470 [Modified Standard Condition 433].
4. No explosives and rock breakers being stored or used within 600 metres either side of the Exclusion Zone [Modified Standard Condition 435].
5. Blasting operations being controlled so that no damage or injury can be caused to the infrastructure located within miscellaneous licences 45/469 and 45/470 by fly rock, concussion, vibration or other means [Modified Standard Condition 435].
6. The rights or ingress to and egress from miscellaneous licences 45/469 and 45/470 being at all times preserved to the licensee without interference [Modified Standard Condition 14].
7. No interference with the purpose or installations connected to miscellaneous licences 45/469 and 45/470 [Modified Standard Condition 14].
8. Such further conditions as may from time to time be imposed by the Minister responsible for the *Mining Act 1978* (WA) for the purpose of protecting the land and infrastructure within miscellaneous licences 45/469 and 45/470 [Modified Standard Condition 437].