JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	**COVENANT FINANCE PTY LTD V SHIRE OF WAROONA [2025] WAMW 11**
CORAM	**:**	WARDEN T MCPHEE
HEARD	**:**	29 October 2024
DELIVERED	**:**	9 May 2025
FILE NO/S	**:**	Objection 692337
TENEMENT NO/S	**:**	Application for Prospecting Licence 70/1770
BETWEEN	**:**	**COVENANT FINANCE PTY LTD** (Applicant) AND **SHIRE OF WAROONA** (Objector)

Catchwords: Application for a Prospecting Licence

Legislation:

Mining Act 1978 (WA): sections 23, 24, 40, 42, 11A and 120
Mining Regulations 1981 (WA): Regulations 59, 154

Result: ***1) Application to be granted.***
2) Subsequent programming orders made

Representation:

Counsel:

Applicant	:	Mr Masson with Mr M Holler
Objector	:	Mr Pudoskis

Solicitors:

Applicant	:	Ensign Legal
Objector	:	Jackson MacDonald

Cases referred to:

- ***Forrest & Forrest Pty Ltd v Wilson*** [2017] (2017) 262 CLR 510
- ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468
- ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27
- ***Cresta Holdings Ltd v Karlin*** [1959] 3 All ER 656, CA, per Hodson J at 657.
- ***Makita (Australia) Pty Ltd v Sprowles*** [2001] NSWCA 305 (***Makita***) at [71].
- ***Owen v Warden Wilson*** [2023] WASC 178,
- ***Argyle v State Administrative Tribunal*** [2022] WASC 317
- ***Striker Resources v Benrama and Ellison*** (2001) WAMW 7
- ***Margaret River Resources Pty Ltd v Shire of Augusta Margaret River*** [2001] WAMW 8
- ***Australian Vanadium Limited v Darren Owen Cousens And Kim Leah Cousens*** [No 2] [2024] WAMW 42
- ***Redland City Council v King of Gifts*** (Qld) pty Ltd (2020) 3 QR 494

- ***Nova Resources NL v French*** (1995) 12 WAR 50
- ***Cazaly Iron Pty Ltd v The Hon John Bowler Mla, Minister for Resources & Ors*** [2006] WASCA 282 (22 December 2006).
- ***Telupac Holdings Pty Ltd v Hoyer*** [2022] WAMW 26,
- ***Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers & Residents' Association*** (1994) 11 WAR 315.

Introduction

1) I have before me an Application for Prospecting Licence P70/1770 (the Application) by Covenant Finance (the Applicant), which has been objected to by the Shire of Waroona (the Objector) by way of Objection 692337 (the Objection).
2) The Applicant seeks the grant of the Application to enable prospecting work to be undertaken on ground the subject of an environmental reserve, within the area for which the Objector is the responsible local government entity.
3) The Applicant advances a case that the Application is compliant with the requirements of the Act and ought therefore be granted.
4) The Objector says I should refuse the application as a result of one or more of the following reasons:
    a. A jurisdictional concern arising from the marking out of the ground the subject of the Application; and / or,
    b. A public interest objection raised on the basis of section 120 of the Act, which ought be upheld; and / or,
    c. A public interest objection which had its roots in environmental concerns, which ought be upheld.
5) In response to the Objection, the Applicant says:
    a. There is no jurisdictional difficulty with the Application;
    b. There is no public interest factor arising from section 120 of the Act;
    c. There is no public interest factor arising from any environmental concern generally, and in particular the matter is as a result of the effect of section 23 & 24(5A) & 5(B) of the Act
6) The Application was heard before me on 29 October 2024. I reserved my decision.
7) I have made a determination that there should be a grant of the Application. All the grounds of the Objection should be dismissed.
8) I will hear the parties as to the form of final orders and any costs issues.

9) My reasons for that determination are set out below.

Issues for Determination

10) As the matter was heard, I consider that there were five issues which were required to be addressed in these reasons to enable me to reach my determination.

11) They were:

a. Issue 1: The Jurisdictional issue associated with marking out;
b. Issue 2: The Admissibility of the report of Joint expert report Environmental Impacts Of Prospecting Licence P70/1770 In Banksia Woodland – Threatened Ecological Communities by Professor K. Dixon and Dr M. Just (the Report) dated 7 / 6 / 2024;
c. Issue 3: Is there a power to decline an application for a prospecting licence on the basis of 'public interest'?;
d. Issue 4: The impact of the section 120 of the Act planning concern as a basis for a 'public interest' Objection;
e. Issue 5: The impact of the environmental issues framed as a 'public interest' objection.

12) I address each of those issues below.

Evidence in this Matter

13) The Evidence filed in the matter was adduced by way of Affidavit.

14) The evidentiary material filed was:

a. Exhibit 1, the Affidavit of Matthew Adam Holler dated 16 / 2 / 2024 tendered by the Applicant;
b. Exhibit 2, the Affidavit of Zach Curtis Howes dated 16 / 2 / 2024 tendered by the Applicant;
c. Exhibit 3, the Affidavit of Craig Zanotti dated 7 / 6 / 2024 tendered by the Respondent.
d. Exhibit 4, the Joint expert report Environmental Impacts of Prospecting Licence P70/1770 In Banksia Woodland – Threatened Ecological

Communities by Professor K. Dixon and Dr M. Just (the Report) dated 31 / 5 /2024 , tendered by the Respondent.

e. Exhibit 5, being the Parties' statement of agreed facts dated 26 / 07 / 2024.

15) No witnesses were required for cross examination.

16) I will make some comments about the evidence below, where relevant to the Issues to be determined.

17) I annexe as Schedule 1, Exhibit 5, which adequately sets out the background to this matter.

Issue 1: A Jurisdictional Issue Raised

18) The Objector raised a jurisdictional issue. The issue related to the validity of the marking out undertaken by the Applicant.

19) Given the now accepted effect of jurisdictional failings following ***Forrest & Forrest Pty Ltd v Wilson*** [2017] (2017) 262 CLR 510 and in particular in respect of marking out, ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468 (***Forrest & Forrest Pty Ltd v O'Sullivan)***, it is appropriate to deal with that issue first.

20) As indicated above, the Applicant is required to establish that the Application has been marked out in accordance with the requirements of Regulation 59 of the Regulations.

21) There was no dispute between the parties as to the consequences of a failure to mark out in accordance with the Act and Regulations.

22) Following ***Forrest & Forrest Pty Ltd v O'Sullivan*** it ought now be regarded as settled law, that a failure to comply with the requirements of marking out, renders the application invalid such that jurisdiction ought be declined.

23) There is no dispute in this case as to the trenches or posts. Nor (blessedly) was there any dispute as to whether grains of sand are "rocks" or no for the purposes of the Regulation.

24) What is in dispute in this matter, is whether the manner of the attachment of the Form 20 to the datum post was consistent with the requirements of the Regulation.

25) A picture of the relevant post (taken from the evidence) is annexed hereto in Schedule 2. It will be noted that the post has a bundle of green tape at the top of it.

26) It is not in dispute that under that tape, was a document, being the Form 20. In short, the Form 20 on the datum post was covered up with tape.

27) The Objector says that amounted to a failure to comply. The Applicant contests the point.

The Regulation

28) The Regulation in question is Regulation 59(1). For ease of reference, the complete Regulation is set out below:

Regulation 59(1)

"Land in respect of which a person is seeking a mining tenement shall, except where other provision is expressly made, be marked out -

(a) by fixing firmly in the ground-

(i) at or as close as practicable to each corner or angle of the land concerned; or

(ii) if there is an existing survey mark at a corner or angle of the land concerned, as close as practicable to the survey mark without moving, changing or otherwise interfering with the survey mark,

a post projecting at least 1 m above the ground; and

(b) subject to subregulation (3), by either -

i) *cutting 2 clearly identifiable trenches; or*

ii) *placing 2 clearly identifiable rows of stones,*

each at least 1 m long from each post in the general direction of the boundary lines; and

(c) then by fixing firmly to one of the posts as the datum post, notice of marking out in the form of Form 20 ".

The Objectors Position on the Jurisdictional Issue

29) The Objector submitted that the requirements of the Regulation were such, and in particular the requirements falling from regulation 59(1)(c) properly construed, as to require the Form 20 to be visible to an observer of the marking out.

30) In short terms, the Objector submitted the word "*notice*" in Regulation 59(1)(c), should be construed to include a requirement that the Form 20 be visible and intelligible upon casual observation.

31) That position taken is best demonstrated by reference to some portions of the transcript:

a. ***PUDOSKIS, MR:*** *Yes. We submit, your Honour, that a requirement of visibility is clear. It simply has to be visible to a person who approaches the post for the purpose of viewing the notice.*

b. ***THE WARDEN:*** *When you say visible, what do you mean? Do you mean the whole notice has to be visible?*

c. ***PUDOSKIS, MR:*** *Yes. It must be possible for a person to approach the post and read the – and read the form 20 notice; nothing more, nothing less than that.*

d. ***THE WARDEN:*** *Right. That's the gravamen of the submission, then, isn't it?*

e. ***PUDOSKIS, MR:*** *Yes. Yes, your Honour. So the point I'm attempting to make is that the mere fact that there may be a document that matches the description of a form 20 is not enough. It has to be – it has to be visible such that the information in the form 20 can be read*

by a person who approaches the post, especially a person who does so for the purpose of trying to work out whether there's a tenement there and what the boundaries of the tenement are and so forth, which is the purpose of marking out, which I will come to in a moment.

32) *And later:*

a. ***PUDOSKIS, MR:*** *It's a notifying sign, your Honour. But I don't read it as a verb, I read it as a noun. To my mind it doesn't make a difference as to which way. But we don't read it as a – a verb would be, "You must notify someone of some information." We say it has that function of notifying, because it is a notice. A notice, by definition, has a function of notifying someone of information, or conveying information. That's what we say.*

b. ***THE WARDEN:*** *And so help me understand this. Because I will say to you that on reviewing your submissions, I developed a preliminary view that what you were trying to do was to establish that the fact of the notice is one thing, and its visibility is another, and that you require your – or your submissions require 59(1)(c) to be read as doing both. Or do you say it somehow loses its inherent character as a notice, as a form 21 – sorry, as a form 20, simply because it's not visible?*

c. ***PUDOSKIS, MR:*** *We say when the provision says "Fix a notice in the form of form 20" what it requires is a document, or a note, that takes the form of form 20 that is a notice, and a notice is something which is visible. So the requirement that it be in the form 20 simply specifies the content of the notice. So - - -*

d. ***THE WARDEN:*** *So, on your submission, it can't be a notice if it's not visible, irrespective of what else is in it.*

e. ***PUDOSKIS, MR:*** *That's right.*

33) The Objector submitted that "*notice of marking out*" read in context on its proper construction was that the notice was visible to interested observers.

34) The Objector submitted that a notice which is not visible to casual observation (as in this case), could not be considered to be a '*notice*' at all.

<u>The Applicants Position on the Jurisdictional Issue</u>

35) The Applicant submitted that the requirement of the Regulation is simply to affix the Form 20 to the Datum post.

36) The Form 20 is a document, proscribed by the regulations, and the use of the word notice in Regulation 59(1)(c) is simply a reference to the form itself.

37) The Applicant submits that the submission requiring 59(1)(c) to be read as including a requirement of visibility, is not supported by the text of the Regulation, nor a contextual reading.

Analysis - The Exercise in Statutory Construction

38) In ***Azure Minerals Ltd v D & G Geraghty Pty Ltd*** [2022] WAMW 27 at [134 – 141] I set out my understanding of the required approach to a question of statutory construction in this jurisdiction.

39) I did not understand those principles to be in dispute between the parties.

40) I consider that same approach is required here, and adopt the approach referred to.

41) In my view, when regard is had to Regulation 59(1) as a whole, it sets out a set of sequential steps required to be undertaken to mark out ground in a compliant manner.

42) Relevant to this matter, the determination may be made by reference to the last two portions of the Regulation, being the words:

    a. " . . . *and*:
    b. *(c) then by fixing firmly to one of the posts as the datum post, notice of marking out in the form of Form 20* "

43) The use of the word "*and*" immediately prior to the words of Regulation 59(1)(c) must make the content of the requirement set out in that Regulation, conjunctive to the balance of the marking out exercise.

44) That was not in dispute.

45) The question is then what is the content of the requirement set out.

46) In my view the comma between '*datum post*' and '*notice of marking out*' results in a circumstance where the proper grammatical construction of the Regulation is that the 'thing' (to use a neutral word) which is required to be firmly affixed to one post, is that 'thing' referred to and described immediately after the comma.

47) At the hearing I put to counsel for the Objector that what was being attempted, was to read the word '*notice*' really as a verb, requiring visibility.

48) Counsel demurred and submitted firmly that on the proper construction of '*notice*', as a noun, it must include the capacity to be observed as a matter of construction.

49) I reject that submission. The Regulation, properly construed is that the latter part of Regulation 59(1)(c) is creating an obligation to affix the thing in the required form, to the postand nothing further.

50) Construed in this fashion, the effort by the Objector can be seen for what it is, being an effort to read the word '*visible*' into the text of the Regulation. I reject that effort.

51) I am fortified in my view by the following passage, which highlights the distinction between notice and knowledge, which I think is applicable here:

    a. "*I do not myself regard the word notice as a synonym for the word knowledge. Notice is a word which involves that knowledge may be imparted by notice, but notice and knowledge are not the same thing, although loosely one sometimes talks as if to act with notice and to act with knowledge were indeed the same.*" ***Cresta Holdings Ltd v Karlin*** [1959] 3 All ER 656, CA, per Hodson J at 657.

52) Another way of articulating it is to note (in broad terms) that a company may be served with notice of some proceedings, at its registered address, and determined to have had notice of those proceedings (for the purposes of say, default judgment), even if there was no subjective knowledge of the proceedings at all, in the mind of the directors.

53) In my view, the Objectors submission that the thing cannot be a notice for the purposes of Regulation 59(1)(c) unless it is visible, can be dealt with in the same fashion.

54) The Objector submitted, without any real reference to authority, that to be a 'notice' the thing must be visible. I do not agree with the proposition generally.

55) In context, to be a notice for the purposes of the Regulation, the thing must comply with the requirements identified – namely that it be in the form of Form 20and that it be fixed firmly to the post.

56) Visibility would be an additional requirement, which is not expressly referred to in the text of the Regulation. There is no reason, in my view, to read that requirement into the word '*notice*'.

57) The necessary conclusion is that the proper construction of the Regulation does not require the Form 20 to be visible to casual observers at all times.

58) In practical effect, I consider that the Regulation requires the '*notice*' to be able to be identifiable as a Form 20 if it becomes necessary.

59) That is what has occurred in this case. It is not disputed that the Form 20 was attached to the post, it was simply not visible unless the tape was unwound.

60) It follows that there is no fault in the marking out.

61) The compliance of the Application is otherwise supported by the evidence of Exhibit 1.

62) No other concern as to compliance is raised by the Objector. In any event, I am satisfied on the evidence that the Application is compliant generally and is therefore jurisdictionally sound.

Issue 2: Admissibility of the Report

63) There was a challenge to the admissibility of the Report. That challenge was quite properly made in the lead up to the trial.

64) In the lead up to trial I made directions that the parties file written submissions in support of their position, following which I would make a determination prior to the trial commencing as to the admissibility of the Report.

65) Prior to trial, I caused a communication to be sent to the parties that I considered that the Report was admissible, but that weight would be considered in the context of the proceedings as a whole.

66) I also indicated that I would provide some reasons for that determination in the substantive decision.

67) Necessarily, these reasons relating to the admissibility of the Report are made with a view of the matter as at the date of that determination, necessarily prior to trial.

68) In broad terms, the Applicant objected to the Report on the basis that it contained a number of opinions based on factual matters, where those factual matters upon which the opinions rested, were said to not be properly proved in evidence.

69) Reliance was placed squarely on ***Makita (Australia) Pty Ltd v Sprowles*** [2001] NSWCA 305 (***Makita***) at [71].

70) That determination itself applied existing rules of evidence, in judicial determinations, and in my view, may properly be regarded as uncontroversial.

71) In ***Markita***, at (81), Haydon JA (as his Honour then was) said:

> a. *81 In Bollock v Wellington (1996) 15 WAR 1 at 3 Anderson J said:*
>
> b. *"Before an expert medical opinion can be of any value the facts upon which it is founded must be proved by admissible evidence and the opinion must actually be founded upon those facts ..."*
>
> c. *He then said at 3-4, citing Steffen v Ruban:*
>
> d. *"As with any other evidence, expert opinion must be comprehensible and the conclusions reached must be rationally based. A court ought not to act on an opinion, the basis for which is not explained by the witness expressing it ...*
>
> e. *None of these requirements is satisfied, when all that the medical expert says is `I have examined this patient and from what I know about plant operation I think he can drive a D10 bulldozer on production work'."*

f. *He also said at 4, citing Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370 at 390:*

g. *"Unless the process of inference by which an opinion is reached is expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to its reliability, the opinion can carry no weight ... ."*

72) The Objector sought to adduce the Report over objection, with reliance on Regulation 154(1) of the Regulations, providing:

a. *(1) In conducting any hearing the warden —*

b. *(a) is to act with as little formality as possible; and*

c. *(b) is bound by the rules of natural justice; and*

d. *(c) is not bound by the rules of evidence; and*

e. *(d) may inform*

73) Further reference was made to ***Owen v Warden Wilson*** [2023] WASC 178, per Smith J at [29]; and, ***Argyle v State Administrative Tribunal*** [2022] WASC 317, per Smith J at [34].

74) It was accepted by the Objector that the rules of evidence may be applied "*at the stage of assessment of evidence in so far as they assist in determining whether evidence received is logically and rationally probative*": *Owen*, [29]-[30].

75) It followed in the Objectors submission as I understood it, that even if the Applicants position was accepted as to the alleged flaws in the Report, the evidence ought be accepted as admissible in this administrative proceeding.

76) I accept the submission of the Objector to that extent. Noting the effect of the Regulations, I consider that it would be in error, to preclude the Objector the right to rely on evidence it considers relevant and probative to its case, in this jurisdiction in this case, unless it was on its face, plainly not probative of any matters in issue.

77) Such questions are to be determined on a case by case basis.

78) However, I reject the Objectors contention that the opinions in the Report ought be given their 'full weight'. I take that to be a submission that I ought simply accept the opinions proffered as stated.

79) That is principally because the complaints made about the absence of certain factual matters, are in my view well founded.

80) Further, it is not an answer, in my view, that the Report was not challenged in evidence in cross examination, and therefore the opinions ought be given full weight.

81) The opinions are merely that, opinions. They do not take on the status of an unchallenged fact, but rather, fall to be assessed in the evidentiary context in which they are proffered.

82) In this case, I consider that the Report is admissible, though the objection raised to its admissibility has merit; so much that I consider the Report would unlikely be admissible in a judicial jurisdiction, largely for the reasons articulated in the Applicant's submissions dated 11 October 2024.

83) I am required to give effect to the strictures in Regulation 154, which is why I expressed the view that I did, that the Report was admissible.

84) As indicated, on the subsequent question of weight though, it simply must be the case that evidence of this kind, which is subject to the sort of criticism made here, must be considered to be of limited to no weight as a result. It is opinion evidence, the basis of which is lacking in many respects.

85) It follows that my view was and is, that the evidence ought be accepted as admissible in this jurisdiction, but is ultimately of very little weight at all when considered in the context of this case, and the other evidence led.

Issue 3 - Public Interest as a basis to Refuse a Prospecting licence Application.

86) The papers in the dispute raised the issue of whether there is a power at all for a Warden, sitting administratively, to decline an application for a prospecting licence on the basis of what was referred to as 'public interest' grounds.

87) The objector submitted that there was, based on the proper construction of section 40 and 42, and the application of a number of long-standing determinations in this jurisdiction.

88) Reliance was placed on ***Striker Resources v Benrama and Ellison*** (2001) WAMW 7 (***Striker***) and ***Margaret River Resources Pty Ltd v Shire of Augusta Margaret River*** [2001] WAMW 8 (***Margaret River***), the latter being a decision of his Honour Warden Calder made in respect of an application for a prospecting licence.

89) At the hearing, the position taken by the Applicant resiled to a degree from that initially stated.

90) It was said by the Applicant, that consistent with my recent decision in ***Australian Vanadium Limited v Darren Owen Cousens And Kim Leah Cousens*** [No 2] [2024] WAMW 42 (***Cousens***), that it may be that there was no such power, but that properly considered, the matter does not arise here as the 'public interest' factors articulated, did not rise the evidentiary level required or contemplated in ***Striker***, and or were not actually, properly considered, 'public interest' factors for the purposes of the Act at all.

91) Ultimately, I accept that submission, for broadly the same reason as set out in ***Cousens***.

92) Given the issue is somewhat controversial though, and the fact that my views are not free from doubt, I will provide further reasoning.

93) In my view, the salient aspect of both ***Striker*** and ***Margaret River***, was that both addressed seemingly as preliminary issues, the theoretical possibility (or not) of the Warden having power to hear an objection to a prospecting licence at all, on the basis of a public interest ground, generally stated.

94) That is not this case. In this case, the Objector conducted its argument fully. The Objector sought to rely on the notion of 'public interest' as a reason for denying the Applications pursuant to section 111A of the Act.

95) The substance of the different parts of the Objection presented to me in this case, were however different to those in ***Striker*** and ***Margaret River***.

96) The first limb of the Objection related to the requirement for me to take into account the matters referred to in section 120 of the Act.

97) That provision refers to, in broad terms, town planning matters. The Objectors case on this aspect, was an objection that the Application ought be refused, because were I to correctly take into account the matters referred to in section 120 of the Act as arising in this case, I would necessarily arrive at a view that the Application ought be refused on the basis of 'public interest'.

98) I note, at this juncture, that there were alternative positions put, which I will address later.

99) I will also add at this point, that the planning issues referred to, were in my view, entirely linked to the environmental objection advanced, and associated with the presence of a reserve on the ground in question.

100) The reserve in question formed in effect, the second limb of the 'public interest' ground of the objection, arguing substantive environmental harm to the area protected by the reserve. That, it was said, amounted to a separate 'public interest' concern, warranting the refusal of the Application.

101) Having given the matter very considerable thought, I have formed the view that the approach taken by the Objector, in asserting 'public interest' as the basis of its Objection to the Application in this case, is erroneous.

102) So too is the notion that this matter is dependent on some kind of generic view as to the power of the Warden to refuse the Application based on an overarching 'public interest' ground, having its roots in section 111A of the Act, which refers only to an express power of the Minister, not the Warden.

103) I accept that view places me, to a degree in conflict with the decisions in ***Striker*** and ***Margaret River***. On balance however, I consider that those decisions may be distinguished from this matter, for the reasons set out more fully below.

104) Dealing with the described 'public interest' grounds in turn as they relate to this issue.

105) The first, relating to section 120 of the Act, is not a 'public interest' ground for the purposes of the Act.

106) It is a ground asserting that the Application should be refused as a result of the matters I am required to have regard to, namely the relevant town planning scheme.

107) In my view, relying on ***Redland City Council v King of Gifts*** (Qld) Pty Ltd (2020) 3 QR 494, to say that town planning matters are matters of public interest (generally), to then ground a submission that I therefore have power to refuse the Application on the basis of 'public interest' generally, is an erroneous construction of the Act.

108) To be clear, I do not doubt that town planning matters are generally to be regarded as matters of public interest, what I doubt is that fact as a basis for the adoption of a general power to refuse an application on the basis of anything else which may be described as 'public interest', by any other party, in any other circumstances, rather than simply applying the requirements of section 120 of the Act to the Application on the facts presenting in evidence.

109) In my view, any determination to refuse (as submitted I should say by the Objector), or restrict by condition an application after taking into account town planning matters referred to in section 120 of the Act, would be a determination to refuse or restrict the application as a result of the town planning matters which I was required to have regard to.

110) That in turn must depend on the nature of the evidence led, rather than the label sought to be applied to the matters in question. That in my view is the source of the relevant power, not section 111A of the Act.

111) As a result, I consider that the thorny question of whether the Warden has a discretion (or no) to refuse an application based on the 'public interest' (and by extension, whether ***Striker*** and ***Margaret River*** are correct) power of the Minister pursuant to section 111A of the Act, simply does not arise in this case in respect of that limb of the Objection relying on section 120 of the Act.

112) The nature of the second limb is different, though I arrive at a similar conclusion. The environmental harm issues relied upon, arises from and relates to the fact of the reserve.

113) There is, as is set out below, an express statutory mechanism in the Act to address questions arising from the fact of the application over a reserve as it arises in this case, and a desire on the part of the tenement holder of such ground to conduct mining operations.

114) There is no dispute in this matter that the land in question is the subject of a reserve, in respect of which the express statutory mechanism I have alluded to applies.

115) Thus, in respect of the second limb, the question is not, in my view, one of whether those matters are a 'public interest' concern, sufficient to enliven a purported discretion to refuse the Application under section 111A of the Act.

116) Rather, in my view, the pertinent question in this matter in respect of that limb, is whether it is appropriate to hear now, a dispute as to the environmental concerns raised in respect of the possible future mining on the reserve, in light of the existence of the statutory mechanism I have mentioned.

117) Again, whilst, in very broad terms it is easy to apply the label of 'public interest' to such a circumstance (particularly in respect of environmental concerns), it is not, in my view, properly considered to be a matter of 'public interest' at all under the Act, as that phrase is properly understood having regard to determinations like ***Nova Resources NL v French*** (1995) 12 WAR 50 and ***Cazaly Iron Pty Ltd v The Hon John Bowler Mla, Minister for Resources & Ors*** [2006] WASCA 282 (22 December 2006).

118) Again, as a result, the particular factual circumstances presenting in this matter, relating to the second limb as I have described it simply do not give rise to the question posed as part of this Issue.

119) A refusal of the Application on the basis of the environmental concerns arising from a submission of the need for me to hear and determine them as some kind of filter or advisory process for the Minister, ***as part*** of the subsequent exercise

of his or her possible power pursuant to section 24(5A) or (5B) of the Act, is precisely that, and should not be referred to as a 'public interest' ground relying on section 111A at all.

120) Accordingly, and as a result I again decline to expressly answer the question posed in this Issue.

121) The better approach, in my view, is in each case to specifically consider the nature of the application and objection raised in the context of relevant and operative provisions of the Act or other Statutory regulatory regimes which apply, rather than asserting generic notions of 'public interest'.

122) I consider that better approach is entirely consistent with that of the learned Warden Cleary (as her Honour then was) in ***Telupac Holdings Pty Ltd v Hoyer*** [2022] WAMW 26, where her Honour declined to hear further a matter following an interlocutory application. I further consider that the approach is also not inconsistent with ***Striker*** or ***Margaret River***, where his Honour Warden Calder was seemingly only addressing (by way of a preliminary issue in each case) whether the Objector ought be permitted to conduct 'public interest' objections at all.

123) To be clear, in this case and in any event, I consider ***Telupac***, ***Striker*** and ***Margaret River*** are all readily distinguishable simply on the fact that before me a full hearing was conducted.

124) That provided me with the evidentiary basis to reach the view I have as to the substance of the matters relied upon, as being 'public interest' matters, and conclude they are not.

125) I will further add that in my very respectful view, that it is only when an objection arises which is based on a factual or legal circumstance to which no other express statutory mechanism in the Act or other relevant Statutory regime is able to be said to answer or relate (with the necessary evidentiary foundation), and that the dispute cannot be properly characterised as a dispute between private interests, that a genuine question of the extent of the power of

the Warden to ultimately refuse an application on inchoate notions of 'public interest' under section 111A of the Act, could arise.

126) That is not this case.

Issue 3: Planning Issue

127) As indicated, a ground for objection relied upon was a 'public interest' ground, reliant on the operation of the requirements of section 120 of the Act.

128) Section 120 of the Act says:

> **a. 120. Planning schemes to be considered but not to derogate from this Act**
>
> *b. (1) In considering any application for the grant of a mining tenement the Minister, warden or mining registrar, as the case requires, shall take into account the provisions of any planning scheme in force under the Planning and Development Act 2005 affecting the use of the land concerned, but the provisions of any such scheme shall not operate to prohibit or affect the granting of a mining tenement or the carrying out of any mining operations authorised by this Act.*

129) The Objector submitted that the Shire is permitted to object on the basis of planning considerations.

130) Given the express requirement on the Warden to take into account such schemes I accept that submission to that extent.

131) I also accept the submission, that, in certain circumstances, it may be appropriate for a Warden to consider appropriate conditions pursuant to section 46A of the Act, in respect of matters raised pursuant to section 120, where it is considered necessary to do so.

132) The 'public interest' submission in this matter relating to planning concerns, does not, even were I to accept completely the submissions of the Objector that I ought give weighty consideration to the evidence, as a question of 'public interest' separate from the consideration required by section 120 of the Act (a

submission I do not accept), rise to the kind of necessary level as contemplated by ***Striker***, applying a similar sort of reasoning as that seen in ***Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers & Residents' Association*** (1994) 11 WAR 315.

133) As indicated, that evidence in this case is of little to no weight, but such as it is, simply articulates a desire to retain a small portion of bushland, that until recently had been earmarked by the same local entity, as a future waste disposal site. Same is hardly the material which might be considered to excite the interest of the Minister in a broad 'public interest' manner as contemplated by the Act.

134) In my view, those considerations in this case properly considered, are really an effort to raise again the matters relevant for consideration by the Minister in respect to the environmental issues which fall, by an orderly application of the provisions of the Act, for consideration pursuant to section 24(5A) and 5(B) of the Act.

135) Shorn of those considerations, there is naught left to consider pursuant to section 120 of the Act, which could compel me to decline a grant (even were I to accept that there was such a power found in section 120).

136) I express that view, as the evidence led in support of the position in respect of the environmental concerns, is of little to no weight for the reasons set out above. In light of that, there is nothing in the evidence led in support of the section 120 of the Act ground which moves me to a view that the application ought be refused on that basis alone, nor anything which moves me to a view that any kind of specific condition need be applied.

137) I note in that last respect, that is so, as the need for the purported strict conditions, was based squarely again on the environmental evidence in the Report, which I do not consider carries sufficient weight to do the work asked of it.

138) As a result, I consider that in coming to my view, I have taken into account the provisions the planning scheme in force, by making an assessment that properly

considered, they raise in this case environmental concerns which do not support a conclusion that the Application should be refused or restricted by condition beyond the norm, and, will in any event, be assessed and determined by the Minister in making a determination pursuant to section 24(5) and (5B) of the Act in due course.

139) Accordingly, I would dismiss that basis of objection.

Issue 4: Environmental Objection

140) The Objectors position on the environmental aspect of the public interest objection is best encapsulated by reference to the following passages from the Objectors submissions filed 6 September 2024:

a. *" . . . The Shire contends that, excluding firebreaks, the whole of the licence area is covered by remnant native vegetation consisting of Banksia woodlands that are part of or include the Banksia Woodlands of the Swan Coastal Plain ecological community (the Banksia Woodlands TEC), a "threatened ecological community" listed under s 181 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth). . . ."*

141) And Later:

a. "*Whether the fact of the requirements for consultation and consent under ss 23(2) and 24(5A) and (5B) of the Mining Act which (the parties agree) apply to the Reserve mean that the warden either lacks the power to consider the matters raised by the Shire or, if he has the power, whether he should decline to consider these matters in his discretion (Issue 5). The Shire contends that these provisions do not affect the scope of the warden's powers under ss 40(1) and 42(3). Nor do they mean, in the circumstances of this case, that the warden should not fully consider the merits of the Shire's concerns and decide on them as appropriate."*

142) The environmental basis of the objection was to be found in the Report.

143) The Applicant submitted the environmental concerns raised, arising as they did from the operation of the relevant reserve, are properly the subject of the operation of section 23 and 24 of the Act, being an express statutory mechanism to address such concerned, and ought not prevent grant.

144) The Applicant accepts that an outcome of the process advocated for, is a grant over land that they cannot conduct mining operations on, until further approvals are obtained.

145) I consider that the relevant issue is best addressed by reference to the question of the application of section 23(2) and 24(5A) and (5B) of the Act first.

146) Section 23 of the Act says as follows:

a. *23.* ***Mining on public reserves etc. and Commonwealth land***

(1) Subject to this Act, a mining tenement may be applied for in respect of the following land (not being land that is already the subject of a mining tenement) —

(a) land, or land of a class, to which section 24, 24A or 25 applies;

(b) Commonwealth land.

(2) The holder of a mining tenement in respect of such land must not carry out mining on or under that land otherwise than in accordance with a relevant consent obtained in relation to that land under section 24, 24A, 25 or 25A.

(3) A mining tenement held in relation to such land is liable to be forfeited if the holder of the tenement —

(a) contravenes this section; or

(b) is in breach of any term or condition to which a consent given under section 24, 24A, 25 or 25A is made subject.

147) Section 24(5A) and 5B says as follows:

24. Classification of reserves

" . . .

a. *(5A) Mining on any land referred to in subsection (1)(c) may be carried out with the written consent of the Minister who may refuse his*

consent or who may give his consent subject to such terms and conditions as the Minister specifies in the consent.

b. *(5B) Before giving his consent under subsection (5A) whether conditionally or unconditionally the Minister shall first consult the responsible Minister and the local government, public body, or trustees or other persons in which the control and management of such land is vested with respect thereto, and obtain its or their recommendations thereon.*"

148) There is no dispute between the parties that the land in question is subject to a reserve, to which section 24(5A) and (5B) of the Act apply.

149) As a result, the situation before me is not that there can be no application for a tenement on the ground the subject of the reserve.

150) Rather the question relates to the manner in which I, in this jurisdiction, should treat such an Application and an objection based on environmental concerns (going to the heart of the matters establishing the reserve) where there is a further prohibition on mining on that ground pursuant to section 23(2) of the Act pending further Ministerial consideration.

151) I do not consider it to be an issue, however for the sake of clarity will state that the prohibition on "*mining*" referred to in section 23(2) of the Act, which is in place absolutely absent the consent of the Minister referred to in sections 24(5A) and (5B), picks up the definitions as set out in section 8 of the Act, in respect of "*mining"*, and "*mining operations"*. They are:

a. ***mining*** *includes fossicking, prospecting and exploring for minerals, and mining operations;*

b. ***mining operations*** *means any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted combusted or refined or dealt with for the purpose of obtaining any mineral or processed mineral resource therefrom whether it has been previously disturbed or not and includes —*

i. (a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral; and

ii. *(b) operations by means of which salt or other evaporites may be harvested; and*

iii. *(c) operations by means of which mineral is recovered from the sea or a natural water supply; and*

iv. *(da) operations by means of which a processed mineral resource is produced and recovered; and*

v. *(d) the doing of all acts incident or conducive to any such operation or purposes;*

152) It is therefore correct to state, that in my view the capacity of the Applicant to engage in any activity which the Objector is concerned about (environmentally), is entirely restricted by the operation of section 23(2) of the Act at this time, pending the Ministerial consent required.

153) Further, in my view, it is telling in the context of this broader dispute, that the terms of section 23(2) refers to the "*holder of a mining tenement*".

154) Necessarily then, I am compelled to a view that the express words of the Act contemplate the grant of a tenement, on which no mining can occur, until further steps are taken by the tenement holder. That may occur immediately following grant. Or it may not.

155) I was not taken to any requirement for a tenement holder to make an application pursuant to section 24(5A) of the Act, within any relevant time frame. Nor do I see any such requirement.

156) It follows from the above, that in my view there is an express statutory mechanism for the consideration of whether mining can occur on land the subject of this specific kind of reserve, able to be enlivened after the grant of the tenement, and which does not appear to be directly linked to the processes associated with the application for the grant of tenure.

157) The Objector submits that the weighing and consideration of the sorts of 'public interest' factors raised, in this case, the environmental ones, ought occur within this jurisdiction, even in circumstances where the Act contemplates a prohibition on mining pending the further consideration of those same factors by the Minister after grant at no specific time.

158) I say the same factors, as the consent required to enable the conduct of mining on the ground the subject of the Application, is necessarily linked by the operation of section 23 and 24, to the kind of reserve in question.

159) In this matter, the reserve in question is unambiguously an environmental reserve.

160) As a result in my view, the Objector's submissions conflate the jurisdiction of the Warden and the Minister in this case, relating to these provisions.

161) I say that, as the prohibition referred to in section 23(2) of the Act, as indicated, appears to operate after grant.

162) Necessarily, it is not therefore able to be considered to be a jurisdictional precondition to grant, and the processes of seeking consent from the Minister may seemingly occur, some significant time later after grant.

163) In my view that must mean that the completion of the function of the Warden can (but seemingly not must) occur irrespective of whether the consent pursuant to section 24 (5A & 5B) has been obtained.

164) I see no part of the other provisions of the Act relating to applications for prospecting licences, (eg, section 42) which permits me to grant an application for a prospecting licence, subject to the Ministers consideration of the grant or refusal of the necessary consent under section 24 (5A) & (5B) of the Act.

165) Rather, the obligation of the Warden is to:

> a. "*…hear and determine the application for the prospecting licence on a day appointed by the warden and may give any person who has lodged such a notice of objection an opportunity to be heard.*"

166) I consider that the proper construction of the Act as a whole, points in the opposite direction than that submitted by the Objector.

167) Section 111A of the Act provides the Minister with an express power to effectively veto an application for a prospecting licence, at any point up to grant on effectively any basis.

168) The consent process referred to in section 24(5A) and 5(B) of the Act, provide for the granting of consent by the Minister, and imposes a number of obligations on the Minister, after grant.

169) Neither provision expressly imports any requirement on the Warden to give any kind of recommendation to the Minister in the form of a decision made in respect of the underlying prospecting licence, relating to matters to possibly be considered in the future, pursuant to the exercise of the discretion referred to in section 24(5A & 5B).

170) Section 40 of the Act, and the reference therein relating to the imposition of any such condition arising, relates to the power to impose conditions upon the grant , in my view at all, and is properly read as preserving the Ministerial discretion referred to in section 24, as being able to operate after grant.

171) I do not consider it is permissible to read into that part of section 40 of the Act, an obligation on the Warden to hear any matters which any party may wish to raise pursuant to 24 (5A) & (5B), at some later time.

172) I consider that the better reading of the Wardens jurisdiction, is that it does not extend to conducting such a hearing and in so doing make effectively a de facto recommendation to the Minster on the possible (but not mandatory) future exercise of his or her power under section 24(5A) or (5B) of the Act.

173) As a result, I consider that in declining or imposing restrictions upon the Application on the basis of matters which are properly to be the subject of an unfettered discretionary process before the Minister at some point in the future, would be in error as an unwarranted intrusion into the decision making power of the Minister.

174) Necessarily in arriving at that view, I am departing to a degree from what might be regarded as the notion that the Warden acts a filter for the Minister, in all things, as is suggested to arise from a certain reading of ***Striker*** and ***Margaret River***.

175) In doing so, I wish to stress that I do not intend to depart from the reasoning in ***Striker*** absolutely, rather consider that in circumstances where the mechanism

in section 23 and 24 of the Act bites on the evidence led, as it does in this case, I am compelled to a view that there is no statutory basis for me to express an opinion on the matters to be raised in that part of the possible future dispute pursuant to section 24(5A) and (5B). Having arrived at that view, I consider that ***Striker*** may be distinguished.

176) I will state that I do not consider it correct to read those provisions (section 23 and 24) as carrying some kind of necessary implication that I should express any view purporting to assist the Minister in the exercise of his or her unfettered discretion on a question which may never arise.

177) Further to that view, I consider that had Parliament intended for the Warden to undertake the role of hearing a dispute in respect of the application of section 24(5A) and (5B) of the Act, the Act would have made reference to same with provisions similar to that associated with the existing provisions relating to recommendations made to the Minister by the Wardens in respect of exploration licences, and mining leases. It does not.

178) Further, the Objector submitted that one of the additional reasons for supporting its view that the matters raised were properly the subject of a hearing before me, was the absence of any kind of definitive process for the exercise of the Ministers powers under section 24(5A) & (5B) of the Act.

179) I reject that submission out of hand. The manner in which the Minister exercises the unfettered discretionary powers he or she has pursuant to the Act, is, it seems to me, entirely a matter for the Minister.

180) In this respect, in ***Striker*** at [112] his Honour Warden Calder said: "*The Minister is, in effect, the guardian of the public interest . . .* ". Whilst ***Striker*** is distinguishable from this matter in that I do not consider this case to be a section 111A of the Act case at all, I am content to express a view that I agree unreservedly with that proposition as to the characterisation of the Ministers position in respect of public interest matters, and it informs my view of the proper construction of section 24 (5A) and (5B) of the Act.

181) The final point to note relates to the following submission made by the Objector in written submissions:

a. It is also relevant that the Minister has made it clear, in response to an application by the Shire under s 111A of the Mining Act in respect of an earlier prospecting licence application (P70/1766) by Covenant over (essentially) the same area that:

i. "the Warden's Court is the correct venue for all concerns to be articulated, by both the applicant and the objector, in relation to P70/1766. The Wardens will hear the evidence put before them and provide a determination based on the evidence, the Mining Act 1978 (WA) and the associated Mining Regulations 1981".

b. 56. There is no reason to think that the Minister would have any different attitude to the licence. This supports the proposition that the warden should fully consider the matters raised by the Shire, notwithstanding the requirements and procedures under ss 23(2) and 24(5A) and (5B) which will apply in any event.

182) Again, I reject the submission. I do so for the following reasons:

a. The fact that a submission was made to the Minister pursuant to section 111A of the Act in respect of a different tenement application, cannot inform the outcome of this application before me.
b. There is no evidence before me that a like application has been made to the Minister in this matter.
c. The exercise of the Ministers discretion under section 111A is a matter for the Minister in each case.

183) I will add that the provision of an excerpt of the view purportedly expressed by the Minister in respect of another matter, that the Warden's Court is the correct venue for "*all concerns*" to be ventilated is also not something that assists me.

184) It is not an aid to statutory construction, nor does it assist in the necessary determination of the extent of relevant power or obligations of the Warden in the circumstances presenting in this case.

185) In any event, if the Minister's view is as it has been said to be, namely that the Wardens Court should hear substantive objections in respect of which the provisions of section 24(5A) and (5B) of the Act bite, then I respectfully reject that view at this time for the reasons given above.

186) I consider such a view is inconsistent with the express provisions of the legislation, and such an exercise would be properly regarded as being beyond my power when considering circumstances such as the ones arising in this case.

187) The outcome of my view, properly considered, is that the applicant in such a situation as presents here may be granted a tenement upon which they cannot mine, pending that further consent required to be obtained from the Minister.

188) The capacity to conduct mining on the ground will be restrained by the operation of section 23(2) of the Act until Ministerial consent is obtained. That application to the Minister may or may not happen.

189) If and when that consent is obtained, mining may occur. If that consent is not sought, or not obtained, mining may not occur.

190) As a result, and whilst I have heard and considered the Objection in the manner in which it has been conducted, I have formed the view that the Objectors case as framed relying on the environmental matters arising from the presence of the reserve on the ground in question, cannot succeed.

191) They are properly, and in my view exclusively, matters for the Minister to consider in the unfettered exercise of discretion pursuant to Section 24(5A) and 5(B) of the Act.

192) I would dismiss that basis of the Objection as a result.

193) That all being said, in the event I am wrong (noting that my views as expressed are not free from doubt) about the interaction of sections 40, 42 and 23 and 24, and further wrong in distinguishing ***Striker*** and ***Margaret River*** and an exercise of power pursuant to section 111A of the Act, and I am required to hear in detail such matters as may be raised by any party considered relevant to the section 24 consent required, then in this case, I will further say (having

heard it) I would nonetheless arrive at a similar view to that I expressed in ***Cousens***.

194) Noting that the evidence relied upon in this matter to give rise to the level of concern suggested which is necessary is of little to no weight, I do not consider that it reaches that threshold accepted by the Objector to be required.

The Alternative Positions put by the Objector

195) In written submissions the Objector advanced submissions that each of the Objection grounds individually was a sufficient basis to refuse the Application. For the reasons set out above, I have rejected that position.

196) The Objector also advances alternative propositions, namely that I should, applying section 111A of the Act, refer the matter for consideration by the Minister pursuant to that provision. I reject that position for the following reasons:

a. The case is not a case where considerations of section 111A of the Act arise, for the matters referred to above;
b. There is no statutory mechanism which enables me to take that course, given the terms of section 40 of the Act as I have described it above;
c. Even if I am wrong about those, the evidence relied upon to ground that submission is of no weight at all. I would not trouble the Minister with it, even were such a course permissible.

197) Finally, the further alternative was proffered that the evidence supports, if not rejection, then the imposition of conditions. I reject that position as well, for the following reasons:

a. In this case, those matters are properly for the consideration of the Minister in the exercise of an unfettered power pursuant to section 24(5A) and 5(B) of the Act; and,
b. Even if I am wrong about that, the evidence relied upon to ground that submission is of no weight at all. It does not rise to the level required to

displace a notion that the standard conditions applicable to prospecting licences, would ameliorate any concern.

Conclusion

198) Subject to hearing from the parties as to the form of final orders and costs, I will grant the Application.

199) To give effect to that view, I will confirm the listing of the matter for 16 May 2025, to make final and any consequential orders.

200) I am grateful to counsel and their instructors for their assistance.

_____

Warden T W McPhee

9 May 2025

Schedule 1

STATEMENT OF AGREED FACTS

BEFORE THE WARDEN
AT PERTH

Application for for Prospecting Licence 70/1770
Objection 692337

BETWEEN:

COVENANT FINANCE PTY LTD Applicant

and

SHIRE OF WAROONA Objector

AGREED FACTS

Date of Document:	26 July 2024
Filed on behalf of:	The Parties
Date of Filing:	26 July 2024

Filed by:
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The Applicants and Objector agree that:

The parties

1. The Objector (the **Shire** of Waroona) is a "local government" within the meaning of the ***Local Government Act*** *1995* (WA) and the ***Mining Act*** *1978* (WA).
2. The Shire is the local government established for the Waroona district under the *Local Government Act*.
3. The Waroona district is designated a shire under the *Local Government Act*.
4. The Shire has the powers and duties of a local government in respect of the Waroona district under the *Local Government Act*, the ***Planning and Development Act*** *2005* (WA) and subsidiary legislation, and other Acts.

5. The Applicant is a registered proprietary limited company under the *Corporations Act 2001* (Cth).

Marking out

6. On 17 November 2023, **Mr** Zach **Howes**, a licensed surveyor, marked out prospecting licence P70/1770.

7. The marking out was in accordance with regs 59(1)(a) and 59(1)(b) of the ***Mining Regulations*** *1981* (WA).

8. At 10.35am on 17 November 2023, Mr Howes fixed a copy of the Form 20 notice to the datum post by covering it with green tape.

9. Immediately after fixing the notice to the post as per paragraph 8 above, Mr Howes took two photographs of the datum post (the **photographs**).

10. The photographs are reproduced on pages 25 and 26 of Mr Howes' affidavit sworn on 16 February 2024.

11. The appearance of the datum post as shown in the photographs on pages 25 and 26 of Mr Howes' affidavit is how the datum post appeared immediately upon Mr Howes affixing the notice to it, and all relevant times thereafter.

12. On 6 May 2024, at the request of the Shire's lawyer Mr Edward Parra, Mr Craig Zanotti attended at the datum post and "unwrapped the tape around the post and underneath found two pieces of paper".[1]

The application

13. The Applicant applied for P70/1770 by lodging a Form 21 on 23 November 2023.

14. The application was made in the prescribed form in accordance with s 41(1)(a) of the *Mining Act* and reg 64(1) of the *Mining Regulations*.

15. The application was accompanied by the amount of the prescribed rent for the first year or portion thereof in accordance with s 41(1)(b) of the *Mining Act*, reg 64(1C) of the *Mining Regulations*, and Schedule 2, item 1 of the *Mining Regulations*.

[1] Paragraph 49 Affidavit of Craig Zanotti and "CZ – 16".

16. The application was made by reference to a written description of the area of land in respect of which the licence was sought, and was accompanied by a map on which were clearly delineated the boundaries of that area in accordance with s 41(1)(c) of the *Mining Act* and, also with reg 66 of the *Mining Regulations*.

17. The application was accompanied by the prescribed application fee in accordance with s 41(1)(f) of the *Mining Act*, reg 64(1b) of the *Mining Regulations*, and Schedule 2, item 10 of the *Mining Regulations*.

18. The application was lodged in the prescribed manner in accordance with s 41(1)(e) of the *Mining Act* and reg 59A(2) of the *Mining Regulations*.

Service of the application

19. Through its solicitor, the Applicant caused notice of the application to be served on the Shire as the owner or occupier of the land to which the application relates within the prescribed period in accordance with s 41(2) of the *Mining Act* and reg 64(1) of the *Mining Regulations*.

The Shire's objection

20. On 15 December 2023, the Shire objected to the grant of the application by lodging a notice of objection in the form of Form 16 under s 42(1) of the *Mining Act* and in accordance with reg 146(1) of the *Mining Regulations*.

21. The notice of objection was lodged within the prescribed time in accordance with s 42(1A)(a) of the *Mining Act* and reg 146(2)(b) of the *Mining Regulations*.

22. The notice of objection was lodged in the prescribed manner in accordance with s 42(1A)(a) of the *Mining Act* and reg 59B(2) of the *Mining Regulations*.

23. The Shire served a copy of the objection on the Applicant on 15 December 2023 in accordance with reg 146(3) of the *Mining Regulations*.

The application area

24. The application area falls entirely within the Waroona district, being the area for which the Shire is the local government under the *Local Government Act*.

Reserve 54410

25. The application area falls almost entirely (95.56% of the application area) within Reserve 54410 (the **reserve**).

26. At its Ordinary Council meeting on 27 September 2022, the Objector passed the following resolution:

> "That Council endorses the proposal to partially change the purpose and land use of part of Reserve 36315 – Lot 1701 (No 702) Buller Road, Waroona to 'conservation of Flora and Fauna".

27. Crown land the subject of the reserve (lot 501 on deposited plan 424876) was reserved by order of the Minister under s 41 of the *Land Administration Act 1997* (WA) on or about 23 January 2024 for the purpose of "conservation of flora and fauna".

28. On or about 23 January 2024, the Minister placed the care, control and management of the reserve in the Shire under s 46(1) of the *Land Administration Act*.

29. The reserve is a class of land that falls within s 24(1)(c) of the *Mining Act*.

30. Up until 23 January 2024, the land the subject of the reserve was part of Reserve 36315 for the purpose of "rubbish disposal site".

Planning instruments that apply to the application area

31. The Shire made Local Planning Scheme No. 7 (**LPS 7**) under the (repealed) *Town Planning and Development Act 1928* (WA).

32. LPS 7 remains in force as a local planning scheme under the *Planning and Development Act*.

33. The area to which LPS 7 relates includes the application area.

34. The application area is shown on Map 5 of 10 maps that form part of LPS 7 immediately north of the area marked as "Buller Nature Reserve".

35. The application area is zoned "Rural 1 – General Farming" under LPS 7.

36. The application area is less than 100 metres from the northern boundary of the "Class A" Buller Nature Reserve (Reserve 22199) for the purposes of "conservation of flora and fauna".

37. *State Planning Policy 2.1: Peel-Harvey Coastal Plain Catchment Policy* (**SPP 2.1**) was made under the (repealed) *Town Planning and Development Act 1928* (WA).

38. SPP 2.1 remains in force as a State planning policy under the *Planning and Development Act*.

39. SPP 2.1 forms part of LPS 7.

40. The licence area falls within the area the subject of SPP 2.1 (the Peel-Harvey Coastal Plain Catchment area).

41. The Shire prepared *Local Planning Policy 17: Vegetation* (**LPP 17**) pursuant to cl. 3(1) of Schedule 2 of *the Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (**LPS Regs**).

42. The LPS Regs are subsidiary legislation made under the *Planning and Development Act*.

43. LPP 17 is a local planning policy within the meaning of the LPS Regs.

44. The area to which LPP 17 relates includes the application area.

45. The Shire prepared a document entitled "Local Planning Strategy" dated March 2009 pursuant to reg 11(1) of the LPS Regs (the **Strategy**).

46. The area to which the Strategy relates includes the application area.

47. *State Planning Policy 2.0: Environment and Natural Resources Policy* (**SPP 2.0**) was made under the repealed *Town Planning and Development Act 1928* (WA) and originally gazetted on or about 10 June 2003.

48. SPP 2.0 remains in force as a State planning policy under the *Planning and Development Act*.

49. The land to which SPP 2.0 relates includes the application area.

Shire's s 111A application in respect of P70/1766

50. The Applicant applied for prospecting licence 70/1766 (**P70/1766**) on 17 August 2022.

51. P70/1766 covered largely same area of land as P70/1770.

52. On 14 September 2022, the Objector requested the Minister to terminate the application in the public interest under section 111A(1)(c)(i) and (ii) of the *Mining Act* on the basis of its assertion that "given the public interest in:

    (a) The special value of the pristine land involved and significant environmental and community issues raised; and

    (b) The unlikelihood of any effective prospecting, without potential risks to the land and substantial further environmental review activating numerous other public decision makers involvement."

53. The Minister received further submissions on behalf of the Applicant for P70/1766 on 2 February 2023 in response to the 111A application. The Objector provided further correspondence to the Minister on 21 February 2023.

54. On 27 April 2023, the Minister informed the Objector that he declined to exercise his power under s 111A of the *Mining Act* in respect of P70/1766 and responded in the following terms:

> "Thank you for your correspondence of 21 February 2023 advising of matters relating to correspondence that you have received from Traditional Owners in relation to Application for Prospecting Licence 70/1766 (P70/1766) and to allegations made by a representative of P70/1766.
>
> The Department of Mines, Industry Regulation and Safety has advised me that P70/1766, applied for by Covenant Finance Pty Ltd on 18 August 2022 is the subject of a Mining Act Objection by the Shire of Waroona and that this application is listed for a first Mention Hearing before the Perth Warden on the 12 May 2023.
>
> I reiterate the view that the Warden's Court is the correct venue for all concerns to be articulated, by both the applicant and the objector, in relation to P70/1766. The Wardens will hear the evidence put before them and provide a determination based on the evidence, the *Mining Act 1978* (WA) and the associated Mining Regulations 1981.
>
> I wish to thank you for raising your concerns with me and for bringing your understanding of this matter to my attention."

55. The Applicant withdrew its application for P70/1766 on 29 February 2024.

Ensign Legal
Ensign Legal
Solicitors for the Applicant

Jackson McDonald
Jackson Mcdonald
Solicitors for the Objector

Schedule 2

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