

---

**JURISDICTION** : MINING WARDEN

**LOCATION** : PERTH

**CITATION** : BLUE RIBBON MINES PTY LTD v ROY HILL  
INFRASTRUCTURE PTY LTD (1) THE PILBARA  
INFRASTRUCTURE PTY LTD (2) FMG  
MAGNETITE PTY LTD (3) PILBARA GAS  
PIPELINE PTY LTD (4) AND BHP BILTON  
MINERALS PTY LTD (5) ITOCHU MINERALS &  
ENERGY OF AUSTRALIA PTY LTD (5) MITSUI  
IRON ORE CORPORATION PTY LTD (5) [2021]  
WAMW 20

**CORAM** : WARDEN A MAUGHAN

**HEARD** : 10 August 2021

**DELIVERED** : 19 November 2021

**FILE NO/S** : Exploration Licence 45/5041  
Objection Nos. 515714, 517470, 517416, 517415,  
517417

**BETWEEN** : **BLUE RIBBON MINES PTY LTD**  
(Applicant)

AND

**ROY HILL INFRASTRUCTURE PTY LTD**  
(First Objector)

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

**FMG MAGNETITE PTY LTD**  
(Third Objector)

**PILBARA GAS PIPELINE PTY LTD**  
(Fourth Objector)

AND

**BHP BILTON MINERALS PTY LTD**  
(First-named Fifth Objector)

**ITOCHU MINERALS & ENERGY OF  
AUSTRALIA PTY LTD**  
(Second-named Fifth Objector)

**MITSUI IRON ORE CORPORATION PTY LTD**  
(Third-named Objector)

---

*Catchwords:*

*Application for Exploration licence – Objection –  
Objection “resolved” by agreed Minute of  
Programming Orders – Intervention by Department of  
Mines, Industry Regulation and Safety – right to  
intervene.*

**Legislation:**

- *Mining Act 1978 (WA)*
- *Mining Regulations 1981 (WA)*

**Result:**        *Department has no right of intervention in proceeding other than pursuant to Reg 68 and/or 154(d) of the Mining Regulations 1981 (WA)*

**Representation:**

*Counsel:*

Applicant	:	Mr Kavenagh
1 <sup>st</sup> Objector	:	Mr Gentilli
2 <sup>nd</sup> Objector	:	Mr Cobbett
3 <sup>rd</sup> Objector	:	Mr Papamatheos, Mr Masson
4 <sup>th</sup> Objector	:	Mr Cobbett

*Solicitors:*

Applicant	:	Kavenagh Legal
1 <sup>st</sup> Objector	:	Jackson McDonald
2 <sup>nd</sup> Objector	:	King & Wood Mallesons
3 <sup>rd</sup> Objector	:	Ensign Legal
4 <sup>th</sup> Objector	:	King & Wood Mallesons

---

**Cases referred to:**

- *Certain Lloyds Underwriters v Cross* [2012] HCA 56
- *Re; ex parte Serpentine-Jarradale Ratepayers v Residents' Association* (1994) 11 WAR 315
- *The United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520

## **Background**

- 1 By application dated 4 October 2017 Blue Ribbon Mines Pty Ltd (Blue Ribbon) sought approval for an Exploration Licence.
- 2 That application was objected to by the various Objectors. It is unnecessary for the purpose of these reasons to discuss the merits of the application, or likewise the merits of the objections.
- 3 As became the practice adopted in the Warden's Court approximately a decade ago a number of the objections will resolve by way of a "Minute of Programming Directions Sought by Consent" ("Minute"). In the present case orders were made by the Warden in terms of several Minutes, in mid-2018.
- 4 In this matter the Department of Mines, Industry, Regulation and Safety (the Department):
  - (a) On 24 March 2021 provided the Applicant and the Second, Third and Fourth objectors with a letter regarding issues it had identified with respect to the consent directions; and
  - (b) Filed an outline of submissions dated 31 May 2021 (the Department's Submissions) contending that the Department has the right to give to the Warden information and or identify issues with the filed Minute.<sup>1</sup>
- 5 The Objectors, contrary to the Department's submissions, submit that the detailed legislative scheme for the administrative determination of applications and objections under Part IV of the *Mining Act* (the Act) and the procedural powers in Part VIII of the *Mining Regulations 1981* (WA) (the Regulations) make no provision for the Department, which is not a separate legal entity, to apply to, intervene, be heard or provide unsolicited materials to the Warden.

---

<sup>1</sup> The 'who', 'what', 'when' and 'whys' of the effluxion of time between 2018 and 2021 ought be the subject of an internal enquiry by the Department the delay is in my view unacceptable.



- 6 It is of assistance to incorporate one of the Minutes sought in this case to these reasons. The Minutes, whilst capable of amendments to suit particular factual scenarios also have generally taken a common form, reflected in the following paragraph.
- 7 The incorporation of the Minute will assist the understanding of the reasons which follow:

*MINUTE OF PROGRAMMING DIRECTIONS SOUGHT BY CONSENT*

*BY CONSENT the parties seek the following directions and subject to the determination of all other Objections to the Application:*

1. *Subject to directions 2 and 5, application for Exploration Licence 45/5041 (the Application) is to be determined in chambers without further evidence or submissions from either the Applicant or Objector in relation to Objection 517416.*
2. *For the purpose of these directions, the Applicant and Objector agree to the following facts:*
  - (a) *The Application encroaches onto Miscellaneous Licence 45/318 (L45/318) held by FMG Magnetite Pty ltd as to 139.1265 HA;*
  - (b) *The Application encroaches onto Miscellaneous Licence 45/319 (L45/319) held by FMG Magnetite Pty Ltd as to 162.3823 HA; and*
  - (c) *The Application complies with the Mining Act 1978 and Mining Regulations 1982.*
3. *The Mining Warden will consider recommending the imposition of the following conditions or endorsements which the parties agree ought be imposed (the Agreed Conditions):*
  - (a) *The area of L45/318 and L45/319 be excised from the grant of the Application.*
4. *If the Mining Warden determines that the Application is to be recommended for grant with the imposition of the Agreed Conditions; and include relevant Department of Mines, Industry Regulation and Safety Conditions and Endorsements (the Standard Conditions), as may be relevant, no notice to the parties is required. (my emphasis)*
5. *If the Mining Warden is minded:*
  - (a) *not to recommend the grant of the Application; or*

(b) *to recommend grant of the Application without the imposition of the Agreed Conditions; or*

(c) *to list the Application for hearing in relation to any other objection associated with it,*

*the Mining Warden will give the Applicant and Objector notice of this and an opportunity to be heard prior to the Mining Warden providing such recommendation to the Minister or at the hearing of the Application.*

6. *Subject to direction 5, the Objector be excused from further attendance at any listing of the Application.*

7. *There is no order as to costs.*

### **Statutory Framework**

8 Section 59(1)(4)(5)(6)

#### **59. Determination of application for exploration licence**

(1) *A person who wishes to object to the granting of an application for an exploration licence shall lodge a notice of objection within the prescribed time and in the prescribed manner.*

...

(4) *Where a notice of objection —*

(a) *is lodged within the prescribed time; or*

(b) *is not lodged within the prescribed time but is lodged before the mining registrar has forwarded a report to the Minister under subsection (2) and the warden is satisfied that there are reasonable grounds for late lodgement,*

*and the notice of objection is not withdrawn, the warden shall hear the application for the exploration 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.*

(5) *The warden shall as soon as practicable after the hearing of the application forward to the Minister for the Minister's consideration —*

(a) *the notes of evidence; and*

(b) *any maps or other documents referred to in the notes of evidence; and*

(c) *a report which recommends the grant or refusal of the exploration licence and sets out the reasons for that recommendation.*

(6) *On receipt of a report under subsection (2) or (5), the Minister may grant or refuse the exploration licence as the Minister thinks fit, and irrespective of whether —*

- (a) the report recommends the grant or refusal of the exploration licence; and*
- (b) the applicant has or has not complied in all respects with the provisions of this Act.*

9 Regulation 68 of the *Mining Regulations* provides:

**68. Warden may obtain report**

*Prior to making any recommendation or granting any application for a mining tenement, (including an exploration licence) the warden may obtain a report from the Director, Geological Survey or any other officers of the Department.*

10 Regulation 154(1) of the *Mining Regulations* provides:

**154. Conduct of hearings generally**

- (1) In conducting any hearing the warden —*
  - (a) is to act with as little formality as possible; and*
  - (b) is bound by the rules of natural justice; and*
  - (c) is not bound by the rules of evidence; and*
  - (d) may inform himself or herself of any matter in any manner he or she considers appropriate.*

11 Regulation 170 provides:

**170. Warden may act on own initiative**

- (1) A warden hearing proceedings may exercise his or her powers on the application of a party or on his or her own initiative unless the Act or these regulations or another written law provides otherwise.*
- (2) A warden may make an order or give a direction on his or her own initiative with or without —*
  - (a) allowing any of the parties to make submissions; or*
  - (b) hearing the parties.*
- (3) If a warden decides to allow any party to make submissions before making an order on his or her own initiative, the warden shall notify each party likely to be affected by the order of how and when the submissions are to be made.*



(4) *If the warden decides to hear any party before making an order on his or her own initiative, the warden shall notify each party likely to be affected by the order of the time and place of the hearing.*

- 12 The standing of the Department is set out in section 11 of the *Mining Act* which provides:

**11. Chief executive officer and other officers**

*There shall be a department of the Public Service of the State to assist the Minister in the administration of this Act, to which department there shall be appointed, under Part 3 of the Public Sector Management Act 1994, a chief executive officer and such number of persons to be mining registrars, geologists, surveyors, inspectors and such other officers as may be necessary for the due administration of this Act.*

- 13 It is moot to observe that for the purposes of section 59(4) of the *Mining Act* the Department is not taken or deemed to be “a party” nor a person who has lodged such notice of objection”. The Department is not in any event a separate legal entity capable of lodging an objection under section 59(1).
- 14 Section 10(2) of the *Mining Act* contrasts the Minister’s position from that of the Department.

**The Procedure to Date**

- 15 For present purposes it is important to note that no recommendation has been made to the Minister by the Warden pursuant to section 59(5) of the *Mining Act*. It is not in doubt therefore that the Warden still has jurisdiction to deal with the present proceedings.
- 16 The Department, upon receipt of the Minutes proports to a deal with it in accordance with the terms of a “Position Paper – Review of Minute of Programming Directions”. That paper which is undated provides the following background:

*“Parties to proceedings before a Mining Warden under Part IV of the Mining Act 1978 (Mining Act) rely on interlocutory applications to present agreed orders (MOPD) to dispose of objections to applications for tenements.*



*In effect, parties propose under the MOPD agreed conditions and or exclusions of land from the application for mining tenement.*

*To ensure that due administration of the Mining Act, the Department reviews all MOPDs filed in respect of the mining tenement applications.*

*In reviewing MPODs, the Department considers whether any proposed:*

- *conditions are consistent with the Mining Act and the nature of rights conferred by the tenement sought; and*
- *land exclusions are legally supported by the Mining Act or other legislation."*

17 It is against this background a review of the Minutes filed in these proceedings was conducted by the Department and the letter referred to in paragraph 4(a) of these reasons was provided to the objector. Whilst not informed as to the precise contents of the letter it is clear there is a dispute between the parties and Department as to what condition should or should not attach to the recommendation.

18 It appears to be the case the objectors decline to engage in a consultative process with the Department or at the very least no agreement was able to be reached between the parties resolving the Department's concerns.

19 The Department indicated that in the absence of agreement it would refer the contents of this letter to the Warden. That has not occurred but as a consequence of the suggested referral the matter has been relisted for determination of what, if any, role the Department has in relation to the determination for an application for the exploration licence.

20 In Warden French, *Re; ex parte Serpentine-Jarradale Ratepayers v Residents' Association* (1994) 11 WAR 315 Kennedy J relevantly said:

*"It appears to me to be not inappropriate, having regard to the Minister's powers under section 111A, to permit a filtering of objections based upon considerations of public interest through the Warden, rather than simply leaving it to interested parties to make their objections directly to the Minister, as no doubt they could."*

21 The Department of Mines, adopting the above principles say:

- (i) It is preferable that the Minister have the Warden's views as to any disputes between the parties and the Department arising from paragraph 4 (or its equivalent) of the Minute of Programming Directions sought by Consent – referenced in paragraph 7 in these reasons;
  - (ii) It is therefore appropriate for the Department to bring any such disputes to the attention of the Warden prior to a recommendation being made to the Minister; and
  - (iii) In that in exercising the power under (ii) above the Department is doing no more than assist(ing) the Minister in the administration of the Act in accordance with section 11 of the Act.
- 22 In acting as contemplated above the Department says that it has already performed a significant role in developing and maintaining the approved standard conditions. In my view the use of those standard conditions promotes consistency in decision-making, fairness and efficiency. Those propositions are hardly contentious.
- 23 It's impracticable for the Warden, having regard to the large number of standard conditions, to consider each of those conditions individually to determine whether they should or should not form part of the recommendation on each individual application which comes before the Warden. It is therefore preferable that there is some consultative process between the parties and the Department to seek agreement as to those matters, prior to a recommendation being made by the Warden.
- 24 The respondent submits that there is a general principle of law that the parties are entitled to carry on their litigation free from interference of strangers *The United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 536.
- 25 The Objector submits the Department's powers under section 11 are to assist the Minister only. The Minister is not the Warden and any submission about the



general desirability of the efficiency of public administration, is not the identification of the statutory power for the Department to provide unsolicited material to the Warden.

26 Nor should the specific language of section 59(4) and Part VIII of the *Mining Regulation* be construed by reference to an assertion that the “purpose” or desirability of a particular outcome which are not found in the language of the legislation such a submission ought to be rejected.

27 As French CJ and Haine J said in *Certain Lloyds Underwriters v Cross* [2012] HCA 56:

*“A second and not unrelated danger that must be avoided in identifying a statute to purpose is the making of some priori assumption about its purpose. The purpose of any legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provision. As Spigelman CJ, in writing extra-crucially, correctly said:*

*“Real issues of judicial legitimacy can be raised by Judges determining the purpose or purposes of parliamentary legislation. It is all too easy for the identification of purpose to be driven by what the particular Judge regards as the desirable result in this specific case.”*

*And as the plurality said in Australian Education Union v Department of Education and Children’s Services* [2012] HCA 3;

*“In construing a statute is not for a court to construct its own idea of a desirable policy, impute it to the legislation, and then characterise it as a statutory purpose.”*

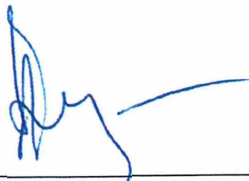
### **Conclusion**

28 Whilst it might be desirable and indeed convenient for the Department to provide to the Warden notice in relation to ‘disputed conditions’ such that they might be resolved prior to recommendation to the Minister such a course is impermissible in my view.

29 In my view the only basis on which the Department can seek to intervene in the proceedings is upon invitation of the Warden pursuant to regulation 68 and or regulation 154(d) by seeking a report from the Department as to the status of

negotiations between the parties and the Department as to the agreement of “standard conditions”.

- 30 In my view in every case the Warden when considering making orders pursuant to a “proforma” Minute ought obtain a report from the Department as to what if any “agreed” or “standard” condition ought to accompany a recommendation. Such a policy protects the ‘public interest’ by bringing disputes to the table. These disputes ought be the subject of consideration by the Warden prior to recommendations to the Minister rather than the recommendation being made without the input of the Warden. The Warden ought not, in my view, leave it to those with vested interests to bring such issues to his attention.
- 31 Whilst this additional step might be seen as unnecessary, and in most cases, a hurdle to the making of recommendation by the Warden to the Minister, in my view no such recommendation ought be made unless the Warden is informed as to all the conditions (including standard conditions) upon which the recommendation is based.
- 32 It appears trite to argue over whether the Warden can act only on information “requested from” as opposed by information “proffered” by from the Department when for the reason set out above that information will in either event be received.



---

Warden A Maughan

19 November 2021