
JURISDICTION : MINING WARDEN

LOCATION : KALGOORLIE

CITATION : GFSG PTY LTD v MLG OZ PTY LTD

CORAM : WARDEN B AYLING

HEARD : 25 JUNE 2019

DELIVERED : 28 MAY 2020

FILE NO/S : Objection 525878

TENEMENT NO/S : Miscellaneous Licence 15/383

BETWEEN : **GFSG PTY LTD**
(Applicant)

AND

MLG OZ PTY LTD
(Objector)

Catchwords: *Objection to Miscellaneous Licence – Whether for a purpose directly connected with mining – Whether land the subject of licence needs to be contiguous with mining tenement – Whether Private road - Injurious Affection*

Legislation:

- *Mining Act 1978 (WA)* ss 8, 91, 117
- *Mining Regulations (1981) (WA)* reg 42B

Cases referred to:

- *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27
- *FMG Chichester Pty Ltd v Hancock Prospecting Pty Ltd* [2008] WAMW 13
- *Quartz Water Leonora Pty Ltd v WMC Resources Ltd* [2001] WAMW 14
- *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28
- *Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Pty Ltd* (1990) 1 WAR 546
- *Weldon v Neal* (1887) 19 QBD 394
- *WMC Resources Ltd v Gardner* (Unreported), Warden Calder, 21 August 1998

Result:

1. Objection 525878 dismissed.
2. L 15/383 recommended for grant, subject to the standard conditions, there being compliance with the *Native Title Act*, and the grant being limited to the land east of the entrance to M 15/1339.

Representation:

Counsel:

Applicant : Ms C McKenzie
Respondent : Mr T Kavanagh

Solicitors:

Applicant : McKenzie and McKenzie
Respondent : Kavanagh Legal

Introduction

1. Since May 2018, GFSG Pty Ltd (“the Applicant”) has been the registered holder of mining lease M15/1339, a 191.25 hectare tenement located 30km north of Coolgardie and 50km west of Kalgoorlie-Boulder. Ms Alison Brown is the sole director of the Applicant. Ms Brown purchased the mining lease knowing that the previous registered tenement holder had in 2004 lodged a mining proposal for the lease setting out an intention to extract sand and gravel and haul it unprocessed to market.
2. The Applicant is unable to action that mining proposal. It cannot haul sand and gravel out of M15/1339 because it does not have access to a nearby road, (known conveniently as “the Sand Haul Road”), the relevant portion of which would be approximately 6 kilometres from the turn-off to M 15/1339 east-west to the Coolgardie-North Road.
3. The Sand Haul Road is already the subject of L 15/111 held by MLG Oz Pty Ltd, (“the Objector”). The length of L 15/111 is 11 kilometres east-west from the edge of the Objector’s M15/1525 to the Coolgardie-North Road. The Objector mines sand and gravel from its lease and uses the Sand Haul Road to remove it.
4. By the current application L15/383 lodged 27 February 2018, the Applicant seeks the grant of a miscellaneous licence to use the Sand Haul Road. Shortly after lodging its application, the Applicant’s director became aware that the land applied for did not overlay the Sand Haul Road on the Department’s Tengraph software. On 8 March 2018, the Applicant updated its application to amend the land described to coordinates mirroring that held by the Objector’s L 15/111. Although the application covers the entire length of the road, the Applicant conceded that it does not require the use of the Sand Haul Road beyond the turn-off to its lease.¹

¹ Evidence of Applicant witnesses Brown and Bellin, T 53 and 88.

5. The Objector lodged its objection on 8 June 2018 claiming four grounds:
 1. MLG Oz Pty Ltd are the registered holders of L 15/111 which will be affected by grant of L 15/383.
 2. Application L 15/383 encompasses all of the land the subject of L 15/111.
 3. The grant of the Application will injuriously affect the Objectors (*sic*) rights and entitlements with respect to activities on the Existing Tenement area. Current operations may be hindered without an appropriate Access Deed.
 4. Withhold your grant.
6. The Applicant lodged its particulars on 21 November 2018, putting forward a number of proposed conditions for L 15/383 if granted. The Objector then lodged particulars of its objection on 17 December 2018, which articulated 22 points.

The Law

7. The object of the *Mining Act* (“the Act”) is to open land up for mining, and to support miners in that endeavour by conferring exclusive rights to the land the subject of their mining tenement. Such exclusivity is subject to a statutory exception relating to the grant of special prospecting licences, but also subject to the possibility a miscellaneous licence may be granted over part of that land.²
8. A miscellaneous licence is also a mining tenement.³ The nature of it allows miners to be on other mining tenements for any of the prescribed purposes, such as a road, power line or jetty, so long as that purpose is directly connected with mining.⁴ The Act envisages that a miscellaneous licence will run concurrently with any other tenement underlying it.⁵

² Sections 91 and 117 of the *Mining Act*.

³ Section 8 of the *Mining Act*.

⁴ Regulation 42B read with section 91(6) of the Act.

⁵ Section 91(8) of the *Mining Act*.

9. But, the scope of the power to grant a miscellaneous licence is subject to the provisions of the Act. If a proposed miscellaneous licence would have the effect of revoking or injuriously affecting any existing mining tenement held, then it should not be granted.⁶
10. An underlying tenement holder usually lodges an objection to the grant of a miscellaneous licence on this basis. A Warden hearing such an objection is bound to consider whether the grant would injuriously affect the existing tenement holder, or hinder or obstruct the holder in the execution of any rights conferred. Where no reasonable condition can prevent such an outcome, the Warden should refuse the application. The Warden must consider what is already known about the length of the existing tenement and its current or proposed mining operations, and then weigh up whether the new application will have the effect of causing such detriment, harm or obstruction to the original tenement holder that the exercise of those rights would be unfairly compromised.⁷

Preliminary Issue

11. The current application was heard in court on 25 June 2019. The Applicant and Objector each called two witnesses. At the commencement of the hearing and before evidence was called, a preliminary issue arose as to the basis of the objection. The Applicant argued that the Objector's particulars cover three new arguments beyond the scope of its grounds of objection lodged on 19 March 2018, and that fairness dictated that the Objector be confined to its original grounds. Specifically, the Applicant argued that the Objector's particulars raised the following new grounds of objection:
 - a. The land applied for cannot be amended;
 - b. The land is not connected with mining; and

⁶ Section 117(1).

⁷ *Re Roberts; Ex Parte Western Reefs Ltd v Eastern Goldfields Mining Company Pty Ltd* [1990] 1 WAR 546.

- c. The application cannot be granted over a private road.
12. In response, the Objector argued that none of these alleged grounds went beyond those raised in the initial grounds of objection lodged on 19 March 2018, but in any event, did not press the first point. The Objector argued that the second point related to a fundamental requirement that any application conform with the Act and Mining Regulations, and the third point was an extension of grounds 1 and 3 of its objection.
 13. Counsel for the Applicant referred to the principles in *Weldon v Neal*⁸ as set out in *WMC Resources v Gardner*⁹ to argue that it would be unfair to permit the Objector to amend its grounds of objection. The principles arising from those cases are rules of fairness to ensure that one party at a contested hearing is not surprised by arguments raised late by the other.
 14. The Objector is not applying to amend its objection. The Objector submits that all of its arguments fall within the grounds of its objection lodged 8 June 2018, and that while those grounds were kept broad, the exercise of the Warden's discretion to grant a miscellaneous licence is always made subject to the application complying with the provisions of the Act.
 15. The two-stage test identified by Warden Calder in *WMC Resources v Gardner* would require me to firstly, consider the nature of the proceedings and what I am being asked to determine, and secondly, to look at the documents or pleadings filed to see if an amendment to the objection would raise a new cause of action or a fundamental change in the nature of the objection.
 16. In undertaking such an analysis, I am to adopt a robust approach.¹⁰ If it is patently clear that the Objector is seeking to run an entirely new argument than that raised in its objection, then that would be unfair to the Applicant. I am conscious of the fact these are administrative and not judicial proceedings. Strict rules of pleading

⁸ *Weldon v Neal* (1887) 19 QBD 394.

⁹ *WMC Resources Ltd v Gardner* (Unreported), Warden Calder, 21 August 1998.

¹⁰ *Quartz Water Leonora Pty Ltd v WMC Resources Ltd* [2001] WAMW 14.

do not apply. There is a need to balance the interests of a party who seeks to be heard on all arguments against the party who may be disadvantaged by an argument being brought on without notice.

17. Here, we have two parties competing over the use of the same road. By notice of objection lodged 8 June 2018, the Objector kept its grounds of objection broad. Significantly, it did not include a ground of objection that the application did not comply with the provisions of the Act. It basically limited its grounds to an objection based on 'injurious affection'.
18. Its particulars lodged on 21 December 2018 put more detail to those grounds. The two new arguments are contained within those particulars - paragraphs 5 and 6, under the heading, "The land applied for is not connected with mining", and paragraph 18, which raises the argument that a grant cannot be made over a private road. The Applicant was thus on notice from December 2018 of these arguments.
19. The Objector has not applied to amend its objection to include the additional arguments raised in its particulars. While I accept that any grant of a miscellaneous licence is made subject to the provisions of the Act, and an applicant should be prepared to defend the legal bona fides of its application, the Objector has limited its grounds of objection to an injurious affection argument related to its position as underlying tenement holder.
20. In my view, the two new arguments do raise additional grounds of objection and go beyond an injurious affection argument. Despite this assessment, I propose to address both of the Objector's additional arguments, as they amount to a complaint the application contravenes the terms of the Act. An application that does not comply with the provisions of the Act or Regulations should not be recommended for grant, so if there is merit in the argument, it is worth hearing. In fairness to the Applicant, it has been able to address both of these arguments thoroughly in written closing submissions, and so any prejudice to the Applicant has been adequately addressed by that opportunity.

Land Not Connected with Mining

21. The ‘land is not connected with mining’ argument emerged in the hearing as a central plank of the Objector’s case. The Objector had obtained from the Applicant a formal admission in April 2019 that the land the subject of its application (and its application to amend) is not contiguous with the land the subject of its mining lease M15/1339.¹¹
22. It emerged in the evidence that there is a gap of 1.3 metres between the Sand Haul Road and the turn-off road to M 15/1339. The Applicant has applied for a miscellaneous licence on the land covered by the Sand Haul Road, which is covered by the Objector’s existing L 15/111. To get to the Applicant’s M 15/1339, its road trains would need to cross 1.3 metres of land which is part of an unrelated mining tenement the subject of E 15/1674.
23. The Objector’s ‘not connected with mining’ argument was a reference to the requirement in section 91(6) of the Act that a miscellaneous licence’s purpose be “directly connected with mining”. The sub-section directs that a miscellaneous licence “...shall not be granted unless the purpose for which it is granted is directly connected with mining.”
24. The Objector argued that the fact the Sand Haul Road was not contiguous with the turn-off road on M 15/1339 meant that the application ought to fall at the first hurdle for failing the requirement of a direct connection under section 91(6). The Objector acknowledges that the purpose for which L 15/383 is sought is connected with mining, but argues the subject of the grant (the road) ought to be ancillary to the mining operations.
25. The first principle of statutory construction is to look at the text itself to obtain meaning. If meaning cannot be determined from a plain reading of the text, then extrinsic materials can be examined.¹² Section 91(6) states: “A miscellaneous

¹¹ Notice of Admission of Facts lodged by the Applicant on 29 April 2019.

¹² *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-7, citing *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28.

licence shall not be granted unless the purpose for which it is granted is directly connected with mining.”¹³

26. From a plain reading of the sub-section, the direct connection is to be between the *purpose* of the grant and the *mining*. (Emphasis added)
27. The Objector’s argument that the direct connection should be a physical one between the purpose of the grant and mining is to read words into the sub-section that are not there. The argument makes some logical sense in that of course there would be a physical connection between the purpose of the grant and mining – that is the very nature of what is being applied for; access to another tenement for the purpose of maintaining mining operations. But, to require the land the subject of the miscellaneous licence to be physically contiguous with the Applicant’s mining tenement is not an interpretation available on a plain reading of section 91(6).
28. The purpose of the proposed licence in this case is to gain access to the Sand Haul Road. Access to the Sand Haul Road is required by the Applicant so it can cart sand and gravel mined from M15/1339 from the tenement and on to market. The purpose of the grant is directly connected to its mining proposal.
29. When one looks at the terms of section 91(6) in the context of the rest of the provision and the remaining terms and object of the Act, it is apparent that the intent of the legislature in the use of the phrase, “directly connected with mining”, was to restrict miscellaneous licences from being granted if their purpose was for a reason unrelated to mineral extraction.
30. The Objector’s argument that the application does not comply with the terms of the Act because it contravenes section 91(6), is therefore flawed. I do not accept that the legislature intended for there to be a physical connection between the land being applied for and the mining directly connected with that land. The direct connection is purposive, not physical, and I find there is a direct connection

¹³ Section 91(6).

between the land applied for and the product of mining proposed to be transported on that road.

31. As for the issue of whether the Applicant has covered the “gap” to get to its mining operation, that issue involves a practical concern as to whether the Applicant has lodged a second application over that portion of land. I was informed that the Applicant has lodged a miscellaneous licence application concerning that 1.3 metres, and the underlying tenement holder of E 15/1674 has not objected. Logically, that application cannot be dealt with by the Department of Mines, Industry and Regulation until this current application is determined. There would be no point in trucks travelling 1.3 metres at the turn-off if they could not get a licence to travel the six kilometres to that turn-off. The practicalities of the Applicant needing to cover the gap with a separate application does not in my view prevent me from considering the merits of the current application – and specifically, whether the purpose of the grant sought is directly connected with mining.

Whether Land Applied for is a Private Road

32. The Objector argues that the Sand Haul Road is a private road, and there should not be a miscellaneous licence granted over a private road. The Sand Haul Road is 11 kilometres in length from the Coolgardie North Road to the boundary of the Objector’s lease (M 15/125) and another 3 kilometres into that lease. The Sand Haul Road had been built by a Mr Gentsch for Western Mining Corporation (“WMC”).¹⁴ In 2006, WMC re-registered the lease and licence in the name of BHP Billiton Nickel West Pty Ltd.
33. In 2015, the Objector purchased M 15/125 and L 15/111 from BHP Billiton. The transfer was registered to the Objector in 2016.¹⁵ The Objector takes the view that as it purchased the lease and licence from BHP Billiton, including infrastructure such as road signs, the Sand Haul Road has now become the

¹⁴ Evidence of Alison Brown, T 37.

¹⁵ Mining Tenement Register Search of L 15/111, at attachment K6 of Affidavit of Kenneth Banks, p 33-34.

Objector's absolute property. The road signs used along the road state, "MLG Lease. Private haul road. No entry."¹⁶ It argues that as it pays for the road's maintenance, it is a private road.

34. The Objector's perspective that the road is a private one is accurate to some extent, in that it is not a publicly gazetted road in which any person can travel, including any mining company, for the purposes of carting mining resources. As the land the subject of the road is the subject of a mining tenement held by the Objector, they hold an interest in that land and are entitled to raise an objection upon any other person's use of the land if that use would be to injuriously affect, obstruct or hinder their mining operations.
35. But, in my view, a finding that the Sand Haul Road is a private road is inconsistent with the terms upon which the Objector holds an interest in the land the subject of L 15/111. The purchase of L 15/111 bought the Objector the non-exclusive right to use the Sand Haul Road subject to the terms of the grant made by the State Government back in 1989 as amended and renewed; it was not a purchase of the freehold land the subject of the road. Section 91(8) of the Act contemplates a miscellaneous licence existing concurrently with another mining tenement over the same land. Miscellaneous licences are a form of mining tenement, so there is nothing preventing two miscellaneous licences from co-existing on the same land.¹⁷ As Warden Calder observed in *FMG Chichester Pty Ltd v Hancock Prospecting Pty Ltd*, "Grants of all mining tenements are expressly made "subject to the Act". That means that the grantee accepts the grant and the rights that go with it subject to the potential for a miscellaneous licence to be granted over all or part of the tenement."¹⁸

¹⁶ Annexure K 11 to affidavit of Kenneth Banks, Exhibit 8, p 44.

¹⁷ Section 8, read with section 91(8) of the *Mining Act*.

¹⁸ [2008] WAMW 13 at [201].

36. Another factor counting against an interpretation of private ownership is that the holder of the pastoral lease underlying L 15/111 also retains rights in relation to that land.
37. Even if one were to assume for the sake of argument that the Sand Haul Road were a private road owned by the Objector, section 91(7) does not prevent a miscellaneous licence from being granted over the land the subject of an existing tenement.
38. For all of the above reasons, the Sand Haul Road is not the Objector's private road over which there can be no consideration of another miscellaneous licence application for use of that road.

Injurious Affection

39. The focus of the Objector on the 'private road' argument really relates to a concern that the grant of L 15/383 will have the effect of revoking or injuriously affecting its existing L 15/111, or by extension, its M 15/125 at the end of the Sand Haul Road. I propose now to turn to the "injurious affection" argument which is raised in ground 3 of the objection.
40. The reference to the phrase "injurious affection" comes from section 117 of the *Mining Act*, a provision inserted to protect the rights and interests of existing tenement holders. As the Full Court of the Supreme Court of Western Australia has held in *Western Reefs Ltd v Eastern Goldfields Mining Pty Ltd* (1990) 1 WAR 546, the first three words of section 91 – "Subject to this Act...", require the Warden to consider whether an application for a miscellaneous licence will infringe the terms of section 117.
41. The scope of the enquiry was described by Brinsden J at 560:

I am therefore of the view that upon an application for a miscellaneous licence, the warden is entitled to consider whether the purpose for which the licence is required, can be carried out without injuriously affecting the primary tenement over which the miscellaneous licence is to be granted. It may be that he

can frame conditions which satisfactorily resolve any likely interference or incompatibility, but, if no condition will meet that requirement then he would be entitled to dismiss the application.

42. The Applicant bears the onus of satisfying the Warden that the grant of its application would not injuriously affect the underlying tenement holder.¹⁹ It called two witnesses – Alison Jane Brown and Nigel Keith Bellin. Counsel for the Objector was put to his election and called two witnesses – Murray Ian Leahy and Kenneth Terrence Banks.

Alison Jane Brown

43. The evidence of Ms Alison Jane Brown comprised the contents of her affidavit, received as Exhibit 1, and her sworn evidence at the hearing. She is the sole director of GFSG Pty Ltd, which is the registered tenement holder of M 15/1339, a lease of 191.25 hectares holding sand and gravel resources. GFSG Pty Ltd was incorporated for the purpose of holding M 15/1339.²⁰
44. Ms Brown is married to Nigel Bellin, who owns and operates Bellini Bulk Haulage Pty Ltd (“BBH”). In accordance with her lodged mining proposal concerning M 15/1339, Ms Brown proposes to engage BBH to cart sand and gravel from the mining lease along the Sand Haul Road. There is only one existing road available for ingress to and egress from M 15/1339, and that is the Sand Haul Road.²¹
45. Ms Brown confirmed there are currently no contracts in place to cart sand out of M 15/1339.²² She informed the court in her affidavit that GFSG Pty Ltd has tendered for contracts that, if granted, may result in up to three road trains per day using the Sand Haul Road.²³ Yet in evidence, she was unable to specify the number of trucks that would travel the Sand Haul Road on behalf of the Applicant. She said, “I don’t know, five, six, 10. However many I could afford

¹⁹ *Western Reefs* (supra), per Ipp J at p 561.

²⁰ Affidavit of Alison Brown, Exhibit 1, [2].

²¹ Affidavit of Alison Brown, Exhibit 1, [9], and T 29.

²² Evidence of Alison Brown, T 46.

²³ Affidavit of Alison Brown, Exhibit 1, [31], and T 47.

to buy.”²⁴ As to whether the trucks would be triple or quad road trains, she was not certain. She said on this, “I wouldn’t have a clue, because I actually haven’t had a chance to actually do a business plan. Because I’ve got this mining leases out in Mount Burges that I can’t use.”²⁵

46. Ms Brown said she had only been on the Sand Haul Road 10 or 12 times, all in company with Mr Bellin, and on those occasions, she had not seen trucks belonging to the Objector, or even any heavy vehicle on the road.²⁶
47. On 21 February 2019, Ms Brown and Mr Bellin met with Mr Murray Leahy, the sole director of the Objector’s company, MLG Oz Pty Ltd. A conversation was had as to the basis for access along the Sand Haul Road. Without descending into what was said specifically, agreement was unable to be reached.

Nigel Heath Bellin

48. Nigel Bellin is the sole director of Bellini Bulk Haulage Pty Ltd and has been working in the haulage/transport industry for 35 years. He is familiar with the Sand Haul Road. He was aware of his father having done some work for Mr Gentsch on behalf of Western Mining back in the 1980s, and he had travelled up and down the road doing a gravel search for the Main Road Department. In the mid to late 1990s, he then carted gold ore along the road for Doug Gould Transport.²⁷
49. In early 2018, Mr Bellin and Ms Brown engaged in discussions with the estate of Charles Boyes to purchase M 15/1339. The lease was transferred to GFSG Pty Ltd in May 2018. After the purchase, Mr Bellin claims he visited the lease twice a month, or sometimes, three times a month. For the rest of 2018, by my estimation, that would have been at least 14 times. In cross-examination, he was

²⁴ Evidence of Alison Brown, T 47.

²⁵ Evidence of Alison Brown, T 43.

²⁶ Evidence of Alison Brown, T 28.

²⁷ Evidence of Nigel Bellin, T 57.

asked how many times he had been out there in 2018, and his reply was, “Half a dozen times.”²⁸

50. From 21 February 2019, Mr Bellin transported a dozer out to M 15/1339 and he says he then spent every second day out there for about six weeks solid. From February until the substantive hearing in June 2019, Mr Bellin said he had been out to the lease maybe once a week.
51. As to vehicles he had observed on all of his visits to the Sand Haul Road, Mr Bellin said he had seen a lot of light vehicles, fuel trucks carting bulk fuel, loaders carting dump trucks and excavators, and freight trucks, but he “...hadn’t seen a lot of MLG trucks out there at all.”²⁹ He clarified that he had seen one or two on occasions when they were fixing up one of the bends (on the road).³⁰
52. The bend was identified by him as the “5K S bend”, which was constructed in March 2019.³¹ His view was that the road was made wider by the introduction of a culvert and that there is no part of the road in which two trucks could not pass each other safely.³² Mr Bellin has been involved in road construction and maintenance and described the process for grading and maintenance of a road using salt water.³³ He expressed some knowledge and experience in that area.

Murray Ian Leahy

53. Mr Murray Leahy gave brief evidence in his position as sole director of the Objector, MLG Oz Pty Ltd. He confirmed that he had instructed Global Exploration Tenement Services to lodge an objection against this application back in March 2018, and that from November 2018 there had been discussions between the Applicant and Objector with a view to resolving the matter by way of a mutually acceptable access agreement.³⁴ He agreed he met with Ms Brown

²⁸ Evidence of Nigel Bellin, T 92.

²⁹ Evidence of Nigel Bellin, T 61.

³⁰ Ibid.

³¹ Evidence of Nigel Bellin, T 63.

³² Evidence of Nigel Bellin, T 65,70.

³³ Evidence of Nigel Bellin, T 67.

³⁴ Evidence of Murray Leahy, T 125.

and Mr Bellin on 21 February 2019 in which they had discussed the terms of access to the Sand Haul Road, but were unable to achieve agreement.³⁵ In March 2019, he proposed an access agreement to the Applicant which was rejected.

54. In cross-examination, Mr Leahy confirmed that his concerns with the Applicant's access to the Sand Haul Road were a combination of safety and upkeep. He said, "...bottom line: cost to our business is the upkeep. Safety of our people is probably the most paramount one." He also agreed that the meeting on 21 February 2019 with Ms Brown and Mr Bellin had been unsuccessful on the basis that parameters could not be agreed as to the use of the road from a "safety and cost standpoint".³⁶

Kenneth Terrence Banks

55. Mr Kenneth Banks gave evidence for the Objector in his role as General Manager Corporate of MLG Oz Pty Ltd. Mr Banks lives and works in Perth, but he visits Kalgoorlie once a week.
56. He agreed that he had not been out to the site of the Sand Haul Road very often at all, probably four times in the previous two years.³⁷ He took some photographs of the road over a week in early June 2019, and had not been on the road for about a year prior to that.³⁸
57. Part of Mr Banks' role with MLG Oz is to analyse movement of its trucks using the trucks' global positioning systems (GPS) on a computer programme called MT Data Hawk-Eye. That data is observed from his office in Perth; rather than visiting the site and observing the trucks himself. Like Mr Leahy, he agreed that the Objector's primary concerns were with maintenance of the road and safety.³⁹ He agreed that two trucks can pass each other on the Sand Haul Road, including

³⁵ Evidence of Murray Leahy, T 119, 120.

³⁶ Evidence of Murray Leahy, T 120/

³⁷ Evidence of Kenneth Banks, T 139-140.

³⁸ Ibid.

³⁹ Evidence of Kenneth Banks, T 145.

the 5K S bend, which is 20 metres wide.⁴⁰ He conceded the road is about as wide as Great Eastern Highway, or at least very wide.⁴¹ He acknowledged that trucks are able to talk to each other and that there could be communication with the Applicant as to the number of trucks to use the road.⁴²

58. Significantly, Mr Banks was unable to specify how he had calculated a figure of \$67 000 a month paid by the Objector to maintain the road, despite that figure having been stated in his affidavit. He agreed that it was an estimation based on a viewing of the company's Qlikview financial accounting software, but was unable to elaborate on the factors which affected the calculation of that figure.⁴³ He was also unable to explain how he had deposed in his affidavit that the Objector runs 16 truckloads a day along the Sand Haul Road, other than to say he would have found that information out from another manager by asking what they believe the average number of vehicles to be on that road.⁴⁴ Even with allowances made for the difficulties of having to explain the company's accounting processes accurately in open court and under scrutiny, the lack of clarity or any sensible explanation as to the basis for those calculations is concerning. Parties should come to court prepared to explain the matters already deposed to in affidavit material lodged with the court. An inability to explain such matters, particularly when they are issues in dispute, does not lend to a conclusion that those facts should be accepted.

Analysis

59. The impression gained from a review of all of the evidence before me is that the Applicant and Objector are able to use the Sand Haul Road without the Objector being injuriously affected in the conduct of its business.

⁴⁰ Evidence of Kenneth Banks, T 146.

⁴¹ Ibid.

⁴² Evidence of Kenneth Banks, T 152.

⁴³ Evidence of Kenneth Banks, T 157.

⁴⁴ Evidence of Kenneth Banks, T 162.

60. In *FMG Chichester Pty Ltd v Hancock Prospecting Pty Ltd*,⁴⁵ Warden Calder explained what it is to “injuriously affect” as contemplated by section 117 of the Act. At [199], he said, “The effect must be a (*sic*) one that actually or potentially damages or harms or is detrimental to the rights of the holder of the underlying tenement.”
61. The object of the Act is to encourage mining without compromising the abilities of other tenement holders to engage in their own mining activities. The Objector asserts that they run a full time (7 days a week 24 hours a day) operation transporting gravel and sand along the Sand Haul Road and that they run approximately 16 truckloads along the road each day. This fact was contested by the Applicant, whose two witnesses Ms Brown and Mr Bellin claim to have seen only a couple of MLG trucks in their visits to the Sand Haul Road leading up to this hearing.
62. I have already expressed some concern as to the basis upon which the Objector has calculated the volume of trucks it uses on the Sand Haul Road. Although the evidence in that respect was unsatisfactory, I would still be prepared to accept that the Objector is considerably engaged in the transport of sand and gravel along the Sand Haul Road, based on the royalties paid by the Objector in the period July 2018 to May 2019.⁴⁶
63. The Applicant witnesses were not at the Sand Haul Road all hours of the day and night. I find Mr Bellin may have exaggerated the number of times he had been there. I also accept that the Applicants were truthful in not having seen many MLG trucks on their visits, but equally they were not in a position to have seen all of the trucks the Objector was said to have been using.
64. Even if I were to conclude that the Objector does use 16 truckloads daily on the Sand Haul Road, and even if I were to factor in a scenario that the Applicant obtains a tender to use up to 10 truckloads daily, there is no evidence before me

⁴⁵ [2008] WAMW 13.

⁴⁶ Evidence of Kenneth Banks, T 173.

that the Objector will suffer actual or potential detriment if the Applicant was also granted a licence to use the road.


65. The Sand Haul Road is wide, perhaps as wide as Great Eastern Highway. On the evidence of all witnesses who spoke on this issue, there is no difficulty with trucks passing each other safely on the road. While trucks will need to take care on the 5KS bend, safety can be assured by communication being made by drivers upon approach to that bend and by schedules being exchanged between the parties. The turn-off to M 15/1339 is between 5 and 6 kilometres up the Sand Haul Road from the Coolgardie-North Road end. The Objector's lease is at the end of the Sand Haul Road. The interference between the parties on the road is limited to the 6 kilometre stretch at the eastern end of the Sand Haul Road, including the 5K S bend. That interference is in my view mitigated by the width of the road, and the ability of the parties to communicate movement.
66. The disputed issue is who will bear the responsibility for maintenance and safety, particularly when there has been a recent history of the Objector upgrading a culvert at some expense on the 5K S bend. That upgrade has been achieved and pre-dated the hearing of this application. While the Applicant would have the benefit of that upgrade going into the future, they will also contribute to its degradation over time.
67. I am persuaded through Mr Bellin's evidence that he has sufficient expertise in haulage and road maintenance to be able to communicate the passage of BBH's trucks and employ a suitable road maintenance regime for the part of the road in which his trucks are travelling.
68. The parties are in the same field of haulage and transport for the mining industry. Mr Bellin and Mr Leahy have known each other a long time. Agreement has not been able to have been reached to date, but that does not suggest to me that the parties cannot co-exist amicably with their respective businesses running on the same road.

69. It seems to me that the Applicant is able to employ a road maintenance regime for the part of the road they are travelling, and charge the Objector for its contribution. Alternatively, the Objector can continue to maintain the Sand Haul Road for the entire length of L 15/111, but their charge to the Applicant should reflect that the Applicant's trucks are not travelling the full length of the Sand Haul Road. I make these observations only to illustrate that it is within the parties' reach to achieve a mutually acceptable commercial solution as to a fair distribution for the cost of road maintenance.
70. For the purposes of this application, the Objector does not appear to be at risk of suffering actual or potential detriment in the future exercise of its rights by the presence of the Applicant on the Sand Haul Road.
71. I am therefore persuaded that the Objector would not be injuriously affected by the grant of this application, and so I propose to dismiss the Objection 525878 and recommend L 15/383 for grant subject to:
- (a) The standard conditions;
 - (b) The application complying with the *Native Title Act*; and
 - (c) The land the subject of the grant being limited to the land east of the entrance to M 15/1339.

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