
JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	TELUPAC HOLDINGS PTY LTD v HOYER [2022] WAMW 26
CORAM	**:**	WARDEN CLEARY
HEARD	**:**	17 November 2022
DELIVERED	**:**	14 December 2022
FILE NO/S	**:**	Application for E70/5860 and Objections 632041 and 632085
TENEMENT NO	**:**	E70/5860
BETWEEN	**:**	TELUPAC HOLDINGS PTY LTD (Applicant) AND THOMAS HARRY JOHN HOYER (First Objector) JARRAHDALE FOREST PROTECTORS INC (Second Objector)

Catchwords: Application for Exploration Licence; public interest objections; interlocutory application; application under s 59(4) of the Mining Act 1978 *that objectors not given opportunity to be heard; meaning of 'no purpose'; role of the warden in Part IV proceedings*

Legislation:

Biodiversity Conservation Act 2016 (WA): s 5.
Environmental Protection Act 1986 (WA): s 3, 4, 37 B, 38, 38A, 40, 44, 45.
Mining Act 1981 (WA) s 6, 24, 57(1), 59(4) and (6), 63AA, 111A, 134.
Rights in Water and Irrigation Act 1914 (WA) s 5C, 11, Schedule 1.

Mining Resources Act 1989 (Qld) s 2, 269.

Environmental Protection and Biodiversity Conservation Act 1999 (Cth): s 18 and Part 9.

Mining Regulations: r137, 154.
Biodiversity Conservation Regulations 2018: r 15
Environmental Protection (Noise) Regulations 1997

Result:

The objectors will not be given an opportunity to be heard on any of their objections.

Representation:

Counsel:

Applicant	:	D Chandler
First Objector	:	In Person
Second Objector	:	M Pudovskis

Solicitors:

Applicant	:	Lawton Macmaster Legal
First Respondent	:	NA
Second Respondent	:	Glen McLeod Legal

Cases referred to:

AC Minerals Pty Ltd v Cowarna Downs Pty Ltd [2022] WAMW 22.
Bond v Maughn [2018] WASC 162.
Cartstens v Pittwater Council (1999) 111 LGERA 1.
Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others [2008] WAMW 9.
Finesky Holdings Pty Ltd v Australian Speleological Federation Inc [2001] WAMW 1.
FMG Chichester Pty Ltd v Rinehart & Ors [2010] WAMW 7.
Hogan v Hinch (2011) 243 CLR 506.
McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423.
Mineralogy Pty Ltd v The Honourable Warden K Tavener [2014] WASC 420.
Nova Resources NL v French (1995) 12 WAR 50.
Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors [2019] QCA 184.

O'Sullivan v Farrer (1989) 168 CLR 210.
Plaintiff M64/2015 v Minister for Immigration and Border Protection [2015] HCA 50; (2015) 258 CLR 173.
Re His Worship Mr Calder SM; ex parte Gardner [1999] WASCA 28.
Re Warden Calder; Ex Parte Cable Sands (WA) Pty Ltd (1998) 20 WAR 343, 364.
Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (1994) 11 WAR 315.
Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc) (1997) 18 WAR 320.
Water Conservation and Irrigation Commission (NSW) v Browning 1947) 74 CLR 492.
Westside Mines Pty Ltd v Tortola Pty Ltd [1985] WAR 345.

1 Jarrahdale is well known in Perth for its spectacular forests and natural amenities. Parts of Jarrahdale are covered in native forest, including a national park and a nature reserve. This case is about mining in Jarrahdale. This interlocutory application is about how the warden of mines may address environmental objections against exploration licences.

2 Telupac Holdings Pty Ltd lodged an application for an exploration licence E70/5860 on 6 August 2021 over blocks at Jarrahdale. On 9 September 2021 Thomas Hoyer, and on 10 September the Jarrahdale Forest Protectors Inc, lodged objections to that application. The objections raise concerns that there will be significant ecological and social impacts both on the national park and nature reserve, and on land adjacent to them, if the exploration licence is granted.

WHAT THIS INTERLOCUTORY APPLICATION IS ABOUT, AND WHAT IT IS NOT ABOUT

3 On 26 August 2022 Telupac lodged an interlocutory application asking the warden to dismiss the objections or alternatively for an order under s 59(4) of the *Mining Act 1978* (WA) that the objectors not be given the opportunity to be heard. If the interlocutory application is successful, Telupac wants the objectors to pay its costs. At the hearing of the interlocutory application Telupac abandoned the application for summary dismissal of the objections.

4 Telupac maintains that there is no purpose in hearing the objections. It says that while at least some of them may be in the public interest, the concerns raised by the objectors are adequately dealt with by the standard conditions indicated by the Department as being applicable to the specific ground and application, and other statutory mechanisms that will or can be invoked upon recommendation to grant. Some grounds, it says are also misconceived.

5 Telupac was not suggesting the objections in their entirety should not be taken into account, but that the warden can and should consider the objections, without hearing evidence on them. Telupac accepted that all of the objections may be in the public interest, and therefore whether they are or not is not a determination I have made in the present case. It should not be presumed, however, that

objections based on similar factors to those in the present case will be determined as being in the public interest in other matters.

6 There are times when, having heard an application and given the opportunity to an objector to be heard, the warden recommends refusal. The objectors say that there is a difference between a recommendation to the Minister to grant with conditions, such as are envisaged by the relevant frameworks, and public interest factors raised in an objection being of such a gravity that there is the potential for the warden to recommend refusal, and, given that, there is merit in such objectors having the opportunity to be heard. The objectors in the present case have urged that if I hear their evidence, I will determine that there are no conditions that may alleviate the serious concerns raised, and I will recommend refusal of the application. Although they concede that the Minister makes the decision, and is not bound by the warden's recommendation, they say a recommendation of refusal by the warden is at least persuasive.

7 There was also a broader concern with the implications of declining to hear evidence on objections. Doing so, Mr Hoyer said, risks a failure in the role of the warden to adequately provide to the Minister the information needed to exercise the discretion to grant or refuse. Such a decision will also impact on future decisions of the Minister in relation to this ground, Mr Hoyer suggesting I must also take into account in making my recommendation that eventually the holder of the exploration licence, if granted, may apply for a mining lease, the Jarrahdale Forest Protectors Inc having as one of their objections a consideration that "exploration by definition is done for the purpose of mining."

THE ISSUES TO BE DECIDED

8 Although any person can object to an application for an exploration licence, under s 59(4) of the *Mining Act* the warden is not obliged to "hear" an objector. The question is, when should the warden exercise the power not to give the objector the opportunity to be heard, and should it be exercised in the present case?

9 There was a slight divergence between the parties as to the wording of the 'test,' if it can be called that, in the application of s 59(4) and the discretion therein, and in these reasons I examine the 'test' itself to determine the appropriate way of expressing it and applying it. In proceedings such as these the warden is bound

by the rules of natural justice.[1] Therefore, it is a significant step to take to tell an objector that they will not have an opportunity to be heard on their objection. To understand and apply that significant discretion under s 59(4) of the *Mining Act* it is necessary to set the scene or context in which the warden makes such a decision, and why. In doing so I have explored the power giving rise to the discretion in the context of the type of proceedings these are, the warden's role within those proceedings, the nature of objections, why there is a distinction in the legislation between lodging an objection and being given the opportunity as an objector to be heard, what it means to be heard in that context and how that distinction should operate.

10 This examination also then addresses Mr Hoyer's claim of the risk of the curtailment of the warden's and the Minister's roles and the subsidiary suggestion by the objectors that a relevant consideration is that a grant of an exploration licence will most likely lead to an application for a mining lease. It is with that understanding, then, that I then address whether the objectors should be given the opportunity to be heard in this case.

OBJECTIONS

Objections generally

11 There is no limitation on who may object to a tenement application other than an objection must be lodged appropriately and be relevant to the grant of the application in the context of the *Mining Act*.[2]

The public interest objection

12 Under s 111A (1)(c) of the *Mining Act* the Minister may terminate or summarily refuse an application for any mining tenement if the Minister is satisfied on reasonable grounds in the public interest that the land should not be disturbed or the application should not be granted. Therefore matters of public interest are a relevant factor in the Minister's discretion. An objection made going to satisfying the Minister that there are reasonable grounds that it is in the public interest to

[1] R 154 (1) Mining Regulations 1981.
[2] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 327.

refuse or terminate an application for an exploration licence is a valid objection.[3] Given the warden has a filtering role (which I address further later in these reasons) in hearing and then recommending for grant or refusal the application for an exploration licence, consideration of an objection on a public interest ground may form part of the warden's recommendation.[4]

WHAT IS THE ROLE OF THE WARDEN IN PART IV PROCEEDINGS?

The proceedings are administrative and decisions of the warden of mines are defined by the principles and policies of the *Mining Act 1978*

13 In determining the way in which the question posed by this interlocutory application should be answered, it is necessary to consider the scope and power of the mining warden under the mining regime, and, in particular, in the context of an objection being lodged.

14 Under s 59(3) of the *Mining Act*, the registrar, where there is no objection, shall recommend the grant of an exploration licence if satisfied that the application has complied with the Act, or to refuse, if not so satisfied. Under sections 59(4) and (5) the warden, where an objection has been lodged, is to hear the application, and then forward to the Minister notes of evidence and other documents and a recommendation for either refusal or grant of the licence. That is, the filtering role the warden undertakes for the Minister for Mines is a role of assisting the Minister for Mines in coming to the decision that Minister may make. The Minister's decision that is assisted by the warden is a decision in relation to the grant or refusal of the licence to conduct mining activities; that is, other than the power to make suggestions as to conditions, the recommendation relates only to the grant or refusal of the licence itself.

15 There is no distinct provision in the *Mining Act* that establishes an administrative wardens 'court.' Rather, the provisions empowering the warden to deal with applications and objections are contained within the provisions which set out the criteria for the granting, refusing and recommending each licence, being Part IV

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[3] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 316, 317 (Kennedy J), 329 (Ipp J), Pidgeon dissenting.
[4] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 317 (Kennedy J) and 328 (Ipp J).

of the Act, and r 137(2) of the Mining Regulations, which deems 'proceedings' to have commenced when, relevant to the present case, an objection is lodged.

16 The warden also has judicial functions. The Warden's Court is established under Part VIII of the *Mining Act*, and given specific powers. Generally, the warden sitting as the Warden's Court has jurisdiction to hear proceedings relating to claims of right arising from matters that the warden deals with under the Act.[5] Under s 134 the warden sitting as the Warden's Court resolves actions, claims, questions and disputes in relation to matters relating to any civil proceedings and in a court of civil jurisdiction.[6]

17 Under r 154, the warden conducting Part IV proceedings must act with as little formality as possible, is not bound by the rules of evidence, but is bound by the rules of natural justice and may be informed in any way appropriate. Under r 154(2) any hearing conducted is to be conducted in public. On the other hand, when sitting as the Warden's Court, under s 135(6) of the *Mining Act* the warden is subject to the practice and procedure of the Magistrates Court. The Magistrates Court is subject to the formal rules of the *Magistrates Court (Civil Proceedings) Act 2004* (WA) and various sets of Rules, and, unless stated otherwise, the rules of evidence.

18 In making a recommendation, the warden does not make a final judgement or a final determination or a final decision.[7] Under s 59(6) the final decision in relation to the grant or refusal of the licence itself, and on what terms, rests with the Minister for Mines. Therefore, in recommending the grant or refusal of exploration licences, and in fact any licence, the warden is performing an administrative, not judicial, function,[8] as a 'filter.'

19 I will say more about the decision the Minister for Mines may make, and the input from other agencies, later in these reasons.

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[5] ***Re His Worship Mr Calder SM; ex parte Gardner*** [1999] WASCA 28 [32] and [33].
[6] ***Re His Worship Mr Calder SM; ex parte Gardner*** [1999] WASCA 28 [33].
[7] ***Re His Worship Mr Calder SM; ex parte Gardner*** [1999] WASCA 28 [15], citing and applying to all recommendatory provisions of the Act ***Westside Mines Pty Ltd v Tortola Pty Ltd*** [1985] WAR 345, 350.
[8] ***Mineralogy Pty Ltd v The Honourable Warden K Tavener*** [2014] WASC 420 [69] and ***Re His Worship Mr Calder SM; ex parte Gardner*** [1999] WASCA 28 [16].

20 As applications for tenements are administrative in nature and the warden performs a filtering role in making a report and recommendation to the Minister in relation to exploration licence applications, it is appropriate for a warden to endeavour to restrict the material that is forwarded to the Minister. The subject of the warden's report and recommendation to the Minister must be restricted therefore to material issues that may lawfully be considered by the Minister.[9]

21 Administrative actions by the warden involve the recognition of criteria and the application or administration of those criteria to the application, taking into account and balancing those with any objection that has been made. The governing legislative regime is the *Mining Act 1978* and the Mining Regulations 1981. There is no other legislative regime which a warden is specifically required to consider and weigh in the consideration in making a recommendation. Any broad issues of, for example, environmental protection or human rights, are considered by virtue of the public interest claim in an objection, as opposed to specific criteria from the mining regime, or any other legislative regime.

22 Therefore, the primary and only question for the warden in considering an application for, as in this case, an exploration licence, is, does the application comply with the Act? 'Comply' is to be considered in the broad sense that it is not only valid in form, but that it complies with the context, purpose and principles of the Act.

23 Under s 57(1) the Minister may grant an application for an exploration licence on such terms and conditions as the Minister sees fit. Under section 63AA(3)(a) of the *Mining Act* the Minister may impose conditions upon or after grant regarding the prevention or reduction of injury to land, whether from a recommendation or other source. It is part of the warden's filtering role, therefore, that a recommendation may be made which includes a recommendation of conditions.

24 It is settled in Western Australia that the Western Australian mining warden has the power to receive and consider objections based on environmental concerns, which are said to be in the public interest.

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[9] ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9 [13].

25 A consideration of whether something is 'in the public interest' requires consideration of a number of competing arguments, and consideration of a number of competing general interests.[10] However, when used in a statute, and, therefore, when being considered by the statutory officer, while the judgement to be made involves undefined factual matters, the discretionary value judgement is confined by the subject matter and scope and purpose of the statutory enactment under which the judgement is to be made. It should not include factors extraneous to the objects the legislation (or legislature) "could have had in view,"[11] or that the objectors would like them to have had a view. That is, the term 'public interest' derives its content from the subject matter and scope and purpose of the enactment in which it appears.[12] It is also in the public interest, when making a determination under an enactment, to give effect to the objects of the Act.[13] The determination of whether something is in the pubic interest is an example of the broader decisions made in the exercise of a discretion - all such decisions must be made within the principles, and apply the principles, of the Act. A decision-maker can go no further, or the decision will have been made outside of their powers.

26 In that regard, therefore, the warden's investigation is constrained by the objects of the *Mining Act 1978*. This regulates the way in which the warden comes to a decision, being a decision to recommend grant or refuse in this case, rather than its outcome. I address the principles of the Act, the application of policy and the relevance of other regimes' policies and principles later in these reasons.

The hearing

27 In its administrative function, the warden "hears" an application, and, by virtue of r 154(2), that hearing is in public. Conveniently, wardens conduct their public administrative hearings in court rooms, however that formality does not mean

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[10] ***McKinnon v Secretary, Department of Treasury*** [2006] HCA 45; (2006) 228 CLR 423 [55].
[11] ***O'Sullivan v Farrer*** (1989) 168 CLR 210, 216, citing ***Water Conservation and Irrigation Commission (NSW) v Browning*** (1947) 74 CLR 492, 505, and cited in ***McKinnon v Secretary, Department of Treasury*** [2006] HCA 45; (2006) 228 CLR 423 [55].
[12] ***Hogan v Hinch*** (2011) 243 CLR 506 [71].
[13] ***Cartstens v Pittwater Council*** (1999) 111 LGERA 1, 25.

they are 'court proceedings,' which, as I have identified, generally involve the determination of a dispute or claim of right.

28 When an objection is lodged, the warden "hears" the application, and may give the objector an opportunity to be heard. The "hearing" of the application must be seen in light of the function of the warden in the administrative proceedings. The word "hear," or "hearing," does not suggest that the warden is presiding over the resolution of a dispute between two parties, even if the applicant and objector disagree on matters. Objections are not "claims of right," or "disputes." The warden's function of determining a recommendation must be carried out in light of the objection. It is not for the warden to determine in Part IV proceedings a claim of right or resolve a dispute, or determine who is "right" about a contention in a final determinative sense, even if the warden must make determinations as to matters of fact or law in order to determine what recommendation to make.

29 Given the warden's function is to assist the Minister for Mines in coming to a decision about whether or not to grant the licence, and if so under what conditions, the provision of that assistance may or may not require a full hearing. [14]

Considerations of policy and principle

30 In general, administrative decision-makers should consider and give effect to government or department policy, but are not bound by policy, each case being decided on its own merits.[15] Nevertheless, the principles of the Act guide a warden when considering an application. Although the decision itself is in the hands of the Minister, as I have identified, any recommendation must recognise and be made within the framework of policy and principles of the Act.

31 The principles of the *Mining Act* have been developed through relevant government policy, applied at the time of drafting the legislative instruments, and identified and set out in case law numerous times.[16] The primary object of the *Mining Act 1978* (WA) is that as far as is practicable land that has either known potential for mining or is worthy of exploration will be available for mining or

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[14] ***Re Warden Calder; Ex Parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343, 365.
[15] See, for example, ***Plaintiff M64/2015 v Minister for Immigration and Border Protection*** [2015] HCA 50; (2015) 258 CLR 173 [54] and [68].
[16] See, for example, the summary in ***Bond v Maughn*** [2018] WASC 162 [17] – [18].

exploration.[17] That is clearly an object relevant to mining itself, the policy of mining being under the direction of the relevant government department related to mining.

32 In Western Australia the warden is not directly subject to the specific regimes of the environmental or human rights protection legislation, in that their principles are not part of the legislative criteria or principles set out or read into the *Mining Act*. Nor is the warden of mines in Western Australia tasked with determining requests for environmental approvals, as, for example, the Queensland Land Court is. Neither does the *Mining Act 1978* (WA) have specific criteria relating to environmental responsibility or responsible land care management, as, again, for example, does the *Mining Resources Act 1989* (Qld).[18] Section 6 of the *Mining Act 1978* (WA) provides that where there is an inconsistency between the *Mining Act* and the *Environmental Protection Act 1986* (WA), the latter prevails, however it is not the case that that means any criteria set out in the *Environmental Protection Act 1986* become relevant criteria for a warden in Part IV proceedings.

33 Neither does the warden exercise discretion as to questions of policy and principle governing the exploration of mineral deposits. That is a matter "within the province of the Minister" although there may be good reason why the warden may investigate, before making a recommendation to the Minister, objections grounded in matters of public interest.[19]

34 Therefore, while an objection may contain considerations of policy relevant to matters of public interest, a warden has no power to make determinations in relation to policy itself, particularly in relation to high level public policy considerations, or to make determinations on the facts which require the balancing of competing policy considerations that arise from the mining regime itself and from other areas of government policy-making. Such a determination would require the consideration of broad areas of expertise and balancing competing

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[17] ***Nova Resources NL v French*** (1995) 12 WAR 50, 57-58.
[18] *Mining Resources Act 1989* (Qld) sections 2 and 269.
[19] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 328.

policy considerations from different areas of community and government concern, not all contained in the *Mining Act*, or the mining regime. [20]

35 The warden of mines, when making a recommendation, is confined to the policies and principles of the *Mining Act*. The warden has neither the expertise or the power to do otherwise.

36 That is not to say that the policies and principles of other regimes, or public policy, may not be relevant to the process of an application for an exploration licence at all. The constraining of a warden's investigation in preparation for a recommendation does not constrain the Minister in their investigation and decision to grant or refuse. Under s 59(6) of the *Mining Act*, even after recommendation, the Minister may grant or refuse an exploration licence "as the Minister sees fit," and "irrespective of whether the report recommends the grant or refusal ...," on any grounds. The ability of the Minister to accept or reject the warden's recommendation under s 59(6) is itself statutorily unfettered, and therefore may enable the Minister to consider broader policy considerations which the Minister, being a Minister of the government, is better placed to do. As I set out later, in some circumstances the Minister for Mines must consult with other Ministers and stakeholders when considering applications, thereby expanding the criteria a Minister may consider.

37 Therefore, the warden of mines sits administratively in Part IV proceedings where an application for an exploration licence has been made, in a filtering role for the Minister for Mines, assisting that minister to make their determination on the application. The warden of mines does not sit in these proceedings in a court setting making final determinations. The filtering role is constrained and defined by the policies and principles of the *Mining Act* and supporting regime, and the warden does not have the power to extend its considerations to broad questions of public policy, or policy and principles that underpin other legislative regimes.

38 In that context, how and when does the warden 'hear' matters?

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[20] ***Finesky Holdings Pty Ltd v Australian Speleological Federation Inc*** [2001] WAMW 1 [99].

ARE ALL OBJECTIONS 'HEARD' BY THE WARDEN?

The operation of s 111A of the *Mining Act*

39 His honour Justice Kennedy in ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association***[21] appeared to be of the view that s 111A of the *Mining Act* leaves open two avenues for the Minister to be informed in relation to objections on the basis of the public interest, one through the filtering process of the warden, which, he thought, was preferable, and the other with objectors raising the public interest making submissions directly to the Minister. In other words, s 111A leaves available a mechanism by which a party can make their objections directly to the Minister. The Minister has the power to terminate the application before recommendation, under s 111A(1)(a), or to refuse the application under s 111A(1)(b), which does not appear to be limited in time, and is available no matter what the recommendation.[22] Therefore, under s 111A(1)(b) and (c), whether or not the warden has provided evidence on a particular objection, the Minister may refuse an application, irrespective of the warden's recommendation, if satisfied on reasonable grounds in the public interest that the land should not be disturbed or the application should not be granted. This too suggests the Minister has a wider discretion than that of the warden.

40 In the present case the Minister has already been invited to terminate or summarily refuse the application under s 111A(1)(a) and (c), and declined to do so, suggesting that the warden's investigation should take its course before the Minister considers the application and the objection.[23]

41 In his letter to Mr Hoyer declining to exercise intervention under s 111A of the *Mining Act* at that time, the Minister noted that there is a specific legislative mechanism, being the wardens court, "allowing for a comprehensive examination

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[21] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 317 (Kennedy J).
[22] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 317 (Kennedy J).
[23] Affidavit of Jacob David Loveland affirmed 26 August 2022 (Exhibit 1 in the interlocutory application), annexure JDL07.

of opposing parties' testimony under oath…to consider the application and any objections." That is the filtering process. The existence of the filtering process, or the Minister referring to it, however, does not curtail the discretion of the warden contained in s 59(4) of the *Mining Act* to decide not to give an objector an opportunity to be heard. The mechanism for a party to object direct to the Minister is always present, but subject to the various discretions imparted on the warden by the legislative regime. The mechanism is always also present whereby the warden may limit the scope of enquiry in the administrative proceedings, leaving it to the parties to make fuller representations to the Minister after the recommendation.[24]

42 Given that the mechanism is always present, neither does any decision by the warden not to give the objector an opportunity to be heard limit the Minister taking into account or seeking further information about the objection.[25] The ability of a party to do so though may not of itself be a sufficient reason for a warden to exercise the discretion under s 59(4) not to give a party an opportunity to be heard.

The discretion under s 59(4) - What does it mean to be 'heard'?

43 His Honour Justice Franklyn, in his much-quoted passages on the power in s 59(4) in ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)***, [26] sets out the steps a warden must take when determining whether to give an objector an opportunity to be heard:

44 First, the warden must:

> *…examine the grounds of objection and determine whether, objectively, they relate to a matter …of such a nature as to being reasonably capable of giving rise to a question whether it is in the public interest that the ground should not be disturbed or that the application… be refused.*

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[24] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 365 (Steytler J).
[25] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 317 (Kennedy J).
[26] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 332.

45 As I have said, Telupac did not press that the objections were not in the public interest and I have proceeded on the basis that they are for the purposes of this interlocutory application. Justice Franklyn proceeds:

> *Should he find it to be of that nature it is still a matter of his discretion whether the objector should be heard.*

46 He went on to acknowledge that, should the warden reach the second step, it is "generally appropriate" that the objector is "heard," or in the words of s 59(4) is given the opportunity to be heard.

47 Therefore, under s 59(4) the warden has a discretion to decide not to give an objector an opportunity to be heard at all or to give an objector an opportunity to be heard in respect of some matters or issues and to refuse to give the objector the opportunity to be heard in respect of other matters and issues. Whether to so restrict the objector is within the discretion of the warden,[27] in the exercise of the filtering role.[28] Therefore, the filtering role is twofold:

a. the taking of and ensuring relevant evidence taken is transmitted to the Minister, and,
b. making a decision not to hear evidence, or limit the evidence in some other way, and therefore to transmit no or limited evidence, to the Minister.

48 Following Justice Franklyn's analysis, there are two outcomes under s 59(4): firstly, the objection is not in the public interest and has no bearing on whether the application is refused, or, secondly, it may have that bearing. However, the question and discretion remain in the latter outcome whether there is any purpose or reason for the objector to be heard.

49 Seen in that context, and in the context of the warden's function in the process, if the warden determines the objection belongs to the first category, the objector would not be given any opportunity to be "heard," as that hearing would have no relevance to whether the application should be granted, and therefore to the recommendation to grant or refuse. If the objection falls into the second category,

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[27] ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9 [11].
[28] ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9 [13].

s 59(4) envisages the prospect that relevant evidence could, but not necessarily would, be called, and therefore heard, as part of the warden's functions in making a recommendation.

50 While his Honour Justice Franklyn recognised that, as I have said, it is generally appropriate that the objector is heard, the warden does not have to "embark upon a full scale investigation into environmental or other public policy matters merely because an objection in that respect had been made."[29] Given the role of the warden is to assist the Minister for Mines to make their decision about whether to grant the licence, and, if so, on what conditions, a full hearing may not always be required.[30] Therefore it is not a forgone conclusion that, having made the finding that the objection has some relevance, the objector will be permitted to adduce evidence or address the warden further on it.[31]

51 Thus there is no right to be heard. Neither, however, is the warden permitted to ignore an objection.[32]

52 Therefore the legislative regime envisages that not all objections before the warden will be given the opportunity to be heard, even where the objection may have some merit, that is, may objectively reasonably be capable of giving rise to the question whether it is in the public interest that the ground not be disturbed or the application be refused.

53 Further, even if the objection falls into the second category, and the warden exercises the discretion not to give an objector an opportunity to be heard, s 59(4) dictates that nevertheless a 'hearing' must be held in order that the warden can complete their role by making a recommendation to the Minister. Therefore, an objector being 'heard' and a hearing taking place to determine the recommendation are two separate matters. The objector having the opportunity to be "heard" in that context therefore means a hearing with submissions and evidence from the objector. Even without the objector having the opportunity to be "heard" the objection and supporting particulars remain, and must be taken

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[29] ***Re Warden Calder; Ex Parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343, 364.
[30] ***Re Warden Calder; Ex Parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343, 365.
[31] ***Re Warden Calder; Ex Parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343, 364.
[32] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 331.

into account, being a relevant and valid objection, when the warden is embarking on the required task to "hear the application."

54 Therefore, not all relevant objections are 'heard' by the warden in Part IV proceedings. The question still remains, how does a warden determine how to exercise the discretion not to give such an objector an opportunity to be heard?

The question of 'no purpose' in giving the objector an opportunity to be heard

55 The applicant and the objector Jarrahdale Forest Protectors Inc expressed the process of determining whether to exercise the discretion in 59(4) slightly differently.

56 The applicant in its written submissions dated 26 August 2022 at [12] set out that the warden may refuse to hear an objector *where no purpose would be served* by doing so. Examples of such circumstances would be, according to the applicant:

a. The objections have no relevant merit, or where they have merit, no purpose would be served in hearing them, or
b. The objection is based on matters that cannot be lawfully taken into account or cannot lawfully affect the outcome of proceedings.

57 In other words, from the wording used in that submission, the general test is whether there would be no purpose in hearing the objection, with suggestions as to how an objection may fit within that description.

58 In contrast, The Jarrahdale Forest Protectors Inc said in its written submissions dated 26 August 2022 at [10] that the warden must take into account, when determining whether to exercise the power not to hear an objector:

a. Whether the objection is self-evidently without merit, or manifestly groundless.
b. Whether giving the objector an opportunity to be heard would serve any purpose.
c. Whether the objection is based on matters that cannot be lawfully taken into account or cannot lawfully affect the outcome of proceedings.
d. Whether the application is frivolous or vexations or otherwise an abuse of process.

59 Other than the example of an objection being frivolous, vexatious or an abuse of process, both parties rely on Warden Calder's words in ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others***[33] in those submissions.

60 In oral submissions the objector said there were 2 principles guiding the discretion that came from Warden Calder's determination:

a. Where the objection has no relevant merit, or, if it does, no purpose would be served in hearing them, and

b. The objector wishes to be heard on matters that cannot be lawfully taken into account.

61 In other words, according to The Jarrahdale Forest Protectors Inc there is only one class of objection where there is no purpose in hearing the objection – while there is merit, there is no purpose. The other possibilities- that there is no merit, or the matters cannot lawfully be taken into account or, from their written submissions, the objection is frivolous or vexatious or an abuse of process, are of a different class.

62 While not a great deal turns in the present case on whether, generally, there must be no purpose served in hearing an objection before the warden should exercise the discretion not to give the objector an opportunity to be heard, or whether there being no purpose served is only one example or category of instances where the warden may decide not to give the objector an opportunity to be heard, I have reviewed the words of Warden Calder to ensure the principles are applied appropriately. Warden Calder relies on his Honour Justice Franklyn's statement on the discretion in s 59(4) in ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)***.[34]

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[33] ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9 [9] – [13] in the case of the applicant, and [11]-[12] in the case of the Jarrahdale Forest Protectors Inc.

[34] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 331, and see ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9 [9].

63 Justice Franklyn says:

> *Speaking generally, the warden may well find there is no occasion or reason for the objector to be heard, either because the merit of the objection is self-evident or because it is self-evidently without merit, or because the claimant's case reveals it to be misconceived or for some other valid reason.*

64 In my view, that passage suggests that there is a general principle that a warden may find that there is 'no occasion' or 'reason' for an objector to be heard. Warden Calder has paraphrased those words as "no purpose to be served" and at the hearing of the interlocutory application counsel for the applicant paraphrased as "nothing to be gained" by hearing evidence on the objection.

65 Given my view on the construction of the discretion in s 59(4) and Justice Franklyn's 2 step process in determining the relevance of an objection, it appears to me that firstly there will be no reason or occasion to give an objector an opportunity to be heard on an objection that bears no relevance to the warden's function. By virtue of the lack of relevance, the objection may not even be acknowledged as having any weight in the warden's recommendations. Indeed, irrelevant objections would be an irrelevant consideration if given any weight.

66 Secondly, even if there is relevance, there may nevertheless be no reason, or purpose, to provide an opportunity to the objector to be "heard," in the sense of hearing evidence or submissions.

67 Having regard to the discussions in ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)***[35] and ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others***,[36] some "observations"[37] of when there may be no occasion or reason are, but are not limited to, the following:

a. Where there may be merit or substance to the objection:

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[35] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320.
[36] ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9.
[37] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 331.

i. The merit in the objection is self-evident, and no further evidence is required to assist the warden in making the recommendation, such as where the same issues or matters have already been put before the warden by other means;

ii. The warden may be satisfied that sufficient protection would be obtained by the application of the provisions of, for example, the *Environmental Protection Act 1986*[38] and the environmental assessment process or other relevant legislation or authorities conferring limitations or prohibitions on the Minister or the applicant; or

iii. The objector's case reveals the objection to be misconceived, perhaps because it is too wide or speculative, although this may also be an objection which has no merit in some cases.

b. Where there may be no merit: where it is apparent that the legal or factual issues sought to be raised by the objector cannot lawfully be taken into account by the Minister or the warden and cannot lawfully in any way affect the outcome of either the proceedings before the warden or the final determination of the tenement application by the Minister, that is, they can have no bearing on the outcome:

i. An example in my view, is the objection of the pastoralist that there is the potential for damage or loss arising from mining operations, there being a general principle that such an objection will not stand in the way of mining activities, the resolution of that risk being rested in the compensation provisions under the *Mining Act*,[39] and in the imposition of conditions.[40]

ii. The same may be said for private land holders' objections.

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[38] See also ***Re Warden Calder; Ex Parte Cable Sands (WA) Pty Ltd*** (1998) 20 WAR 343, 364.

[39] ***FMG Chichester Pty Ltd v Rinehart & Ors*** [2010] WAMW 7; see also ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 325.

[40] ***AC Minerals Pty Ltd v Cowarna Downs Pty Ltd*** [2022] WAMW 22, particularly [128] – [134].

iii. Where the objection is based on an irrelevant consideration that can be given no weight, or is based on broad public policy considerations that are unable to be 'determined' by the warden in its administrative function.

IS THERE 'NO REASON OR OCCASION' IN THE OBJECTIONS BEING HEARD IN THE PRESENT CASE?

What must the warden consider in determining whether there is no occasion or reason to give an objector an opportunity to be heard?

68 Having reviewed the warden's powers and the context of the discretion in s 59(4), and determined the appropriate way to address the question to be asked in determining my discretion, I turn to the application of the discretion in this case.

69 The warden determines whether there is no occasion or reason to hear the objection, or that hearing it would serve no purpose, by focusing on the objection as lodged, and considering the nature and context of the objection in the context of the Act.[41] This includes the nature of the tenement applied for, the grounds of objection and any particulars filed by the parties.[42] In addition to particulars, Mr Hoyer filed an affidavit dated 5 October 2022, and there was filed a document headed "Summary of Objection" to which I have also had regard. The applicant filed an affidavit of Christopher Lee Stott affirmed 10 May 2022, and referred to his evidence without objection in this interlocutory application and I have also had regard to that evidence.

70 These are objections based on largely environmental concerns, and raise specific concerns over particular parts of the environment, such as the local flora and fauna, and water management. The nature and context of the objections include a consideration of other areas of policy and the principles under other enactments relevant to the management of the environment. As I have already addressed in these reasons, it is my view that the presence of other regimes is relevant to a determination of the exercise of this discretion.

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[41] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 331.

[42] ***Cazaly Iron Ore Pty Ltd v Hammersley Resources Limited, and Others*** [2008] WAMW 9 [11].

The application of questions of policy and principle to the discretion

71 To understand how other policy regimes are relevant, I have reviewed two relevant to this case.

The Environmental Protection Act 1986 *(WA)*

72 While not specifically subject to environmental criteria under the *Environmental Protection Act 1986*, that Act does have an impact on the process of granting or refusing a licence.

73 Under that Act any significant proposal may, and some proposals must, be referred for an Environmental Impact Assessment, completed by the Environmental Assessment Authority.

74 Under s 37B of the *Environmental Protection Act 1986* a 'significant proposal' means a proposal likely, if implemented, to have a significant effect on the environment. 'Proposal' is defined in s 3 of the Act as, relevantly, a policy, plan or program, project undertaking or development or a change in land use. 'Significant effect on the environment' is not defined, perhaps to ensure such a judgement is made on a case by case basis. While it has been acknowledged that not all mining proposals may be significant proposals,[43] that is not a relevant question for the warden to determine; it is for those who are able to report and the Authority itself to determine. The practical effect, however, of the legislation is that it is doubtful that a recommendation to refuse could be based on environmental public interest grounds if the Authority is not so concerned that it refuses to review a proposal because it is in its view not significant.

75 Under s 38 of the Act, significant proposals may be referred to the Authority by its proponent, or any other person. The Minister (for the Environment) may also refer a significant proposal to the Authority if it appears to the Minister that there is public concern about the likely effect of a proposal on the environment. A decision making authority, which includes the Minister for Mines, must refer a significant proposal to the Authority, under s 38(4), unless the proposal has already been referred, and if the Authority takes the view that a significant

[43] ***Finesky Holdings Pty Ltd v Australian Speleological Federation Inc*** [2001] WAMW 1 [102].

proposal has not been so referred, the Authority itself must require the proponent or decision making authority to refer the proposal to it, under s 38A. No decisions must be made by the decision making authority, once a matter has been referred, without the Authority declining to assess the proposal, or the assessment is completed, and it is an offence to proceed otherwise.

76 Under s 40, when the Authority decides to assess the proposal, it has the power to:

- Require information from anyone;
- require the proponent to undertake an environmental review and to report thereon to the Authority;
- conduct a public enquiry, and
- take other investigations and enquiries as it sees fit.

77 Once an assessment is completed, under s 44 the Authority must prepare a report, setting out:

- The key environmental factors and
- Its recommendations as to whether or not the proposal may be implemented and any conditions and procedures attached to a recommendation for implementation.

78 Under s 44 the Minister concerned with the environment must provide the report to any other Minister likely to be concerned in the outcome of the proposal, which would clearly include the Minister concerned with granting mining licenses, and under s 45 must consult with the Minister of the key decision making authority on any implementation issues for agreement on implementation. If agreement cannot be reached, there are mechanisms in the Act for settling of the disagreement.

79 Implementation conditions may include:

- at the proponent's expense, take environmental protection, abatement or restoration measures on the subject land, or on other land, in order to directly or indirectly offset the impacts of the implementation of the proposal on the environment;
- contributing moneys to be used for the purpose of taking environmental protection, abatement or restoration measures on the subject land or other land;

- the proponent giving an environmental undertaking in relation to other land;
- arranging for an environmental protection covenant to be given by a specified person other than the proponent in relation to other land;
- at the proponent's expense, prepare, implement and adhere to environmental management systems, environmental management plans and environmental improvement plans;
- at the proponent's expense, arrange for audits as to whether or not the implementation conditions have been complied with to be carried out at specified times by a person nominated or approved by the CEO and report to the CEO on the findings of those audits.

80 In operating under the Act, under s 4 the Minister and Authority must comply with the objects of the Act, being to protect the environment of the State, by having regard to:

a. The precautionary principle;
b. The principle of intergenerational equity;
c. The principle of the conservation of biological diversity and ecological integrity;
d. Principles relating to valuation, pricing and incentive mechanisms, such as environmental factors being included in the valuation of assets and services, and
e. The principles of waste minimisation.

81 Therefore, at any time, anyone, including the Minister for Mines, concerned over the application may refer the application to the Authority. Once there, the authority has significant powers to gather evidence, investigate, analyse, consult, recommend and review.

The Rights in Water and Irrigation Act 1914 *(WA)*

82 The *Rights in Water and Irrigation Act 1914* (WA) makes it an offence under s 5C to take water from certain watercourses, wetlands or underground sources when protected, or from an artesian source, without a licence. Neither may a person, under s 11, obstruct or interfere with a watercourse or wetland without a permit.

83 The objects of that Act are:

(a) to provide for the management of water resources, and in particular —

(i) for their sustainable use and development to meet the needs of current and future users; and

(ii) for the protection of their ecosystems and the environment in which water resources are situated, including by the regulation of activities detrimental to them;

and

(b) to promote the orderly, equitable and efficient use of water resources; and

(c) to foster consultation with members of local communities in the local administration of this Part, and to enable them to participate in that administration; and

(d) to assist the integration of the management of water resources with the management of other natural resources.

84 In determining whether a licence should be granted, under schedule 1 clause 7 of the Act the Minister must consider the application in light of those principles, and in addition, where relevant, must consider whether the proposed taking or use of the water:

- is in the public interest; or
- is ecologically sustainable; or
- is environmentally acceptable; or
- may prejudice other current and future needs for water; or
- would, in the opinion of the Minister, have a detrimental effect on another person; or
- is in keeping with matters such as local practices, and
- any other relevant matters.

85 Under clause 15 conditions and restrictions may be imposed on the licence, and may be cancelled under clause 24.

86 These are but two of the regimes that appear to be relevant to the application before this court. Having briefly reviewed them, it is clear that:

a. Those regimes have stringent application or review processes in place;

b. Each of the application or review processes have attached to them significant environmental considerations that the reviewer or decision maker must consider, and

c. In some cases, there must also be consultation with the Minister or decision maker overseeing and determining the application or administering the grant.

87 Further, the water regime specifically precludes the applicant from certain activity unless a permit or licence is obtained. Therefore, lawfully, they cannot undertake those activities until granted permission, even if the application for the exploration licence is itself granted. Once the environmental impact assessment has commenced, the exploration licence cannot be granted until resolution.

88 Having reviewed those two regimes, and given the confinement of a warden's decision to the principles under the *Mining Act*, the following can be said:

a. Mining activities, whether exploration or otherwise, cannot be conducted unless authorised by a licence to mine, or explore, being a mining or exploration licence.[44]

b. However, the *Mining Act* is only concerned with activities that are prohibited unless authorised by a mining licence.[45]

c. Once granted, such licences do not automatically authorise other activities, even if they are in connection with mining, where those other activities are expressly prohibited by other legislative regimes.

d. Where a regime or enactment prohibits behaviour, or prohibits that behaviour without licence from another agency, the legislature puts the recommendation for and regulation of that behaviour not on the warden of mines, or the Minister for Mines, but on the appropriate expert authority whose Act and Department enshrines and imposes a set of principles, objects and policies regulating that behaviour.

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[44] See, in the Queensland context, ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2019] QCA 184 [110], which, in my view, despite the difference in legislation and regimes, is nevertheless a relevant statement of the principles where specialist courts are urged to take into account the principles of other regimes in assessing objections or whether to hear an objection.

[45] See, as above, ***Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd & Ors*** [2019] QCA 184 [110], with similar comment.

e. Further, there may be activities which, while not expressly prohibited by other enactments, may be the subject of stringent review by an authorised agency with relevant expertise, governed by specialised principles and policies, either prior to or post grant, a referral to or condition over which will effectively prohibit or limit all or some activity until the completion of that review and the imposition of further restrictions, guidelines, licences or conditions. This also effectively places the recommendation for and regulation of that behaviour not on the warden of mines, but on the appropriate expert authority whose Act and Department enshrines and imposes a set of principles, objects and policies regulating that behaviour, sometimes in conjunction with the Minister for Mines.

f. Broad and competing government policy considerations are beyond the warden's jurisdiction.

89 The effect of those principles is that, in my view:

a. There may be utility in raising, in an objection, environmental concerns over an application for a mining tenement, such that:

i. it will ultimately ensure that the Minister for Mines, the Department and any other agency required to consult with the Minister for Mines are notified of those concerns, so that they appropriately address them under the relevant regimes, and

ii. the warden may consider whether a recommendation upon conditions, and the type of conditions, is appropriate, however

b. On the basis that the legislature has seen fit to put on the relevant expert authority the power to authorise certain activities, the Minister for Mines has limited need for information about that activity.

c. The concerns themselves, and the veracity or certainty of those concerns, or the application to them of broad public or competing government policy considerations being adequately the subject of other regimes or exclusively within the realms of government ministers, either prohibiting certain activity or providing extensive and expert review, are not then material considerations for the mining warden as part of the recommendation process.

d. If those factors are not material considerations for the mining warden as part of the recommendation process, neither are they part of the filtering role.
e. Not being part of the filtering role, or material considerations to the recommendation process, there would be no occasion or reason for the warden to give an objector an opportunity to be heard on them.

What are the grounds of objection in the present case?

90 The grounds of objection provided by the objectors can be broadly classed as concerns over:

a. Ecological impact
b. Environmental impact
c. Social and lifestyle impact
d. Impacts on water, in particular, and
e. Economic, visual and tourism impact on the area.

91 Firstly, I will deal with some general objections and queries raised by the objectors in their particulars.

92 In its Particulars of Objection dated 14 March 2022, the Jarrahdale Forest Protectors Inc says that "the objection is made to ensure the protection of the ecological integrity of the Jarrah Forest and to raise awareness of this…" [3].

93 Mr Hoyer, in his Particulars of Objection, notes the need to ensure "the quiet amenity and other commercial pursuits of all participants and owners in the proposed licence area…" [3]. He made further reference to the amenity of others in [6]. Mr Hoyer made submissions from the bar table about who those others were and what they had told him about their concerns. I accept that he has spoken to others, and that there is a general concern about mining in the area, for many reasons. However, given the nature of the presentation of that information, I can only give that information a little weight in the assessment I am required to make in the interlocutory application.

94 Both objectors in their Particulars of Objection outline the likely global catastrophe of continuing to clear forests.

95 Further, the objectors' Particulars of Objection reference the prospect of a mining lease eventually being granted following the exploration licence, if granted. Mr Hoyer in the interlocutory application argued that I should consider in this

interlocutory application the prospect of a mining lease being granted. His submission was that as this is the start of the life of what could be a long and significant disturbance of the land:

a. Evidence should be gathered, recorded and distilled now, before the land is disturbed,
b. If that evidence is gathered and distilled at the time of the application for a mining lease, some disturbance will already have occurred, and any objection based on proposed disturbance of the land at that time is weakened by the presence of some disturbance already having occurred;
c. Further, by that time the mining process on this ground will be legitimised, whereas the warden has the opportunity at this time to signal to the Minister, by a recommendation to refuse, that the mining process in this area has no legitimacy;
d. Without hearing evidence at this stage, the warden will not have the opportunity to so signal, and the opportunity to have any licence refused will be lost, or significantly hampered in the future.

96 Jarrahdale Forest Protectors Inc submitted that while there may be conditions applicable to this site, already foreshadowed by the Department, any 'summary' decision on their applicability ignores the fact that the objections in this matter are wide ranging and varied. Therefore, accepting that the conditions adequately address the substance of the objections without hearing evidence would be an error.

97 In any event, this objector also argued that the starting point for the application for the licence should be the recommendation of refusal, rather than simply in relation to appropriate conditions. Not giving the objectors the opportunity to be heard means the warden will have lost the opportunity, properly open to the warden, to recommend refusal.

98 This objector also states, in its particulars, its willingness to "prepare and present documents and evidence" to the Minister and to the Environmental Protection Authority if required.

99 The applicant's argument that there is no occasion or reason, or nothing to be gained by hearing evidence on any of the objections can be summarised as:

a. The standard proposed conditions and endorsements applicable to this application, attached as part of annexures CC1 to exhibits 3 and 4 to

affidavits of Cecilia Camarri affirmed on 14 November 2022, and attached to these reasons as Annexure A, adequately address particular concerns raised;

b. Some concerns are not relevant considerations to the granting or refusing of an application;

c. Objections and references to open cut mining, bauxite mining, other miners' applications and proposals, and the use of water do not assist the warden completing their function;

d. The Minister and the applicant are subject to other legislative regimes which will manage the process of grant, and the exploration itself, should the application be granted;

e. Some grounds are speculative or wide, general statements about adverse impacts.

100 In addition, in general, the applicant says that the objectors in their Particulars of Objection are misguided as to the assumptions they have made on the type of mining to be carried out, the way it will be conducted, references to other companies and the need for water. Specifically:

a. Both objectors seek confirmation from the applicant that it demonstrates how it will source its water. The applicant says water will not be sourced for the purpose of its proposed exploration, only needed in the initial work programs for "personal hydration."[46]

b. Both objectors note the undesirability of new tracks being made for access in the forest areas. The applicant says "initial" access will be on existing roads and tracks, with limited time in the initial exploration in the field.[47]

c. Both objectors refer to the fact that Alcoa has a licence to operate in the area (under a state agreement) and future proposals, part of the area over which the applicant has applied, and suggest that the existence of a mining operation already in that area should form part of the warden's investigation and report to the Minister. The applicant says that what other mining companies do in the area is not relevant to their application. I

[46] Affidavit of Christopher Lee Stott, affirmed 10 May 2022 [48].
[47] Affidavit of Christopher Lee Stott, affirmed 10 May 2022 [45] – [47], [49].

accept that there is a public policy implication, leading to practical ramifications, of more than one mining operation in such protected areas. Such public policy matters may have a general public interest consideration, but they are matters of public policy.

d. Reference is also made to open cut bauxite mining in the area. From the explanation of the work to be performed at least in the proposed initial phase of the exploration licence, no open cut mining is considered.[48] While it may be that, ultimately, an application for a mining lease may involve proposed open cut operations, the applicant says that is a matter that will be considered, and the subject of further applications in due course, and is not a relevant factor to consider in this application.

101 I accept the evidence of Mr Stott and the responses given by the applicant to the general comments and requests and objections. I am of the view that they adequately answer those general concerns raised, and there would be no reason to hear further on those matters.

102 I turn to the specific objections.

Water

103 There are various objections that relate to water, over and above the general objections and response regarding where the applicant will source its water needs. These relate to adverse impact on the Serpentine catchment, wetlands and local hydrology. They are in:

Both objectors general objections as originally filed

In both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (i), (iii) and (iv)

Hoyer Particulars [6], [8], [11], [12] and a general comment on page 2.[49]

Jarrahdale Forest Protectors Inc Particulars pages 2, 6 and 7.

[48] Affidavit of Christopher Lee Stott, affirmed 10 May 2022 [42]-[51].
[49] Neither set of particulars were paginated, so I have attributed my own page numbers to them for clarity, starting with the cover page as page 1 on each.

104 There are proposed conditions and endorsements which incorporate the following:

a. *Waterways Conservation Act 1976, Rights in Water and Irrigation Act 1914, Metropolitan Water Supply, Sewerage and Drainage Act 1909, Country Areas Water Supply Act 1947, Water Agencies (Powers) Act 1984* (E7)*;*

b. Chemical and potentially hazardous substances having to be stored and kept in compliance with Water Quality Protection Notes and Guidelines published by the Department of Water and Environmental Regulation (E9), and the rights of ingress at all reasonable times available to its officers (E8);

c. The prohibition of taking ground water from and the construction or alteration of an artesian well without licence issued by the Department of Water and Environmental Regulation.

105 Each of these regimes prohibits or limits the use of water. Proposed conditions 5 and 13 specifically refer to a prohibition on mining on the catchment area unless the applicant has obtained the consent of the Minister, a breach of which would render the applicant liable to forfeiture. The conditions put the responsibility on the Minister to make the decision to allow the use or obstruction of water, which is not a factor connected to the grant or refusal of the exploration licence itself. The Minister makes that decision having weighed up all the competing policy considerations, and any expert advice he sees fit to seek. Not being a decision to grant or refuse the exploration licence itself, the warden has no role in filtering evidence or information for the Minister.

106 Proposed endorsements 9, 10, 12, 13, 14, 16 and 17 specifically refer to various types of water, water places and water infrastructure, and restrict the applicant in its activities, in some cases altogether, in others without guidance and advice or permission from other authorities.

107 In addition, a general objection that there will be "adverse impact" on areas or features is what the applicant has termed 'misconceived.' The general objections of such a nature that relate to water were not enunciated further in the objectors' particulars. As such, the general nature of such an objection is a broad objection on the overall effect of mining on the environment and the land on which the tenement sits. These involve broad public policy considerations. I have already

explained that the warden has no purpose in hearing evidence on such considerations.

108 Accordingly, the substance of the objections relating to the use of ground water, the potential effect on water quality and the use or obstruction of other water and water courses, or the general effect on water, catchment areas, wetlands and water courses are not material considerations for the warden, and do not form part of the warden's filtering role. Not being part of the filtering role, or being material considerations to the recommendation process, there would be no occasion or reason for the warden to give an objector an opportunity to be heard on them.

Noise, dust, radioactive dust pollution, sand and soil erosion and blowing off pollution, impact on quiet amenity and damage to soil structure and chemistry

109 There are various objections which deal with this type of concern. They are in:

> Both objectors' general objections as originally filed
>
> In both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (vi), (vii) (viii) and (x)
>
> Hoyer Particulars, a general comment on page 4
>
> Jarrahdale Forest Protectors Inc Particulars a general comment on page 4.

110 The Environmental Protection (Noise) Regulations 1997 govern the emission of noise, and the authorisation of emitting noise exceeding those limits. Having established limits, the relevant expert authority can punish those who exceed them, but also authorise exceeding those limits upon application. Therefore, noise limits have been set, and must be complied with. That being the case, there is no question for the warden to determine in relation to noise, and it is not a material consideration for the warden. There is therefore no reason to hear evidence about potential noise.

111 Proposed condition 3 prohibits the use of equipment that may create dust without approval from the Department. Regarding erosion, proposed endorsements 11 and 12 limit collection and storage of water to ensure minimised erosion. Proposed conditions 1, 2 and 3 require rehabilitation. Other proposed conditions, such as 4 and 5, prohibit the disturbance of the land without permit from the Minister or the Department. Therefore, given the wider policy considerations the Minister and Department may consider, and which the warden cannot, any risk of

dust and erosion, now raised, may be considered in that process. The Environmental Assessment Authority, if given the opportunity, may also address those factors. That being the case, there is no question for the warden to determine in relation to these factors, and they are not a material consideration for the warden. There is therefore no reason to hear evidence about the potential dust and erosion.

112 In relation to pollution in general, proposed endorsements 9 and 11, in addition to the availability of the Environmental Assessment Authority process, and the requirement of the Minister for the Environment to be consulted remove from the warden the question of pollution. In any event, such questions may involve broader public policy considerations, which the warden does not have the power to consider. Accordingly, there is no reason to give the objectors the opportunity to be heard on the subject, and it is not a material consideration.

113 Several of the objections from both objectors referred to the general loss of amenity from these factors. Such objections are wide and speculative, and even if evidence was heard on them, would relate to broad public policy factors, requiring a balancing of all of the public policy factors relevant to mining in areas such as the ground in the present case. The warden is not equipped to, and does not have the power to, determine such matters, and that is an additional reason why the warden has no reason to give the objectors an opportunity to be heard on objections relating to noise, dust and erosion, effecting the amenity of the area and its inhabitants.

Ecological impacts, particularly to specific flora and fauna in the area, including the black cockatoo and the resilience of the ecosystem of the forest and surrounding areas in general

114 The objections and information regarding these matters can be found in:

Both objectors' general objections as originally filed

In both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (ix)

Hoyer Particulars page 3 [8] and 4 [12]

Jarrahdale Forest Protectors Inc Particulars pages 2, 3, 5, 6 and 7.

115 The endorsements and conditions proposed by the Department are specifically targeted to and recognise the protected status of the reserve, national park and endangered species. For example:

a. Proposed conditions 1, 2 and 3 and proposed endorsements 2, 3, 4, 7, 9-16 provide for the general care and maintenance of the site;

b. Proposed conditions 3, 4, 5 and 13 and proposed endorsements 10, 13, 14 and 16 prohibit activity prior to written consent of the Minister or Department or other expert authority to proceed, condition 4 requiring that the Minister's consent be with the concurrence of the Minister for the Environment. The latter is without reference, and therefore separate to, the Environmental Assessment Authority, which as I have explained could also have a significant impact on the proposal and any prohibitions.

c. Proposed endorsements 2, 3, 4, and 15 provide that the licence is limited to activity for which the applicant has sought prior advice or had regard to the law regarding that matter, in relation to vegetation, specific rare flora sites, the existing ecological community and irrigation areas.

d. Proposed endorsement 7 refers to a series of enactments which regulate and prohibit the use and access to water.

116 Named flora in the objections, as the objections note, are protected by the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), having been designated endangered and vulnerable under that Act. While I have no evidence of this status, for the purposes of the interlocutory application I accept that that is the case. This Act, like the *Environmental Protection Act 1986* (WA) has significant principles and objects relating to the protection of the environment. Under s 18 the Act provides for penalties for any person who takes an action that will have a significant impact on endangered or vulnerable species unless approvals have been granted. Part 9 of the Act sets out the process for obtaining approvals, including the preparation of assessment reports, consultation by the relevant Commonwealth Minister with any other relevant Minister, including with a state minister if the action satisfies certain conditions, which may be the case here, and inviting public comment. If the action is to be approved, conditions may be imposed on the action.

117 Therefore, no or limited activity can occur where there is that flora. The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) puts the

responsibility on the commonwealth minister to make the decision, having weighed up all the competing policy considerations, and any expert advice sought. Accordingly, the Act takes the subject from the warden, and the existence of endangered and vulnerable species is not a material consideration for the warden, and does not form part of the warden's filtering role. Not being part of the filtering role, or a material consideration to the recommendation process, there would be no occasion or reason for the warden to give an objector an opportunity to be heard on this.

118 Proposed endorsement 2 acknowledges the exploration licence affects specific rare flora sites declared under the *Wildlife Conservation Act 1950* (WA), an Act which is now replaced by the *Biodiversity Conservation Act 2016* (WA). That Act prohibits disturbing endangered, vulnerable, protected and other species of flora without authority. In s 5 of the *Biodiversity Conservation Act 2016* 'disturb' is defined as anything which, relevantly, alters the natural behaviour of fauna to its detriment, or altering the long term persistence of flora in its habitat.

119 Under the Act, where the *Environmental Protection Act 1986* (WA) has already issued an authority allowing for the disturbance of flora or fauna that comes under the *Biodiversity Conservation Act 2016*, a second authority from the Department of Biodiversity, Conservation and Attractions is not required. Otherwise, if no authority under the alternative regime has been obtained, authorisation under r 15 of the Biodiversity Conservation Regulations 2018 must be obtained from the Minister (or their delegate) relevant to the *Biodiversity Conservation Act 2016* before activity which will disturb listed species. This Act is governed by a set of principles focused on ecologically sustainable development, environmental damage and biodiversity sustainability.

120 The particular endangered flora and fauna are also protected by the fact that at least part of the area in the application is either national park or dedicated reserve. I address that protection below.

121 Each of these conditions, endorsements or protections under other Acts means that there is significant control and oversight in place under Departments or authorities which have expertise in the area, either before or after grant. Where there is a prohibition of action prior to permit, licence or authority, the decision rests with the authority or the Minister, rather than the warden, whether it is the Minister for Mines or another authority making the decision. The gathering of

evidence which goes to support that decision is to be done by an expert agency or body, rather than the warden.

122 The status of the endangered or vulnerable species or communities is self-evident, by their very categorisation as such.

123 The conditions and other enactments put the responsibility on the Minister or those other authorities to make the decision, having weighed up all the competing policy considerations, and any expert advice it seeks. As the warden does not have a filtering role for other agencies, the warden has no reason to gather evidence on those factors which are the subject of their decisions. Accordingly, that subject is not a material consideration for the warden. Not being a material consideration, there is no reason for the warden to hear evidence or make a recommendation on that subject.

Social, visual, lifestyle, economic, local hobby farm, honey production and tourism impacts and general opposition to mining in a metropolitan area

124 The objections and information regarding these matters can be found in:

> Both objectors' general objections as originally filed
>
> In both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (xi), (xiii), (xv), (xvi) and (xviii)
>
> Hoyer Particulars page 3 [6] and 4 [12]
>
> Jarrahdale Forest Protectors Inc Particulars page 7.

125 Each of these considerations is broad and speculative, and do not of themselves constitute a consideration that has any bearing on a decision to recommend refusal.

126 Similar to any general objections about water interference, the matters raised by the objectors of this nature are a broad objection on the overall effect of mining on the environment and the land on which the tenement sits. These involve broad public policy considerations over many government agencies. I have already explained that the warden has no jurisdiction to consider such matters. Not being part of the filtering role, or material considerations to the recommendation process, there would be no occasion or reason for the warden to give an objector an opportunity to be heard on them.

Long-standing community opposition from the Serpentine Jarrahdale Ratepayers and Residents Association

127 The objections and information regarding this matter can be found in both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (i).

128 The opposition by a group, long-standing or otherwise, is not a relevant consideration. This is a statement of intent – that people are intent on continuing to protest mining in the area, as is their right, but it is not an objection. Accordingly it is not a consideration for the warden.

Heavy haulage and the creation of new tracks

129 The objections and information regarding these matters can be found in:

> Both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (xiv)
>
> Jarrahdale Forest Protectors Inc Particulars page 4 [9].

130 The objectors appear to be concerned that as mining requires haulage, large vehicles will require access to the entire site. The focus of this objection appears then to be a cause of the other matters raised in the objections such as dieback and noise and dust pollution. As it is an objection linked to others, the endorsements and conditions I have acknowledged relating to those objections are equally relevant to this objection. As such, it is not a separate objection, and is not material to the warden's considerations.

Dieback

131 The objections and information regarding this matter can be found in:

> Both objectors' general objections as originally filed
>
> In both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (ix).

132 Dieback is the subject of a specific proposed condition (7), requiring the applicant to provide a management plan, without which, exploration cannot occur. Compliance with the management plan, once approved, then becomes a condition of the licence.

133 Similar to the conditions and endorsements on the use and prohibitions regarding water, this condition would remove from the warden the decision regarding the risk and management of dieback. Therefore, the question being removed from the warden, it cannot be material to the warden's considerations and there is therefore no reason to hear evidence or submissions on the objection.

Adverse impact on National Parks and Reserves

134 The objections and information regarding these matters can be found in:

> Both objectors' general objections as originally filed
>
> In both objectors' 'Further Grounds' of objection, attached to their original objections as filed, numbered (xii)
>
> Hoyer Particulars pages 2 and 3 and 4 [12]
>
> Jarrahdale Forest Protectors Inc Particulars pages 2 – 3 [4].

135 Under sections 24(1)(b) and (3A) of the *Mining Act 1978* (WA) exploration in national parks and reserves cannot occur without the prior written consent of the relevant Minister. Under s 24(8) of the Act that Minister is the Minister charged with the administration of national parks and reserves, not the Minister for Mines.

136 Therefore, in addition to the proposed endorsements and conditions, the ability for the proposal to be referred to the Environmental Assessment Authority and the protections under the *Environmental Protection Act 1986* (WA), *Biodiversity Conservation Act 2016* (WA), *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and the various enactments relating to water, the *Mining Act* itself requires the approval of a Minister as a separate approval, requiring consideration by the authorising body of any policies and guidelines developed specifically relating to mining in such areas. Not being the Minister for Mines, a separate and distinct approval is required by this section, in relation to this matter.

137 While that approval relates to the area of the park and reserve only, the s 24 approval is one of, as I have shown, many protections, and there are more general protections that relate not only to the parks and reserves, but the other ground as well.

138 Section 24 alerts the Minister for Mines to the need to have separate and additional regard to the risks of mining in such areas, over and above the usual relevant

criteria in granting a licence. The risks to such areas of any activity are self-evident, by virtue of their classifications. An assessment of the appetite for the risk posed by activities in those areas, both on and adjacent to the areas designated in s 24(1) involves balancing public policy factors across government departments. The warden has no power to make recommendations on such factors and they cannot be material to the warden's considerations.

139 Further, approval of the minister responsible for the land described in s 24(1) is required before mining activity can occur irrespective of the Minister for Mines view of the risks. The warden does not have a filtering role for that minister. Therefore, there is no reason for the warden to hear evidence on those risks.

140 Any exploration around or adjacent to the area of the reserve or national park is addressed by the imposition of conditions and endorsements, such as those suggested by the Department in this matter, the prohibitions on certain activity without permit or authorisation, and the possibility of public review by expert agencies. Therefore, the question of exploration around protected areas is also removed from the warden, does not form part of the filtering role and it cannot be material to the warden's considerations.

An illustration of the questions raised in the present case

141 Before I note my conclusions on the objectors being given the opportunity to be heard, I will address two cases that illustrate the arguments raised by both parties in this interlocutory application, and touch on the question of whether it is a relevant factor for my consideration in this interlocutory application that the exploration licence may convert to a mining lease.

142 In his affidavit and submissions Mr Hoyer raised the case of ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd***[50] as precedent for the warden giving environmental objectors an opportunity to be heard, and refusing the application as a result. I do not agree that that case supports Mr Hoyer's contentions. In that case 3 objectors were given the opportunity to call evidence in objection to an application for an exploration licence over forested ground in Nannup, Manjimup and Bridgetown-Greenbushes, with a water reserve and a

[50] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6.

designated dieback risk zone. Warden Hall found that the area was environmentally sensitive regarding flora, fauna and water catchment and that mining in the area "could potentially have adverse impacts on the environment" and tourism businesses in the area.[51]

143 In addition to their objections based on environmental concerns, the objectors argued that under s 75(7)(b) of the *Mining Act*, the exploration licence, if granted, would almost certainly result in the grant of a mining licence should the applicant lodge an application. His Honour agreed, finding that s 75(7)(b) provides for a 'virtual automatic conversion' of an exploration licence into a mining lease.[52] That being the case, the warden took the view that that "raised the bar in relation to applications for exploration licences,"[53] following Warden Wilson in ***Darling Range South Pty Ltd v Ferrell***[54] who said that with the need for a detailed scrutiny of exploration licence applications, that elevated the importance of the "right to be heard" of anyone whose rights, or land, may be affected by the application.

144 As my review of the cases and discretion in s 59(4) shows, there is no "right" of an objector to be heard, but I accept that the warden may have been referring to a general importance, under the rules of natural justice, that if a person is to be affected by an administrative decision, they should be given the opportunity to say how. Further, I accept that public interest factors may well be said to affect every person. I also agree that matters of public interest, where it is possible that mining will progress on a significant site, must be "more vigorously scrutinised."[55]

145 However, it appears Warden Hall did not have occasion to consider s 75(9) of the *Mining Act*, under which that 'virtual automatic conversion' is removed when the

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[51] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6 [64].
[52] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6 [66].
[53] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6 [70].
[54] ***Darling Range South Pty Ltd v Ferrell*** [2012] WAMW 12 [141].
[55] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6 [71].

application for the mining lease covers all or part of land falling within one or more of the classes categorised in s 24(1) of the *Mining Act*. Those categories include national park, nature reserve, state forest and water reserve or catchment area. If the applicant in the present case is to apply to convert the exploration licence, if granted, to a mining lease, therefore, the usual procedure under s 75 applies, and objections may be lodged and considered, with the Minister for Mines having all the powers and discretions generally applicable to applications for mining leases which are not simply 'conversions' under s 75(7).

146 That appears to have been what occurred in ***Finesky Holdings Pty Ltd v Australian Speleological Federation Inc***,[56] where the applicant had exploration licences over the land, and was applying to convert them to mining leases. The applicant accepted that the area was of conservation significance, primarily due to the status of caves in the area of the application. The warden found that the applications covered a unique karst system which was outstanding on a world scale, likely, if application was made, to be listed as a World Heritage site. Mining on that area would make that listing less likely, and adversely impact the cave system and the related fauna. Some of the ground was inevitably to be declared a reserve.

147 The warden recommended that only some of the applications made for mining leases be granted, the remainder being refused. However, while recommending refusal, the warden's recommendation was complex, recommending that the Minister refer the entire proposal to the Environmental Assessment Authority, and that a review be undertaken to determine the exact area of ground required for the applicant to undertake its proposed mining activities, with only that ground to be the subject of the grant, and no more, the remainder therefore to be refused. He also acknowledged that while generally the warden provides a public forum for the presentation of evidence and the making of submissions, even regarding environmental matters, and that that is part of the warden's filtering role, the warden is unable to address public policy which "embraces more than merely the provisions of the *Mining Act*" such as "a balancing of economic and non-

[56] ***Finesky Holdings Pty Ltd v Australian Speleological Federation Inc*** [2001] WAMW 1.

economic interests and rights which are solely within the domain of the State Government and relevant Ministers."[57] He found that it was not appropriate that the warden comment on such issues.[58] Therefore, even after hearing extensive and complex expert evidence, the warden acknowledged his inability to consider policy matters, and recommended the Minister seek expert advice, effectively, recommending a grant, with conditions, subject to what other agencies determine.

148 I note that there was already over the entirety of the ground considered, multiple exploration licences, and that no such latitude of refusing all but the essential tenements is available to the warden in the present case – there being only 1 tenement applied for.

149 In ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd***[59] the warden recommended refusal of the entire application. However, that was not based on the objections themselves. The warden found that the information provided in the statement required under s 58 of the *Mining Act* to support the application, was inadequate. He found that given the "strong right of conversion," it was not appropriate for the applicant to say the information the objectors and warden required to determine how each of the areas, being state forest, private land and water catchment areas would be affected by the program of works would be provided if and when the application for the mining lease was lodged.[60] Therefore, his Honour effectively found that the applicant had not complied with the requirement under s 58(1) of the Act, and could not recommend the grant.

150 While contained in the objectors' particulars are questions going to the future use of and access to the ground, no challenge is made in either objection to the s 58 statement in the present case.

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[57] ***Finesky Holdings Pty Ltd v Australian Speleological Federation Inc*** [2001] WAMW 1 [99].
[58] ***Finesky Holdings Pty Ltd v Australian Speleological Federation Inc*** [2001] WAMW 1 [99].
[59] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6.
[60] ***Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd*** [2016] WAMW 6 [71].

151 Having regard to both cases, and s 75(9) of the *Mining Act*:

a. While the gathering of evidence is an example of the filtering role of the warden, recognition that the Minister requires expert assistance from the Environmental Assessment Authority and other Ministers and government departments, in terms of environmental expertise and broader policy concerns, limits the utility of that exercise, particularly when the objections and particulars themselves clearly set out the parameters of the objections, and each of those authorities have their own evidence gathering and investigating mechanisms, rendering, in effect, the filtering role irrelevant to those mechanisms, and

b. An extensive process of assessment of an application may take place on an application for a mining lease over the ground in the present case despite there already being an exploration licence held over the ground.

Neither objector is to be given the opportunity to be heard on any of the objections

152 Having reviewed all of the objections, I am of the view that none of the objections are such that either of the objectors should be given the opportunity to be heard on them, because:

a. As a whole, while they may be of broad 'public interest' they are mostly in truth matters of broad and competing public policy over which the warden cannot make any recommendation or determination; and

b. The question of the issues raised in the objections are removed from the warden and do not form part of the filtering role because:

i. Many of the concerns relate to activities that are expressly prohibited, or are limited at law by the need for approvals and permits from other expert authorities for whom the warden does not have a filtering role, or any role;

ii. Some of the objections relate to activities which the proposed endorsements and conditions limit until either authorities or consents are sought, or for which management plans and other agreements must be provided and adhered to, or which simply become conditions of the licence;

iii. There is the opportunity for different parties, including the Minister for Mines and the Authority itself, to refer the proposal to the Environmental Assessment Authority, which would remove the relevant questions from the warden, while imposing its wider public policy considerations and expertise in gathering and assessing the evidence in that process;

iv. There is legislation governing protected flora and fauna, national parks and reserves, pollution and water which the warden neither has the power or expertise to gather evidence on or make determinations of fact under, or make determinations or recommendations on the broad public principles and policies required, and therefore has no role, and

v. In any event, the status of the areas and flora and fauna is self-evident, and no evidence is needed on that fact.

153 Therefore, the assessment of the objections in the present case, in the context of the administrative role of the warden, the objects of the Act and application of the discretion leads me to the conclusion that there is no reason to give the objectors the opportunity to be heard on any of the objections.

154 Neither am I satisfied that there is an automatic right of conversion from the exploration licence to a mining lease such that there is no ability to effectively object upon that conversion, or that there is a residual consideration that the gathering of evidence and analysis prior to activity at all ensures the future viability of objection to a mining lease. As I have found there is no reason for any evidence to be gathered at all in the current objections; to gather evidence despite that finding, so that future objections may be preserved, would be to gather evidence for an irrelevant purpose. Therefore, in the present case, it is not a relevant consideration that the exploration licence may be converted to a mining lease.

WILL MAKING THE ORDER AS SOUGHT BY THE APPLICANT JEOPARDISE THE WARDEN'S ROLE OR THE MINISTER'S DECISION?

155 As I have identified, the objectors claim that if the warden exercises the discretion in s 59(4) in this case not to give them an opportunity to be heard, it will curtail the warden's role in making a recommendation to the Minister, in that it forces

the warden to recommend the grant on standard conditions, when the warden might, having heard evidence on the objections, decide that the standard conditions are inadequate, or that no conditions would be adequate, and thus recommend refusal. In addition, there is the concern that the warden, being a filter for the Minister, by declining to hear evidence on the application and objections, risks the Minister not having adequate and accurate information when exercising their discretion.

156 Their Honours Justices Kennedy and Franklyn recognised in ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association***[61] and ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)***[62] that it is generally appropriate that the warden consider, as part of the filtering role, a public interest objection, as opposed to leaving it to the Minister to determine such an objection.[63] However, Franklyn J accepted that the *Mining Act* left open the opportunity for parties to address their objection directly to the Minister.[64]

157 It is not the case that the objector's concerns will have no effect on a grant. The Department has acknowledged that the concerns are of such a nature that if granted, specific conditions should be imposed. Having reviewed the objections, it appears appropriate that should a recommendation for grant be made, the recommendation be that conditions are imposed. What is the case, therefore, is that the objections have had an effect on a recommendation.

158 What is also the case, however, is that having had regard to the substance of the objections, the conditions recommended and the proposed methods of exploration set out in Mr Stott's affidavit, and the other legislative regimes governing the areas of concern, and given the warden is not in a position to, and does not have the function to, make a determination on high level public policy considerations,

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[61] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315.
[62] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 332.
[63] ***Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association*** (1994) 11 WAR 315, 317.
[64] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 332.

policy considerations that do not fall under the mining regime, or consider and make determinations on the veracity or otherwise of the complex science behind the objections, or matters where the warden has no part to play in gathering evidence and making a recommendation effectively to an authority other than the Minister for mines, no determination could be made on those matters by the warden. Not being able to make such a determination so that a refusal on those grounds would be made, it remains that there would be no reason or occasion in hearing the objectors further on the matter, and therefore no point in giving them the opportunity to be heard.

159 Not giving the objectors an opportunity to be heard is acknowledging the limits of the power and role of the warden, in the present case, rather than curtailing or weakening the warden's role and the information being presented to the Minister, remembering that the Minister has their own discretion to seek information, both under the *Mining Act* and under other enactments, and, under s 111A, parties may provide information to direct to the Minister. That is not to say that all exercises of the discretion in that way will not curtail the warden's role or the information the Minister receives; it is to say that that is not the case in the present case. This is, therefore, in this case, not a relevant consideration.

CONCLUSION

160 There may be a need for a detailed scrutiny of exploration licence applications, irrespective of whether there are to be automatic rights of conversion to mining leases, where it appears from objections that proposed activity poses a risk to particular environments.

161 However, in the present case the objectors are effectively asking the warden to make a decision that mining in the Jarrahdale area will cause significant, unacceptable and irreversible harm on the forest and its flora and flora, its environs, its social and commercial amenability, and on the climate, such that no conditions, of any sort, would ameliorate or guard against the risk. Should the objectors be given the opportunity to be heard on some or all of the objections, the applicants would be afforded natural justice, and the opportunity to respond. Any such hearing would no doubt involve experts. Any determination by the warden would require a consideration of that expert evidence and the science of

what the objector has described as the ecological 'tipping point' and the causes of climate change and the balancing of not only the principles of the mining regime, but principles regarding environmental protection, urban planning, water, flora and fauna management, economic development and climate change.

162 As I have explained, these are all areas of expert determinations, concurrent prohibitions and limitations or high level public policy factors and not within the power of the warden to make a determination or recommendation on.

163 In coming to the conclusion that there is no occasion or reason for any of the objectors being given the opportunity to be heard on any of the objections in the present case I am not concluding that the objections, unless otherwise stated, do not have merit. Each of them is a concern that is in the public interest to raise, although some, as I have noted, are wide and lack particularity, or the possibility of particularity, and may never be more than a general comment on the balancing interests of resources, public amenity and the general possible effects of mining on the world. Neither, am I therefore, saying they will not be taken into account in making the recommendation to the Minister, or in the preparation of recommended conditions.

164 Neither is there a need for a hearing to determine some of those matters themselves. It is self-evident that where there is national park, nature reserves, designations of endangered and vulnerable communities and water reserves and catchments, mining will have an impact. The only available inference from the designation of those areas and fauna and flora, is that it will.

165 The proposed conditions and endorsements illustrate that there are a significant number of agencies, enactments and mechanisms in place to ensure vigorous scrutiny of the application. As I have shown, neither, therefore, is there a need, or the ability, of the warden to hear evidence on the objections where other authorities will, and where, particularly, the legislature has placed the decision of licencing activities that potentially impact those areas, and their surroundings, on other agencies. The warden does not provide a filtering role for them. Even where it is the Minister for Mines making the decision to permit specified activity, before or after grant, the Minister for Mines may revert to the expertise of the Environmental Assessment Authority, if the proposal has not already been

referred, which has far wider principles and powers to determine that actual or likely impact of the activity.

166 In addition, the Minister must assess the risk, and appetite for risk, to those factors and protected areas and communities. The assessment of the appetite for risk to those areas is a question of balancing competing public policy factors. That is the province of the Minister, and the warden has no role to play is such considerations. The warden's role is only to recommend or refuse the grant of the exploration licence itself, and the warden has no power to recommend a refusal on public policy factors.

167 As a result, there are no factors in the objections upon which it is likely that I would recommend refusal, even having heard evidence, as none of the factors contained in the objections form part of the warden's filtering role, other than the role of recommending conditions.

ORDERS

168 I make the following orders:

a. Under s 59(4) of the *Mining Act* Mr Hoyer will not be given the opportunity to be heard on any of his objections;

b. Under s 59(4) of the *Mining Act* the Jarrahdale Forest Protectors Inc will not be given the opportunity to be heard on any of its objections.

169 I will hear from the parties as to costs.

170 I will hear from the parties as to a hearing of the application for the exploration licence, including whether a hearing is to be held on conditions to be imposed.

Warden Cleary

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

eMITS MAINTENANCE

DRAFT Tenement Endorsement and Conditions Extract

Tenement: **E 70/5860**

#	ENDORSEMENTS	Status	Start Date	End Date
1	The Licensee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.	Draft		
2	The Licensee's attention is drawn to the Environmental Protection Act 1986 and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004, which provides for the protection of all native vegetation from damage unless prior permission is obtained.	Draft		
3	The land the subject of this Licence affects Rare Flora sites (112369, 103518, 103520, 103521, 103522, 103523) declared under the Wildlife Conservation Act 1950. The Licensee is advised to contact the Department of Biodiversity Conservation and Attractions via email address flora.data@dbca.wa.gov.au (with ID numbers) to receive the population details and information on the management of Declared Rare Flora (or Priority Listed Flora) present within the tenement area.	Draft		
4	The land the subject of this Licence may affect a Threatened Ecological Community. The Licensee is advised to contact the Department of Biodiversity Conservation and Attractions (DBCA) Threatened Species and Communities Unit for further information on this Threatened Ecological Community at communities.data@dbca.wa.gov.au.	Draft		
5	The land the subject of this Licence affects a Heritage Place No. 03302 registered pursuant to the Heritage of WA Act 1990.	Draft		
6	The Licensee's attention is drawn to the provisions of section 55 of the Land Administration Act 1997.	Draft		
	In respect to Water Resource Management Areas (WRMA) the following endorsements apply:	Draft		
7	The Licensee's attention is drawn to the provisions of the: • Waterways Conservation Act, 1976 • Rights in Water and Irrigation Act, 1914 • Metropolitan Water Supply, Sewerage and Drainage Act, 1909 • Country Areas Water Supply Act, 1947 • Water Agencies (Powers) Act 1984	Draft		
8	The rights of ingress to and egress from, and to cross over and through, the mining tenement being at all reasonable times preserved to officers of Department of Water and Environmental Regulation (DWER) for inspection and investigation purposes.	Draft		
9	The storage and disposal of petroleum hydrocarbons, chemicals and potentially hazardous substances being in accordance with the current published version of the Department of Water and Environmental Regulation (DWER) relevant Water Quality Protection Notes and Guidelines for mining and mineral processing.	Draft		
10	The taking of groundwater from an artesian well and the construction, enlargement, deepening or altering of any artesian well is prohibited unless current licences for these activities have been issued by Department of Water and Environmental Regulation (DWER).	Draft		
11	Measures such as drainage controls and stormwater retention facilities are to be implemented to minimise erosion and sedimentation of adjacent areas, receiving catchments and waterways.	Draft		
12	All activities to be undertaken so as to avoid or minimise damage, disturbance or contamination of waterways, including their beds and banks, and riparian and other water dependent vegetation.	Draft		
	In respect to Proclaimed Ground Water Areas the following endorsement applies:	Draft		
13	The taking of groundwater and the construction or altering of any well is prohibited without current licences for these activities issued by the Department of Water and Environmental Regulation (DWER), unless an exemption otherwise applies.	Draft		
	In respect to Proclaimed Surface Water Areas, Irrigation District Areas and Rivers (RIWI Act) the following endorsements apply:	Draft		
14	The taking of surface water from a watercourse or wetland is prohibited unless a current licence has been issued by the Department of Water and Environmental Regulation (DWER).	Draft		
15	Advice shall be sought from the Department of Water and Environmental Regulation (DWER) and the relevant water service provider if proposing in an existing or designated future irrigation area, or within 50 meters of a channel, drain or watercourse from which water is used for irrigation or any other purpose, and the proposed activity may impact water users.	Draft		
16	No exploration activity is to be carried out if: • it may obstruct or interfere with the waters, bed or banks of a watercourse or wetland • it relates to the taking or diversion of water, including diversion of the watercourse or wetland unless in accordance with a permit issued by the Department of Water and Environmental Regulation (DWER).	Draft		
	In respect to Public Drinking Water Source Areas (PDWSA) the following endorsement applies:	Draft		
17	All activity within proclaimed public drinking water source areas shall comply with the current published version of the Department of Water and Environmental Regulation (DWER) [Quality Protection Note 25 Land Use Compatibility in Public Drinking Water Source Areas]. Key issues that need to be considered within the Water Quality Protection Note are:	Draft		

#	ENDORSEMENTS	Status	Start Date	End Date
	• All involving the storage, transport and use of toxic and hazardous substances (including human wastes) within public drinking water source areas being prohibited unless approved in writing by the DWER. • Seek written advice from the DWER if handling, storing and/or using hydrocarbons and potentially hazardous substances.			

#	CONDITIONS	Status	Start Date	End Date
1	All disturbances to the surface of the land made as a result of exploration, including costeans, drill pads, grid lines and access tracks, being backfilled and rehabilitated to the satisfaction of the Environmental Officer, Department of Mines, Industry Regulation and Safety. Backfilling and rehabilitation being required no later than 6 months after excavation unless otherwise approved in writing by the Environmental Officer, Department of Mines, Industry Regulation and Safety.	Draft		
2	All waste materials, rubbish, plastic sample bags, abandoned equipment and temporary buildings being removed from the mining tenement prior to or at the termination of exploration program.	Draft		
3	Unless the written approval of the Environmental Officer, Department of Mines, Industry Regulation and Safety is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of costeans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.	Draft		
4	The prior written consent of the Minister responsible for the Mining Act 1978 being obtained, with the concurrence of the Minister for Environment, before entering or commencing any prospecting or exploration activity on National Park Reserve 28862, 39825	Draft		
5	The prior written consent of the Minister responsible for the Mining Act 1978 being obtained before commencing any exploration activities on Catchment Area Reserve 16634, Gravel Reserve 26079, 26080, Conservation of Flora & Fauna 32202, Drainage Reserve 44959, Public Recreation 36695, 45703, Conservation Reserve 50643, Conservation Park 990, State Forest 22.	Draft		
6	No excavation, excepting shafts, approaching closer to the South West Highway, Highway verge or the road reserve than a distance equal to twice the depth of the excavation and mining on the South West Highway or Highway verge being confined to below a depth of 30 metres from the natural surface.	Draft		
7	In areas of native vegetation within the tenement, no exploration activities commencing until the licensee provides a plan of management to prevent the spread of dieback disease (Phytophthera species) to the Executive Director, Resource and Environmental Compliance, DMIRS for assessment and until the written approval of the Executive Director has been received. All exploration activities shall then comply with the commitments made in the management plan.	Draft		
8	No interference with the use of the Aerial Landing Ground and mining thereon being confined to below a depth of 15 metres from the natural surface.	Draft		
9	Mining on a strip of land 20 metres wide with any pipeline as the centreline being confined to below a depth of 31 metres from the natural surface and no mining material being deposited upon such strip and the rights of ingress to and egress from the facility being at all times preserved to the owners thereof.	Draft		
10	No interference with Geodetic Survey Station JARRAHDALE 3, 4, 5, 6, 7, 8, 9, 9A, 10, 10A, 11, 12, 16, 17, 17T, 18, NT 27, SERPENTINE 10, 11, 11A, 12, 14, 15, 16, 17, 18, 19, 20 and mining within 15 metres thereof being confined to below a depth of 15 metres from the natural surface.	Draft		
11	Mining within a radius of 150 metres of any Australian Telecommunications Commission microwave repeater station being confined to below a depth of 60 metres from the natural surface.	Draft		
12	No interference with the Australian Telecommunications Commission microwave repeater station ray-line.	Draft		
	Consent to explore on Catchment Area - Serpentine Pipehead Dam granted subject to:	Draft		
13	No mining on any Reservoir Protection Zone (RPZ) 286 located within the subject mining tenement boundaries without first obtaining the written consent of the Minister responsible for Mining Act 1978.	Draft		
	In respect of the grant to the Licensee of this Licence , the Native Title Group's consent pursuant to clause 18 of Schedule 10 of the Gnaala Karla Booja Indigenous Land Use Agreement(s) (relevant ILUA) to such grant is, as a condition precedent, subject to the Minister for Mines, Industry Regulation and Safety (DMIRS) imposing the following condition:	Draft		
14	As the Gnaala Karla Booja ILUA (relevant ILUA) applies to this Exploration Licence , the Licensee must before exercising any of the rights, powers or duties pursuant to this Exploration Licence over that portion of the area of land the subject of the relevant ILUA: (i) subject to paragraph (ii), execute and enter into in respect of this Exploration Licence an Aboriginal Heritage Agreement (as defined in the relevant ILUA) with the Native Title Agreement Group or Regional Corporation (as the case requires) for the relevant ILUA on terms and conditions agreed by the Licensee and the Native Title Agreement Group or Regional Corporation (as the case may be) for the relevant ILUA (the Parties) or, failing such agreement being reached between the Parties within 20 Business Days of the commencement of negotiations, execute and enter into a NSHA subject only to any necessary modifications in terminology required for the tenure; (ii) where: A. the Parties have been unable to reach agreement on the terms and conditions of an Aboriginal Heritage Agreement under paragraph (i); and B. the Licensee executes a NSHA (subject only to any necessary modifications in terminology required for the tenure); and C. The Licensee provides a copy of the NSHA to the Native Title Agreement Group or Regional Corporation (as the case requires) for the relevant ILUA for execution;	Draft		

if the Native Title Agreement Group or Regional Corporation (as the case requires) does not execute the NSHA and provide a copy of the executed NSHA to the Licensee within 20 Business Days of receipt of the NSHA, the requirements of paragraph (i) do not apply; and

(iii) provide to the Department of Mines, Industry Regulation and Safety (DMIRS) a statutory declaration from the Licensee (or if the Licensee is a corporation, from a director of that corporation on its behalf)] in the form contained in Annexure U to the Settlement Terms (as defined in the relevant ILUA), as evidence that the Licensee has complied with the requirements of paragraph (i) of this condition or that paragraph (ii) of this condition applies."

-- End of Report --