
JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	AC MINERALS PTY LTD v COWARNA DOWNS PTY LTD [2022] WAMW 22
CORAM	**:**	WARDEN T W McPHEE
HEARD	**:**	16 May 2022, 13 June 2022 & 25 July 2022, 10 October 2022
DELIVERED	**:**	21 October 2022
FILE NO/S	**:**	Application for Mining Lease M28/400, M28/401 and Objections 569539 and 617255.
TENEMENT NO/S	**:**	Mining Leases M28/400 and M28/401
BETWEEN	**:**	AC MINERALS PTY LTD (Applicant) AND COWARNA DOWNS PTY LTD (Respondent)

Catchwords: *Application for a Mining lease, Objection by pastoral lease holder, reasonable conditions to recommend, costs, frivolous.*

Legislation:

- *Mining Act 1981* (WA) (the Act) Section 20(5), 67, 71, 73, 74, 75, 105A, 111A
- *Mining Regulations 1981* (WA) (the Regulations) Regulation 154(1)(l), 165(1), 165(4)(a)
- *Industrial Relations Act 1979* (WA) Section 90
- *Rules of the Supreme Court* 1971 (WA) Order 59 rule 9

Result: ***1) Application M28/400 recommended for grant subject to conditions;***
2) Application M28/401 should be recommended for grant in respect of the ground not forming part of M28/400 subject to conditions;
3) Objections 569539 and 617255 are dismissed.

Representation:
Counsel:

Applicant	:	Mr Masson
Respondent	:	Mr Russell

Solicitors:

Applicant	:	Ensign Legal
Respondent	:	Austwide Legal

Cases referred to:

- ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Limited and Anor*** [No3] [2022] WAMW 15
- ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Ltd*** [2022] WAMW 5
- ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron & Ors*** [No 2] [2022] WAMW 12
- ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468 (16 December 2020)
- ***Forrest & Forrest Pty Ltd v Wilson*** (2017) 262 CLR 510
- ***Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [No 15]*** [2021] WASC 307
- ***DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd*** [2022] WASCA 97 (2 August 2022)
- ***Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd and Ors*** [2022] WAMW 3

- ***Re Warden Heaney; Ex parte Serpentine-Jarrahdale Ratepayers & Residents Association (Inc)*** (1997) 18 WAR 320
- ***Sinclair v Mining Warden at Maryborough*** (1975) 132 CLR 473
- ***FMG Chichester Pty Ltd v Rinehart & Ors*** [2010] WAMW 7
- ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** (2007) 34 WAR 403
- ***Commissioner Of State Revenue v Abbotts Exploration Pty Ltd*** [2014] WASCA 211 (14 November 2014)
- ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153
- ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd and Another*** [2007] 34 WAR 403
- ***Commissioner of Police v AM*** [2010] WASCA 163 (S)
- ***Murray Riverside Pty Ltd v Toscana (WA) Ravenswood Estate Pty Ltd*** [2022] WASCA 67
- ***The Mining Registrar, At Karratha And Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2021] WAMW 13)
- ***Hot Holdings Pty Ltd v Creasy*** (1996) 185 CLR 149
- ***Tortola Pty Ltd v Saladar Pty Ltd & Anor*** [1984] WASC 433 (21 November 1984)

Introduction

1 I have before me two applications for mining leases.

2 The applications are M28/400 and M28/401 (the Applications).

3 These reasons relate to those applications and also address an interlocutory application in respect of same, filed on 22 December 2021 by the Applicant (the Interlocutory Application).

4 Those Applications are over effectively the same ground, with M28/401 being slightly larger in area.

5 The Applications are the subject of objection, being objections 569539 and 617255 by the Objector (the Objections).

6 The Applicant is a corporate entity seemingly directed to the exploitation of mineral resources.

7 The Objector is a pastoral lease holding corporate entity. It is not in dispute that the Applications encroach upon the relevant pastoral lease.

8 The Interlocutory Application, after direction mentions, was initially listed for hearing on 16 May 2022.

9 At that hearing, following submissions and some argument, it was largely agreed by the parties that the whole of the Applications might be able to be the subject of a further hearing, limited to conditions to be imposed, on a later date. The matter then returned before me on 13 June 2022.

10 I made Orders to give effect to that position which had been reached.

11 After conferral between the parties, and further short argument on 13 June 2013, I made the following Orders on that day:

a. (1) In respect of the Interlocutory Application dated 22/12/2021, there be a direction that the Objector be confined to submissions and evidence as to conditions;

b. (2) The Interlocutory Application is otherwise dismissed;

c. (3) By 29 June 2022, The Applicant file and serve any submissions in support of the Applicant's Minute of Programming Directions dated 18 May 2022;

d. (4) By 8 July 2022, the Objector file and serve any submissions in support of the Objector's Minute of Programming Directions dated 30 May 2022;

e. (5) By 15 July 2022, the Applicant file any responsive submissions.

f. (6) On 25 July 2022, the Warden will conduct a hearing pursuant to section 75 of the *Mining Act* limited to the conditions proposed by the parties to be recommended for imposition on grant of the Application.

12 On 13 June 2022, the Objector also advanced an oral application for costs of the Interlocutory Application. That was resisted by the Applicant. As a result, I indicated to the parties that if the Objector's position on costs was to be pressed, then appropriate written submissions could be included in the written submissions filed as required above for the hearing on 25 July 2022. Both parties did so.

13 The content of the Minutes of Programming Orders (referenced in Orders 3 and 4) are of no moment now, in light of the manner the matter proceeded, however the first two orders are relevant to the determination on a question of costs, which I address at the end of these reasons.

14 The matter returned before me on the 25th of July 2022 for that hearing, which I will refer to as the Final Orders Hearing.

15 After that hearing the parties filed a further document, the details of which are provided later in these reasons, and subsequently declined an invitation to put on any further submissions.

16 As a result, I reserved my decision.

17 On 27 September 2022, I provided to the parties an advanced copy of my reasons for decision.

18 On 10 October 2022, I heard further submissions which were put on a consent basis. As a result of those submissions, I made an order recalling the advance copy of my reasons (they not having been formally published), and further reserved my decision to consider a legal issue which had arisen.

19 In broad terms I have found for the Applicant. My reasons for doing so are set out below.

20 As a result of those reasons, I make the following substantive Orders:

a. The Objections numbered 569539 and 617255, should be dismissed;

b. Application M28/400 is recommended for grant subject to conditions, being those referred to in Schedule 3 to these reasons including Annexure A thereto;

c. Application M28/401 should be recommended for grant only in respect of the area not forming part of M28/400, again subject to the conditions contained in Schedule 3 with Annexure A;

d. Programming orders made for any consequential orders sought.

Background

21 The comments I make in this section are in my opinion not controversial and are taken from the Affidavit and documentary material provided.

22 The Applicant is the Applicant for mining leases M28/400 and M28/401. Those applications are made as a result of the statutory right pursuant to section 67(1) of the Act, accruing to the Applicant as the holder of E28/1610.

23 The Objector is the registered lessee of the Yindi pastoral lease.

24 As indicated above, it is not in dispute that the proposed mining leases encroach upon the pastoral lease.

25 The Objector conducts pastoral operations on the pastoral lease, grazing approximately 3000 head of cattle between three pastoral leases, one of which is Yindi pastoral lease.

26 There are a number of dams on the pastoral lease in question, however none are situated on the area the subject of the Applications. The Objectors case includes an assertion of watercourses feeding the dam, running through the ground the subject of the Applications.

27 The ground the subject of the Applications, is ground within the parameters of E28/1610, held by the Applicant.

The Application

28 The Applications are for mining leases. M28/400 was lodged on 2 December 2019, and M28/401 lodged on 1 February 2021.

29 It is not disputed that the Applications together, encroach upon the relevant pastoral lease by a total of 2500.3132 HA.

30 As indicated, it appears that the whole of the ground the subject of application M28/400 is contained within the ground the subject of application M28/401.

31 As a result, it may be said that the Applications as framed seek the grant of two mining leases over substantially the same ground.

The Objection

32 The objections are Objection 569539 to M28/400, lodged on 24 December 2019, and Objection 617255 to M28/401, lodged on 8 March 2021.

33 There is no material difference between the two objections, save for ground 8 on Objection 617255, which references the fact of the two Applications sitting over similar ground, though is framed in what might be described as a quizzical manner, rather than a clearly articulated basis of objection. It is noted too that objection 617255 relates to the larger of the two mining lease applications.

Jurisdictional Issues

34 No jurisdictional fact issues were expressly raised in this matter by the Objector.

35 The Objections in their terms did not raise any such concern.

36 Following the determination of his Honour Justice Tottle in ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468 (16 December 2020) (***Forrest & Forrest Pty Ltd v O'Sullivan)***, it cannot be disputed that 'marking out' is a jurisdictional fact, required to be established as a prerequisite to the exercise of the relevant jurisdiction by a Warden.

37 At [47], his Honour said:

> a. *I set out below my reasons for concluding that marking out the land the subject of a prospecting licence in the prescribed manner and in the prescribed shape, conditions the jurisdiction of a mining registrar or warden, as the case may be, to grant a prospecting licence. Although there are several strands to my reasoning (broadly summarised by the sub-headings used in the following section of these reasons) that combine to lead me to conclude that marking out is jurisdictional, the imperative nature of the statutory language and the majority's judgment in Forrest & Forrest v Wilson and their Honour's observations about the nature of the statutory regime are matters to which I attach particular weight.*

38 There is no reason to doubt a proposition that the same reasoning must also apply to an application for a mining lease, particularly in light of the decision in ***Forrest & Forrest Pty Ltd v Wilson*** (2017) 262 CLR 510.

39 In ***Forrest & Forrest Pty Ltd v O'Sullivan*** his Honour went on at [74]:

> a. *Equally, however, it is clear from the Act itself that the application of the rule is likely to involve some issues of fact and degree. That this is so is apparent from the provisions of the Act that contemplate that marking out will be achieved using rudimentary materials - pegs, marks, posts and cairns of stones and poles (see s 18(a) and s 104(1)) - and that marking out will often occur in very rugged terrain. It is evident that this combination of circumstances is likely to create practical difficulties that will in turn give rise to factual disputes about the degree to which applicants have complied with the marking out requirements. In that context, however, the issues that mining registrars and wardens are required to determine are whether marking out in a particular case conforms to what has been prescribed by the regulations. The very nature of the subject matter means the regulations are likely to be concerned with physical standards expressed by reference to specified distances and dimensions. In other words mining registrars and wardens are not required to form value judgments on broadly expressed subjective criteria. The confined nature of the issues of fact and degree to be resolved for the purposes of determining whether the marking out requirements have been met is such that I am not persuaded that marking out should not be characterised as a jurisdictional fact.*

40 Further, at [79] of ***Forrest & Forrest Pty Ltd v O'Sullivan*** his Honour said:

> a. *In my view the objects of the Act are advanced by holding that marking out in the prescribed manner and in the prescribed shape is an essential precondition to the warden's jurisdiction to determine an application for a prospecting licence for the following reasons.*
>
> b. *(a) It promotes certainty. It eliminates any possibility of a reward for non-compliance that might otherwise flow from a successful appeal to the Minister under s 56 of the Act from a warden's refusal to grant a prospecting licence on the ground of non-compliance with the marking out requirements.*
>
> c. *(b) It imposes no additional burden on applicants because they must comply strictly with the marking requirements by reason of the decision in Hunter Resources. An applicant who does not comply is the author of its own misfortune.*
>
> d. *(c) Whether there has been compliance with the marking out requirements is capable of being determined before third parties who may have an interest in the application are put to the expense of becoming involved as objectors. Of course, the procedure to be followed in each case will be a matter for the warden. Determining the issue of compliance with the marking out requirements as a precondition to jurisdiction*

> *avoids the delay associated with a contested hearing of objections and possible further delay in the event of an appeal to the Minister.*

41 Applying the decision in ***Forrest & Forrest Pty Ltd v O'Sullivan*** [2020] WASC 468 (16 December 2020) as I am bound to do, I consider it is therefore necessary for me to turn my mind to the question of compliance with the jurisdictional prerequisites of the Application, including the requirement to mark out.

42 For the Applicant's part, in addition to the Affidavit of Richard Jones, I was provided with the Affidavit of compliance of a Ms Ashleigh Brice, which, in its terms contained the following statement[1]:

> a. *"To the best of my knowledge information and belief the Application complies with the relevant marking our provisions of the Act and Regulations thereto."*

43 That Affidavit, sworn 16 December 2019 related to M28/400.

44 In addition, the materials reveal the "Compliance Statement" of Ms Celeste Patricio, seemingly an agent of the Applicant, who says in that statement[2]:

> a. *"To the best of my knowledge, information and belief all relevant marking out provisions of the Act have been complied with."*

45 That "Compliance Statement" was made in respect of application for M28/401. It appears to be undated.

46 Noting that no factual issue was raised by the Objector, I accept from those representations on their face that the agents of the Applicant have sworn (or represented) as to a genuine belief that compliance in accordance with the marking out requirements had in fact occurred.

47 Both of the compliance representations I have referred to were also annexed to the Affidavit of Mr Richard Jones of the Applicant, which also advanced a similar belief that all of the jurisdictional requirements of the relevant provisions of the

[1] Affidavit of Mr Jones (Applicant), Annexure RPHJ6 page 50
[2] Affidavit of Mr Jones (Applicant), Annexure RPHJ20 page 122

Act (notably, section 74(1)(ca)(ii) of the Act) to enliven my jurisdiction to hear the Application, had been met, directly on the part of the Applicant.

48 In my opinion that belief expressed by the Applicant, in the absence of any contrary proposition advanced by an Objector, and in light of the absence of any request for cross examination, is a sufficient evidentiary basis to establish, relevantly for me in this matter, that the marking out, and other compliance requirements of the Act have been met.

49 I am fortified in my views described above by considering that in the matter before me, the Objections made no reference to notions of compliance at all, and certainly did not raise any positive argument that there had been non-compliance.

50 No evidence was led by the Objector in respect of any issue in relation to marking out, nor any other issue of compliance with the jurisdictional requirements of the Act.

51 No interlocutory application was filed, putting such matters in dispute.

52 In those circumstances, in my opinion, and considering the statement of his Honour Justice Tottle referred to above at [40(d)] hereof relating to the procedure to be followed by a Warden, I consider I am able to rely upon an oath of compliance by the Applicant in all respects, in this matter.

53 In my opinion, it follows that there is a sufficient basis to conclude that the Warden's jurisdiction is enlivened.

54 I will however also note that such an assertion in an Affidavit may not always be sufficient in respect of marking out (or any other jurisdictional fact).

55 In the event an objector seeks to place the facts upon which such an assertion is based in dispute in some substantive manner, it is likely the case that it would not be appropriate or sufficient to simply rely upon such an assertion.

56 In such a case, the factual dispute created by a particularised objection on jurisdictional grounds supported with evidence would have to be heard to determine whether the factual position met the requirements of the Act, either as a preliminary issue before a Warden, or and in my opinion preferably, as an issue raised in the substantive hearing.

57 In this respect, I note and consider applicable to that sort of question, the approach detailed in ***Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [No 15]*** [2021] WASC 307 per Le Miere J at [30] – [43], recently affirmed on Appeal in ***DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd*** [2022] WASCA 97 (2 August 2022). There, his Honour Justice Le Miere at [41] – [43] (endorsed on Appeal) said, in coming to a view denying an application to have a preliminary issue, that some relevant considerations were:

> *a. The separate trial of issues will give rise to significant contested factual issues;*
>
> *b. There is a significant chance, indeed likelihood, that the determination of the separate issues would be appealed and further prolong the resolution of litigation which has now been on foot for more than 10 years;*
>
> *c. The utility, economy and fairness to the parties of the separate trial of the proposed issues is not made out.*

58 Whilst it ought not be necessary, for the avoidance of doubt, the comments immediately above ought not be construed as an invitation to ambush. In my opinion, the requirement for procedural fairness compels a view that if one party is intending to raise a jurisdictional argument, it should be clearly articulated and particularised at an early stage in the proceedings.

59 The final point to note at this stage is that the whole of ground or area of M28/400 sits within M28/401. In my opinion the Act does not contemplate two mining leases sitting upon the same ground. So much is plainly clear from the language in section 71 of the Act, referring to the grant of "a" lease.

60 In this matter, questions of excision of part of the land sought be made the subject of a grant (which might be caught by the issue ventilated in ***Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd and Ors*** [2022] WAMW 3) do not arise given the clear power pursuant to section 73(1) of the Act, for the Minister to make a grant for part of the land applied for.

61 In the Applicant's written submissions filed 17 March 2022, the following submission appeared at paragraph 5:

> *a. Pursuant to s. 75(7), properly construed, the Minister has a statutory duty to grant M28/400 and/or M28/401.*

62 I understood following the Final Orders Hearing, that reference to "*and/or*", to be a submission there was no imperative on the recommending for grant of both tenements, and no other specific submission was made. In short, in my opinion the submission must have meant that the Applicant was content with an outcome where only M28/401 proceeded with a recommendation for grant, though not solely M28/400.

63 As it transpired, that position was not what was sought by the Applicant. That was made clear by the Applicant's submissions filed prior to 10 October 2022 in response to the provision of the advance copy of my reasons on 27 September 2022. It became apparent that the issue had arisen as a result of an oversight on the part of the Applicant, and a mistaken view as to how I would construe the passage referred to above at paragraph 61(a) hereof, in light of the presumed operation of section 105A of the Act.

64 Upon clarification, what was actually sought was the grant of both tenements, with the grant of M28/401, being recommended only for the portion of land remaining after M28/400 was granted.

65 On 10 October 2022, section 105A of the Act was relied upon by the Applicant, to seek to compel that conclusion.

66 Section 105A and the relevant authorities were not the subject of submissions before me at the Final Orders Hearing. That however, is no criticism of the parties, as the hearing developed in a relatively unorthodox (though beneficial) manner.

67 On 10 October 2022, the Applicant cited ***Hot Holdings Pty Ltd v Creasy*** (1996) 185 CLR 149, and ***Tortola Pty Ltd v Saladar Pty Ltd & Anor*** [1984] WASC 433 (21 November 1984) amongst others, to advance its contention that the construction of section 105A of the Act, compelled the outcome sought by the Applicant. The position advanced was not opposed by the Objector.

68 I accept that submission with one caveat. It was initially put in oral submissions on 10 October 2022, that the operation of section 105A of the Act compelled a determination of the priority of the first in time Application, in all circumstances where there has otherwise been compliance with the requirements of the Act.

69 Whilst that submission is broadly accurate, in my opinion the correct application of the authorities referred to, provides for a residual discretion in exceptional circumstances for the Minister to depart from the strict application of the relevant principle falling from section 105A of the Act.

70 Given the filtering role of the Warden (see ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153 at [97]-[98]; see also ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd and Another*** [2007] 34 WAR 403 at [72]), I consider that in the event exceptional circumstances are able to be shown, it may be open and appropriate for a Warden hearing a matter to provide a recommendation to the Minister to consider whether section 105A of the Act ought be strictly applied.

71 An example of such circumstances would be where it might be appropriate to consider whether section 105A ought be applied strictly or not, might be a circumstance where it was determined that a relevant fraud was made out, or pursuant to the clear circumstances detailed in section 105A(5) of the Act. I note

also the express reservations in section 105A of the Act, making its operation subject to both section 111A of the Act, and seemingly the Act broadly.

72 Given no such circumstances were raised in this matter, it is not necessary to comment further.

73 In this matter, there were no circumstances made known to me which would justify a departure from the strict application of the relevant principle. Whilst the outcome may be regarded as a little untidy in terms of tenement management in an overall sense, those matters do not rise to the level required to suggest a departure by the Minister from the operation of section 105A of the Act.

74 As indicated, and noting the obligation created by section 73(2) of the Act which would rest upon the Applicant if my recommendation is accepted, the issue might have been more efficiently resolved by the provision at the hearing of an amended application over the lesser ground claimed being made, once a view had been taken by the Applicant to press the M28/400 application.

75 In this case though in light of the way it developed that is the counsel of perfection with the benefit of hindsight, and no criticism of counsel appearing for either of the parties is made. Indeed, I too passed like a ship in the night on the legal issue subsequently raised.

76 Again I am fortified in my view as to the appropriateness of the outcome, and the manner in which it has been reached, by the active consent of the Objector to it.

77 For completeness, and on the issue of the overlap in the ground sought, the grant of a mining lease grants a bundle of rights to the holder. It is not necessary to go into those rights in detail at this juncture, suffice to say that as a result of the existence of those rights, there is in my opinion no capacity to suggest that two mining leases can coexist upon the same ground.

78 As indicated above, the objection lodged in respect of M28/400 makes no reference to the fact of the subsequent larger M28/401 covering the same ground.

That, in one sense, is not surprising as the smaller tenement application was first in time. The objection in respect of M28/401 did raise the issue, however only in an oblique way. As a result, it might have created something of a procedural difficulty, in that the tenement which I have indicated above is to be recommended for grant only in part, has no clear ground of objection to it relating to the contiguous ground issue.

79 However, I did not understand the issue of be of any substantive moment.

80 Further, it was not suggested by the Objector there was anything significantly different in respect of any impact upon its interests. Indeed, Objection ground 8 of the Objection to M28/401 appears to simply note that M28/401 may well be in substitution of M28/400.

81 As a result, whilst the form of the relevant documentation could have been more clearly put by both parties, it may be said there is no substantive issue arising. Thus the real issue in this respect is whether I can or should recommend for grant two mining leases over the same ground where there is no clear objection on that basis.

82 In my opinion the answer the first part of that question is unambiguously no, where the ground is the same.

83 In respect of the second part, in my opinion, consistent with the exercise of the obligation pursuant to section 75(5)(c) of the Act, I am required to provide the Minister with a report which recommends the grant or refusal of the mining lease and sets out the reasons for that recommendation.

84 On the proviso that there is no identifiable prejudice to either party (thus imperilling the obligation to afford procedural fairness to the parties), I do not consider that I am confined to the detail of the objection, to recommend a refusal of a grant in part, in a circumstance such as this one, where a recommendation that the Applications be granted would result, for all intents and purposes, in two

mining leases over the same land, either of which may be sold or transferred. The irreconcilable difficulty in that proposition is manifest.

85 It follows that subject to the comments I make below in respect of conditions, it (M28/401) should be recommended for grant only in respect of the balance of the ground not covered by M28/400, pursuant to the application of section 73(1) of the Act.

Chronology of the Dispute

86 In summary, on the material before me, the Applications were lodged in December 2019 and February 2021, with objections following shortly thereafter.

87 The matter was transferred to the Perth field from Kalgoorlie, by Order of 19 November 2021, listing the matter for mention on 25 March 2022 in Perth.

88 In the intervening period, the filing of the Interlocutory Application occurred on 22 December 2021.

89 At the mention hearing on 25 March 2022, programming Orders were made by consent, seeking to program the Interlocutory Application.

90 After that, the matter moved with a degree more purpose, culminating in hearings on 16 May, 13 June, and 25 July 2022.

91 As indicated above, a further, very short hearing was conducted on 10 October 2022, following the receipt of submissions raising the legal issue arising from section 105A of the Act, which was not canvassed at the Final Orders Hearing.

Agreed Evidence

92 The Applicant relied upon the evidence of Mr Richard Peregrine Hugh Jones dated 22 December 2021 (the Applicant's Affidavit).

93 As indicated above, in the materials provided to me, though not expressly referred to, was also the agents Affidavit and statements of compliance. Those

compliance representations, in totality, were contained as an annexure to the Applicant's Affidavit and adopted.

94 The Objector relied upon the evidence contained within the Affidavit of Mr John Jones dated 18 February 2022 (the Objector's Affidavit).

95 Neither party sought to examine or cross examine the deponents of either Affidavit.

96 Primarily, the Affidavit material relied upon, was advanced by each party in respect of the Interlocutory Application.

97 No objection was taken as to content by either party. Accordingly, I treated that evidence as the evidence advanced by the respective parties in relation to the Interlocutory Application, the Final Orders Hearing, and the costs application in relation to the Interlocutory Application.

98 Neither party sought to adduce any other evidence, though it will have been noted that the Objector was at liberty to file additional material, relevant to the conditions argument to be had at the Final Orders Hearing, by Order 1 of the Orders made on 13 June 2022.

Applicable Law

99 In this matter, arising from the manner in which it was conducted, there was in truth no dispute between the parties in respect of the application of the relevant provision of the Act.

100 Ultimately, what was in dispute was manner in which I was asked to treat the proposed conditions being advanced.

101 Nevertheless, it is appropriate to set out the framework of the applicable law in respect of the matter.

102 The Applications are for a recommendation for the grant of a mining lease, pursuant to sections 67, 71, and 75(5) of the Act.

103 The manner in which those provisions operate was not in dispute.

104 Following the application for a mining lease, section 75(1) of the Act provides a mechanism for any person to object. There is no requirement of standing, nor may any qualification on whom object.

105 By the operation of section 75(4), the fact of an objection gives rise to the jurisdiction of the Warden to hear the application for a mining lease, which results in a recommendation being made to the Minister, who then makes the actual determination as to whether a grant ought be made or no.

106 The operation of the provisions in the context of a dispute between a mining tenement applicant for the one part, and a pastoral lease holder, have also been the subject of previous analysis in this jurisdiction, and in the Supreme Court.

107 It was accepted by both parties that Section 75(4) does not require all objections to be heard. That is relevant to the question of the determination of the Interlocutory Application, and the manner this matter proceeded.

108 Franklyn J in ***Re Warden Heaney; Ex parte Serpentine-Jarrahdale Ratepayers & Residents Association (Inc)*** (1997) 18 WAR 320 **(Re Warden Heaney)** stated at 331:

> a. *"The nature of the discretion focuses attention on the objection as lodged and (the warden's) discretion as to whether or not the objector should be given the opportunity of being heard must be exercised judicially, having regard to the nature and content of the objection in the context of the Act. …… Speaking generally, the Warden may well find there is not 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."*

109 At 332, Franklyn J in ***Re Warden Heaney*** stated the following in respect of the application of the Minister's discretion to refuse an Application pursuant to section 111A of the Act:

> a. "*Relevantly, s 111A authorises the Minister to refuse the application but only if satisfied on reasonable grounds in the public interest that the land*

should not be disturbed or the application should not be granted. In my view that requires that an objection on public interest grounds provides adequate particulars of the respects in which it can be objectively said it is in the public interest that the claimant's application be refused or the subject ground be not disturbed. That is necessary not only to properly and adequately identify the objection but so that the claimant knows what is the objection he has to meet in the event of the objector being given the opportunity to be heard."

110 At 325 Franklyn J of ***Re Warden Heaney***:

a. *"Whilst, on their own, private interests are not a relevant consideration, they may well be such if there is a public interest in their protection. It does not necessarily follow (although it might in a particular case) that, because of the provisions of those sections of the Act, there can be no aspect of public interest in an objection lodged by a private landowner or occupier who is entitled to the protection provided by those sections. That indeed was recognised by Jacobs J in Sinclair in the above quoted passage which, in my view, in its entirety, appears appropriate to the concept of "public interest" in the context of the Act. It is important to recognise, however, that in that context the public interest is that identified in section 111A. Consequently, in my view, to be relevant as going to "public interest", an objection, whether lodged primarily in respect of a "private interest" or as one of "public interest" must contain a discernible objection concerning the public interest of such a nature as to be capable of exciting the consideration of the Minister under section 111A. That is to say, it must be discernible from the objection that it raises a question which, objectively viewed, can reasonably give rise to a concern that the disturbance of the relevant land or grant of the application may not be in the public interest. The determination whether or not such disturbance or grant is or is not in the public interest is a matter for the Minister to be taken into consideration in the exercise of his discretion under section 111A."*

111 In ***Sinclair v Mining Warden at Maryborough*** (1975) 132 CLR 473 at 487, Jacobs J at 487:

a. *"The words public interest are so wide that they comprehend the whole field of objection other than objection founded on deficiencies in the application and in the required marking out of the land applied for. For instance, the public interest may tell against the grant of a mining lease even though particular interests of an individual are the only interests primarily affected. It may thus be in the public interest that the interests of that individual be not overborne. However, all the objections can be and should be related to public interest. But private interest as such are not a relevant consideration. So far as they are intended to be protected, they are specifically so protected by the Act itself.*"

112 In applying those principles, Warden Calder, in ***FMG Chichester Pty Ltd v Rinehart & Ors*** [2010] WAMW 7 (***FMG Chichester***) put it this way:

> *a.* "*In my opinion the compensation provisions of the Mining Act, insofar as they relate to pastoral leaseholders, are consistent with there being a legislative intention reflected in the provisions of the Mining Act that, as a matter of general principle and application, the potential for damage and loss to a pastoralist arising from mining operations that are permitted under the Act is not something that will stand in the way of productive extractive mining operations, and other mining operations being carried on in an appropriate and reasonable manner by the holder of a mining tenement and the compensation for loss or damage actually suffered by the pastoral leaseholder that is within the compensation provisions is the primary means chosen by Parliament of resolving the conflict of land use interests.*"

113 It was not suggested by the Objector in this matter that any relevant matters rose to the threshold which might excite the interests of the Minister to deny the application on the basis of the operation of section 111A of the Act.

114 Ultimately, it was as a result of the acceptance of those principles, that the Objector was drawn into a position whereby it was content to approach the resolution of the dispute in the manner proposed, and as a result may be said to have actively participated in the Final Orders Hearing and its genesis.

115 It is relevant to note at this point the operation of section 20(5) of the Act, which creates a right, which appears to govern the manner in which tenement holders may traverse land, over which they have no specific tenure rights.

116 That provision is said to create a general right of access to a tenement for the tenement holder, relevantly for this case, through a pastoral lease. Section 20(5)(e) of the Act makes plain that such a right does not entitle (relevantly in this case), the Applicant, to prospect or fossick on, explore, or mine on or under, or otherwise interfere with the relevant land being travelled over.

117 In my opinion, that access right, does not on its face, grant to the tenement holder any kind of exclusive right to utilise any particular access road, nor empower the tenement holder to exclude the (relevantly) pastoralist from the use of any

relevant access way in good faith in accordance with the usual operation of the pastoral lease.

118 In effect, in my opinion, the seemingly *de minimus* nature of the right conveyed by section 20(5) of the Act, must be regarded as having to coexist with the existing rights of the pastoral lease holder.

119 Also inherent in any consideration of this matter, and the application of the relevant principles, is the fact of the compensation regime within the Act.

120 Sections 123 – 125 of the Act provide for the grant of compensation to affected (relevantly) pastoral lease holders, whom do not have the benefit of the protections afforded to private land holders pursuant to section 35 of the Act.

121 In this case, no plaint has been commenced by either party seeking compensation at this time.

122 As a result, it is not appropriate to comment further on what the outcome of any such plaint might be, save to simply highlight the fact of the compensation regime as a mechanism to address commercial grievances held by the pastoral lease holder as a result of the conduct of the Applicant. Again, it is noted that the Act treats pastoral lease holders as being distinct from the private rights protected under the Act.

123 In this respect, in my opinion, a view can be expressed that the rights of a pastoral lease holder, when regarded through the prism of the Act, may be considered to be largely commercial rights to be appropriately protected, and compensated for by the protective mechanisms in the Act, without permitting the grant of a veto over mineral exploration activities. That view is, in my opinion, consistent with Warden Calder's reasons in ***FMG Chichester***.

124 In this case, the Objector did not challenge, as a matter of law, the statements of his Honour Warden Calder in ***FMG Chichester*** I have cited above.

125 Whilst I am not bound to follow the determination of another Warden, I am content to express a view that a decision of another Warden ought be considered to be of persuasive weight, particularly on questions of principle in respect of the interpretation and application of the Act.

126 Leaving aside the merits of this particular matter, I will add that that is also for reasons of judicial comity, as well as the important practical need for a degree of legal certainty within the jurisdiction where there are a number of active sitting Wardens.

127 In this case, I consider that the relevant approach to take in light of the facts and circumstances presented is that set out by Warden Calder in ***FMG Chichester***.

128 As indicated, it was not suggested that the approach taken in that case was plainly wrong, nor any effort made to distinguish it. As a result, in my opinion it should be applied.

129 It was for this reason that the capacity of the Objector to be heard at large, was curtailed, ultimately largely by agreement, to being heard on appropriate conditions to be imposed.

Matters to be determined

130 As a result of the manner in which it was conducted the matters to be determined were therefore of relatively narrow compass.

131 The parties were able to agree the bulk of the matter, namely that a recommendation was most likely to go to the Minister that the Applications be accepted, subject to a number of conditions.

132 The focus of the Objection turned, at the Final Orders Hearing, to the conditions to be imposed rather, save for the most superficial of submissions, than any detailed notion that a recommendation for a grant ought not be made at all.

133 As indicated above, principally, the reason that the matter moved in that manner, was a result of the application of what was accepted by both sides, as being the accepted general principles largely summarised in ***FMG Chichester***, when addressing objections to tenure applications by pastoral lease holders.

134 Those principles are referred to above, and I did not understand their application to be in dispute, save for in respect of the argument associated with costs, and the framing of the Interlocutory Application.

135 Relevantly, in my opinion, the conditions which were advanced as those being sought by the Objector, are required to be established as being "*reasonable*".

136 In coming to a view as to what is "*reasonable*" for the purposes of section 71 of the Act, regard must be had to the statements of principle referred to above at [108] – [129], relating to the intersection of rights between an applicant for a mining lease, and a pastoral lease holder.

137 Thus, in coming to a view in respect of any such conditions to be recommended to the Minister for grant pursuant to section 71 of the Act, in my opinion it is appropriate to take the following approach to each proposed condition:

a. What is the purpose of the proposed condition?

b. Does the proposed condition operate in a manner consistent with the principles referred to above at [108] – [129]?;

c. Is the proposed condition able to be meaningfully enforced in the event of an alleged breach?

138 In addition to the above, the objects and purposes of the Act ought be considered, and in my opinion any condition imposed must be demonstrated to be consistent with those purposes, as articulated in, for example, ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** (2007) 34 WAR 403 at [21]-[25] per Pullin JA, and ***Commissioner Of State Revenue v Abbotts Exploration Pty Ltd*** [2014] WASCA 211 (14 November 2014) per Buss P at [56].

139 In my opinion approaching proposed conditions in that manner, permits a view to be taken as to whether it is reasonable or not.

140 In my opinion, no recommendation ought be made for a condition which is not able to be determined to be reasonable in the circumstances presenting at the time of the hearing, based on a consideration of the relevant evidence provided.

141 The parties advanced a number of proposed conditions. Some were agreed, and some were not.

142 The complete conditions proposed by both parties were contained in an Aide Memoire filed in advance of the Final Orders hearing on 25 July 2022.

143 They are in the document annexed to these reasons as Schedule 1.

144 In that document, it appeared that there were agreed conditions, namely 1, 2, 3, 4, 12 and 18.

145 Even though they have been the subject of an agreement between the parties, given my jurisdiction has been invoked, I consider it is necessary for me to give consideration to them, so as to come to a view that they are reasonable in the context of the application of section 71.

146 In the circumstances, it is convenient to do so by way of the following table, with reference to the proposed conditions as detailed in Schedule 1:

Condition	Consideration	Conclusion
1	This condition incorporates the draft conditions which the Department of Mines, Industry Regulation and Safety (the Department) considers appropriate in the circumstances. Those draft conditions may be found at Annexure A to Schedule 3. (I removed them from Schedule 1 to avoid duplication). The Department has provided those draft conditions, however, again, I consider it is necessary for me to turn my mind to whether they are reasonable.	The proposed condition, and the proposed draft conditions of the Department are reasonable in the circumstances,

Condition	Consideration	Conclusion
	The starting point in respect of the proposed departmental conditions, is that the Department, being the body tasked with the support of the Minister in respect of the administration associated with the conduct of mineral exploration in the State, has determined that those conditions are appropriate. That fact, in my opinion, is of weight. Considering those conditions further, it is apparent that the conditions are broken into a section headed endorsements, and conditions. The endorsements appear to operate to bring certain matters to the attention of tenement holders. Ultimately, they are of use in the sense of focusing the minds of tenement holders on key pieces of legislation and other matters, though care must be taken to ensure that a perception is not developed that if a matter is not raised in an endorsement, it is of no moment. Plainly that is not so. Nonetheless, the endorsements seek to inform the tenement holder of certain of its obligations and are consistent with the principles described at [108] – [129] and [138] hereof. Turning to the conditions proposed by the department, the content of them is largely self-explanatory. They are, without exception, entirely protective of the Objector in this matter. Most telling are conditions 3 and 6 proposed by the Department, which both parties to the matter accepted would entail the Objector being given a right to be heard prior to any such determination being made. Those conditions in particular, will facilitate the protection of the Objectors interests, in respect of the detailed mining proposals which on the face of the Objections, are the Objectors primary concern, and enable the Minister to make appropriate decisions in accordance with the exercise of the statutory duty under section 84(1) of the Act, consistent with the principles detailed at [108] – [129] and [138] above. In terms of enforceability, in the event of a breach of condition by the Applicant, the Department, and indeed the Objector, will have a	and ought be recommended.

Condition	Consideration	Conclusion
	range of remedy's available (see for example the nature of events in ***The Mining Registrar, At Karratha And Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2021] WAMW 13).	
2	This proposed condition requires the Applicants to effectively take all reasonable steps to minimize interference with the pastoralists activities. It is not disputed that there will be some activities upon the tenement, consistent with the stage of the development of the mining proposal which I infer is currently underway or in planning. It is foreseeable that those activities might have the possibility of interfering in the conduct of pastoralist activities in some manner. The Applicant has the capacity to manage those activities, and take steps to minimize any interference with the known activities of the Objector. Whilst the precise nature of the activities of the Applicant are not presently known with certainty, what is known is the intent to carry out some activity. That fact, and its possible intersection with the activities of the Objector, create a basis for the imposition of the condition upon the Applicant, so as to inform their future conduct. In my opinion, it is a condition which if imposed, will ensure that the Applicant is required to act in a manner which is mindful of the interests of the Objector, and communicate with it. It is a condition which is also consistent with the principles set out in [108] – [129] and [138] of these reasons. It does not purport to preclude any activity, rather it seeks to create a collaborative framework for the management of the intersecting interests. In this, it is difficult to see how the Applicant could comply with the condition, in the absence of meaningful communication and conferral with the Objector. That is ultimately beneficial to both parties. The condition itself is silent on the manner in which the "minimization" may be achieved, and in my opinion, that is consistent with the positive obligation imposed upon the Applicant to take those steps which might be required based on what their future activity is.	The proposed condition is reasonable in the circumstances, and ought be recommended.

Condition	Consideration	Conclusion
	In addition, it functions within the context of the statutory compensation regime. In the event the Applicants activities interfere with the pastoralists activities, and cause loss, the Objectors loss may be compensated. Such losses may be avoided or ameliorated, following compliance with the proposed condition. In terms of its enforceability, in the event that the Objector comes to a view that its interests are being disregarded by the Applicant, or the condition breached, the Objector has a range of possible steps open to it.	
3	This proposed condition creates an obligation of consultation with the pastoralist as to the location of haulage routes. That obligation is not onerous at all, and again, seeks to create a collaborative framework for the management of the intersecting interests. It is also protective of the Applicant, in that appropriate consultation, may beneficially impact the amount of any compensation which becomes payable in the future. In terms of its enforceability, in the event that the Objector comes to a view that there is noncompliance, the Objector has a range of possible steps open to it.	The proposed condition is reasonable in the circumstances, and ought be recommended.
4	This condition requires the Applicant to provide notification of any damage to the Objector's property or operations. The purpose of such a condition is obvious on its face. Given the existence of the compensation regime, it is also perfectly reasonable to impose an obligation upon the Applicant to notify the Objector of any damage caused by its activities. The pastoral lease in question appears to be of a significant size, which is a further reason to impose that positive obligation upon the Applicant. Again, in the event of a breach of the condition, the Objector would have a range of available steps it could consider.	The proposed condition is reasonable in the circumstances, and ought be imposed.
12	This proposed condition is creates an obligation to make good any damage caused, particularly in respect of fencing. For the same reasons as set out in respect of proposed condition 4, the conditions	The proposed condition is reasonable in the

Condition	Consideration	Conclusion
	purpose and enforceability is clear, and is consistent with the principles outlined above at [108] – [129] and [138].	circumstances, and ought be imposed.
18	This proposed condition creates an obligation to specifically notify the Objector of vehicle strikes on cattle. The Objectors Affidavit details that the primary business operations of the Objector are the grazing of cattle. For the same reasons as set out in respect of proposed condition 4, the condition's purpose and enforceability are clear and is consistent with the principles outlined above at [108] – [129] and [138].	The proposed condition is reasonable in the circumstances, and ought be imposed.

147 It follows from the above consideration that the proposed conditions as identified are reasonable, and ought to be applied to any grant made by the Minister, based on the circumstances currently known.

148 Of the remaining conditions advanced by the Objectors, conditions 5, 6, 9, 14, 16 and 19 were not pressed by the Objector, and will not be considered further.

149 In my opinion those conditions as originally sought, may be determined to be unreasonable for my purposes, simply as a result of the Objector being content to abandon them.

150 In a circumstance where the Objector was represented by solicitors commonly appearing in the jurisdiction, as well as very experienced counsel, I consider there is no call for me to enquire into those proposed conditions further.

151 That leaves the conditions for consideration by me where there was a degree of dispute, namely those referred to in Schedule 1 as conditions 7, 8, 10, 11, 13, 15 and 17 (the Disputed Conditions).

152 At this juncture it may be said that when considering the dispute as a whole, rather than require a complete hearing on the matter, the majority of the issues were agreed, leaving a narrow focus as to the remaining conditions in dispute.

153 The parties are to be commended for the entirely sensible and efficient manner in which the matter was dealt with.

154 The adoption of a similar approach should be given consideration in other like matters.

155 In respect of the Disputed Conditions, there remained, following the implementation of the very helpful approach by both counsel appearing in the matter, two broad areas of dispute which require my determination.

156 They were as follows:

a. A number of the proposed conditions as contained in Schedule 1, which were not agreed, however which the Applicant was prepared to agree as an alternative position (the primary position being that the conditions were not reasonable and ought not be made), subject to some amendments (the Amended Conditions).

b. A number of the proposed conditions as contained in Schedule 1, which were not agreed, and were not the subject of any proposed alternative wording (the Unamended Conditions).

157 The prospect of the alternative wording (acceptable to the Applicant as an alternative position) arose during the course of the hearing on the 25th of July 2022.

158 Rather than seek to make those amendments to the papers presented to me effectively on the basis of submissions from the bar table, I directed the parties to provide a further Minute detailing the position. That was done on the 25th of July, and is contained in these reasons as Schedule 2.

159 I provided the parties with an opportunity to make any further written submissions in light of that document, if they wished to do so. Neither party considered it necessary and advised my chambers accordingly.

160 As I have indicated, the approach taken by counsel in the matter is to be commended and encouraged.

161 I am grateful to the parties for the willingness to agree a significant amount of the matters in dispute, which necessarily aids the efficiency of my determination.

Application of the Legal Principles to the Disputed Conditions

162 In my opinion the Applicant's primary position in respect of both the Amended Conditions, and the Unamended Conditions, should be accepted.

163 In my view, the Disputed Conditions are not reasonable, and ought not be recommended.

164 In the particular circumstances of this case, the issue really distils to a determination of whether I consider that the Amended Conditions, and the Unamended Conditions should be considered to be reasonable, and be imposed, in circumstances where it is accepted that they are to a large degree seeking to guard against the unknown.

165 The key thread running through both the Objections as filed, and the Objector Affidavit material, was a complaint as to the absence of information as to what the Applicant's detailed mining proposal might entail. The Applicant, for its part, accepted completely that there was no such detail available at this time, however that they were entitled to proceed in its absence given the relevant provisions of the Act.

166 The trite and easy answer is to simply say that in the absence of a known risk, there is no need to impose any condition at all.

167 That is the tenor of the position of the Applicant, seeking to invoke principles falling from the decisions of mine in ***Cockatoo Island Mining v Pearl Gull Iron and Silver Gull Iron Pty Ltd*** [No 3] [2022] WAMW 15. That decision was the last of 3 decisions in respect of that particular dispute, also consisting of ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Ltd*** [2022]

WAMW 5 and ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron & Ors*** [No 2] [2022] WAMW 12.

168 Those decisions relate to an application for a Miscellaneous License.

169 In my opinion whilst there is a degree of force in a submission that a similar approach can be taken in respect of this matter, the distinct nature of the difference in the core application type must be given appropriate weight.

170 As a general proposition I consider that a Warden determining conditions to be recommended for imposition upon a mining lease following a dispute between an applicant and a pastoralist, ordinarily ought not impose conditions simply because they might be found in a commonly drafted access agreement. Such agreements, whether they are based on templates or bespoke, are subjective commercial agreements between parties, and not of broader application.

171 The approach to be taken in a matter such as this one, is to meet the requirement to give appropriate consideration to the facts and circumstances presenting in each case in evidence, so as to determine what conditions are considered reasonable, rather than apply any kind of overarching principal.

172 In this case, it was accepted that there was little or no evidence before me as to the future activities of the Applicant. That was by design of the Applicant, but understandably so given the nascent nature of their activities.

173 The Objector's evidence was also vague, and lacked the detail of a necessary kind to enable a clear understanding of the precise pastoral activities of the Objector to be discerned.

174 Given much of it related to the possible impact of unknown future events, at imprecise locations, that is not surprising.

175 An example of that is as follows:

> *a. There are no dams currently situated within the area the subject of the Applications, however due to the nature of the water courses that run*

> *through the Applications, as well as the superior cattle grazing area, it has always been envisaged that a further dam or dams would be 'sunk' to take advantage of the water courses within the area the subject of the Applications. The proposed location of the further dam is marked on attachment JLCJ03 to this Affidavit.*[3]

176 That evidence is a representation as to a possible future intention. As a result, I consider it of limited weight.

177 I note again in this last respect, that the orders made on 13 June 2022 did not preclude the Objector from calling further evidence relevant to the conditions to be imposed.

178 As a result, the inescapable conclusion to be drawn, which was not in effect disputed by the Objector at the Final Orders Hearing, is that the conditions sought to be imposed by the Objector were conditions seeking to guard against hypothetical concerns that the pastoralist had arising from what the Applicant might do in the future.

179 Further, it was accepted by both parties, that in the absence of a miscellaneous licence, access rights which I was told from the bar table are currently used, are limited to that right pursuant to section 20(5) of the Act as described above.

180 That right was accepted by both parties to be a right of access only, and does not on its face, permit the use of private roads for mining operations or related purposes. It may only be utilised for access to the tenement by the tenement holder. It was expressly accepted by counsel for the Applicant that that access right which currently existed, was limited in that way. In my opinion that view is correct.

181 As a result, in all of the circumstances as presented to me, there was no evidence in support of the contention that the conditions were sought to address any actual known or reasonably foreseeable risk of disruption to the Applicant's activities.

[3] Affidavit of Mr Jones (Objectors Affidavit) dated 18 February 2022, para 19

182 In general terms, it follows that on that basis I do not consider conditions seeking to guard against the hypothetical as reasonable, as that term is used in the Act.

183 Whilst there ought not be a fetter on the nature of the conditions that a Warden might recommend, there must in my opinion, be a principled approach to such questions, also based on an evidentiary foundation.

184 As a result, I am content to express a view that for a proposed condition advanced by a pastoralist in a case such as this one, in a manner consistent with ***FMG Chichester***, that the purpose or reason for seeking to impose such a condition ought be more than the hypothetical. In my opinion that view is consistent with the approach I have mentioned above at [171].

185 At one point counsel for the Objector submitted that an approach of "*why not impose*" was appropriate. With respect I do not agree, for the reason that imposing conditions sought by the Objector in this case, effectively because they were sought by the Objector, is in my opinion inconsistent with the principles discuss above at [108] – [129] and [138].

186 Mining leases are valuable grants from the State, and the conditions to be imposed upon them ought be imposed in a manner which is consistent with both the principles discussed above at [108] – [129], as well as the general objects and purposes of the Act as described in [138] hereof.

187 The more detailed position may be considered with reference to the content of Schedule 2, and the table set out below.

188 It will be noted I have omitted the column in relation to the Applicant's alternative wording. That is for the reason that I do not consider that the Objector's proposed conditions are reasonable for a range of reasons, and do not become reasonable as a result of the proposed amended wording. In effect, I accept the Applicant's primary position that they ought not be imposed at all.

No.	Objector's Proposed Condition	Consideration	Conclusion
7	Maintain pastoral access roads on the pastoral lease that are used by the holder, at the holder's cost, to the satisfaction of the pastoral leaseholder	The purpose of this proposed condition requires the Applicant to meet the costs of maintaining access roads, which the Applicant might utilize in accordance with section 20(5) of the Act at this time, to the satisfaction of the pastoral lease holder on the pastoral lease. In effect, it purports to require the Applicant to meet the cost of the maintenance of the roads on the pastoral lease, to an unknown standard determined by the Objector, without any limitations. The condition itself is also not necessary. In the event that there is usage of roads pursuant to section 20(5) of the Act, which causes damage to the roads, that damage may be addressed by way of compensation. It is also in my view inconsistent with the principles described above, at [108] – [129] and [138] hereof, in that it would empower the Objector to set a requirement which is not commercially reasonable, nor able to be met. Thus on its terms, it would create what may be regarded as a de facto right of veto on mining operations, by setting a condition which if used in a particular manner, could never be met. As to enforceability, whilst the condition on its terms could theoretically be enforced, the nature of it is such that it would guarantee future disputes as to the nature of the extent the Applicant might be asked to maintain the relevant roads.	It is not a reasonable condition, and ought not be recommended.
8	Comply with any reasonable precautions which the pastoral leaseholder may impose against the spread of any disease or noxious weed or	This condition seeks to create a specific obligation upon the Applicant to assist in the management of spread of any disease or noxious weed or vermin on the pastoral lease. In this, the purpose may be said to be consistent (and indeed, a more specific subset) with proposed condition 2 of Schedule 1, in respect of minimizing the impact of the Applicant's activities. In my opinion the imposition of condition 2 of Schedule 1, creates an imperative on the part	It is not a reasonable condition, and ought not be recommended.

No.	Objector's Proposed Condition	Consideration	Conclusion
	vermin on the pastoral lease	of both parties to identify and communicate their respective conditions, which would naturally include any requests made by the Objector in respect of the matters the subject of this proposed condition. That, coupled again with the statutory compensation requirements, creates a sufficient mechanism to manage the matters of concern. On the issue of consistency with the principles outlined above at [108] – [129] and [138] hereof, again, the proposed condition may be said to empower the Objector with the capacity to create barriers to the conduct of the Applicant's activities, in a manner which may be inconsistent with those principles. As to enforceability, whilst the condition on its terms could theoretically be enforced, the nature of it is such that it would guarantee future disputes as to the nature of the extent the Applicant might be asked to do.	
10	Take all reasonable precautions consistent with mining operations to minimise soil erosion on the pastoral lease	This proposed condition seeks to impose a condition in anticipation of the activities of the Applicant. The extent of any erosion risk is not currently known, nor can even be speculated about. It creates obligations which are unable to be identified with any degree of satisfaction. Further, it is the sort of concern, which in my opinion, falls squarely into the operation of section 84 of the Act. In the event there is, in the future, a mining proposal which gives rise to significant environment concerns associated with erosion, those representations may be made to the Minister. In the event there is commercial loss to the Objector following erosion generally, plainly there is a remedy open to the Objector through the operation of that mechanism.	It is not a reasonable condition, and ought not be recommended.

No.	Objector's Proposed Condition	Consideration	Conclusion
		The proposed condition also has a degree of overlap with a number of the Department of Mines, Industry Regulation and Safety's proposed conditions, as identified in Annexure A to Schedule 3. On the issue of consistency with the principles outlined above at [108] – [129] and [138] hereof, again, the proposed condition may be said to empower the Objector with the capacity to create barriers to the conduct of the Applicant's activities, in a manner which may be inconsistent with those principles. As to enforceability, whilst the condition on its terms could theoretically be enforced, the nature of it is such that it would guarantee future disputes as to the nature of the extent the Applicant might be asked to do.	

No.	Objector's Proposed Condition	Consideration	Conclusion
11	Keep all drill holes, costeans, trenches, excavations, shafts and other workings on the pastoral lease secure and safe and properly maintained and, where necessary, fenced	This proposed condition seeks to impose a condition in anticipation of the activities of the Applicant. The extent of any risk to the pastoralist is not currently known, nor can even be speculated about save in the most general way. It might be considered, that the risk of cattle (or persons) encountering unfenced and unsafe workings being injured or killed, is a foreseeable future risk following a decision to conduct the drilling of holes on ground adjacent to, or part of an existing pastoral lease. In my opinion, as such, it is entirely within the ambit of a number of the agreed conditions, not least of which is condition 2 of Schedule 1. The proposed condition also has a degree of overlap with a number of the Department of Mines, Industry Regulation and Safety's proposed conditions, as identified in Annexure A to Schedule 3. In the event there is commercial loss to the Objector following an act of the Applicant, plainly there is a remedy open to the Objector through the operation of the compensation mechanism. On the issue of consistency with the principles outlined above at [108] – [129] and [138] hereof, again, the proposed condition may be said to empower the Objector with the capacity to create barriers to the conduct of the Applicant's activities, in a manner which may be inconsistent with those principles. As to enforceability, whilst the condition on its terms could theoretically be enforced, the nature of it is such that it would guarantee future disputes as to the nature of the extent the Applicant might be asked to do.	It is not a reasonable condition, and ought not be recommended.

No.	Objector's Proposed Condition	Consideration	Conclusion
13	Install and maintain new and existing fencing to protect station livestock from any hazards on the pastoral lease such as dumps, tailings dams, open pits, water storage dams and the like, and install and maintain cattle grids at agreed points along such fencing	This condition seeks to expand the "*fencing*" obligation identified in proposed condition 12 to cover a range of other infrastructure. The views I have expressed in respect of proposed condition 12 are entirely apposite.	It is not a reasonable condition, and ought not be recommended.
15	At the request of the pastoral leaseholder, with reasonable notice, temporarily suspend operations on roads as necessary to allow for mustering of livestock	This condition seeks to impose a condition requiring the Applicant to suspend its activities upon the roads to allow the mustering of the Objectors livestock. The first difficulty with the proposed condition is the limited nature of the existing rights of the Applicant under section 20(5) of the Act, to use the roads, does not in my opinion, extend to excluding the Objector from conducting its usual operations on those roads. That is not to say that the Objector may obstruct the Applicant from utilizing the benefit of section 20(5) of the Act, though disputes in that respect are questions which can only be answered upon consideration of the precise circumstances faced. The second major difficulty faced is that the issues sought to be addressed in the imposition of the condition, again fall squarely within the parameters of the proposed agreed condition 2 of Schedule 1. On the issue of consistency with the principles outlined above at [108] – [129] and [138] hereof, again, the proposed condition may be said to empower the Objector with the capacity to create barriers to the conduct of the	It is not a reasonable condition, and ought not be recommended.

No.	Objector's Proposed Condition	Consideration	Conclusion
		Applicant's activities, in a manner which may be inconsistent with those principles. As to enforceability, whilst the condition on its terms could theoretically be enforced, the nature of it is such that it would guarantee future disputes as to the nature of the extent the Applicant might be asked to do.	
17	Construct and maintain water diversion culverts, and/or other water course diversion infrastructure on the pastoral lease as directed by the pastoral leaseholder	This proposed condition is the high water mark of the effort by the Objector to impose onerous conditions upon the Applicant. On its face it contains absolutely no causal reference to the activities of the Applicant at all. The obligation created, is conceptually very significant indeed. It involves the Objector being empowered to call upon the Applicant to conduct significant water diversion works, entirely at the election of the Objector, with no requirement for those works to be informed by the actions of the activities of the Applicant, nor even indeed the ground proposed to form part of the mining lease itself. In my opinion again, the matters of concern, fall squarely within the parameters of the proposed agreed condition 2 of Schedule 1. In my opinion such a condition creates a de facto right of veto, in a manner which is entirely inconsistent with the principles outlined above at [108] – [129] and [138] hereof. As to enforceability, whilst the condition on its terms could theoretically be enforced, the nature of it is such that it would guarantee future disputes as to the nature of the extent the Applicant might be asked to do.	It is not a reasonable condition, and ought not be recommended.

189 It follows that in the case before me, where only the most general of evidence was advanced by the Objector as to the operations of the Objector which might be impacted by the possible future actions of the Applicant, I am of the view there is no basis to support the Amended Conditions nor the Unamended Conditions as reasonable.

190 In my opinion, the framework of conditions I have determined as being reasonable, in addition to the fact of the availability of the compensation regime, provides an appropriate degree of protection to the Objectors interests at this stage.

191 That is not to say that when the detail of the mining proposals of the Applicant becomes available that there may be conditions which may be considered to be reasonable, and indeed ought be imposed to protect the pastoralists interests in a manner consistent with the Act, once the extent of the activities of the Applicant becomes known.

192 In this last respect, it is something of a curiosity that there appears no mechanism in the Act for the Minister to refer factual questions which might arise in matters such as this one, after the hearing of the matter in this jurisdiction, back to this jurisdiction to consider in light of a more detailed mining proposal which becomes available, with a view to considering what if any further conditions might be considered reasonable.

193 However, given the power in the Act for an applicant to seek to advance to grant in the broad absence of the relevant information which would be contained in a mining proposal, in my opinion, there is no basis for me to take any further step in the matter to require the production of the mining proposal (or other like information) at this time, for the purposes of seeking to determine the full extent of the appropriate conditions required to protect the interests of the pastoralist which might be required in the future.

194 Whilst a Warden does have a filtering role (see ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153 at [97]-[98]; see also ***Re Minister for Resources; Exparte Cazaly Iron Pty Ltd and Another*** [2007] 34 WAR 403 at [72]), in my opinion that filtering role does not extend to placing a fetter on the right of an Applicant to advance an application (such as the ones before me now) in the absence of material which the Applicant is not obliged to furnish under the Act.

195 The provisions relied upon here (in particular section 74(1)(ca)(ii) of the Act), in my opinion, when considered in conjunction with the principles discussed at [108] – [129] and [138] hereof, permit the Applicant to advance the matter in the absence of the information that the Objector complains is missing.

196 The Act is also clear, pursuant to section 84 of the Act, that subsequent to the grant of a mining lease pursuant to sections 71 and 74(1)(ca)(ii) of the Act, and following the later provision of a detailed mining proposal, the Minister on consideration of that mining proposal may impose further conditions.

197 It follows that it may be said that the mechanism of the Ministerial discretion to impose any further conditions at any time, is the mechanism by which the Act seeks to address the difficulty created by the absence of information, in matters such as this one.

198 The commercial interests of the Objector pastoralist are also protected by the existence of the capacity to seek compensation for loss suffered as a result of the activities of the Applicant.

199 It follows that that curiosity I have identified, is one which may be safely left to another day, and to other persons.

200 It also follows from the above, that the conditions I consider are reasonable, and should be recommended, are those which I have detailed above and are also reproduced for completeness in Schedule 3 of these reasons (which is a document originally produced by the Applicant, which has been subject to some redactions

to remove the conditions I do not consider reasonable, consistent with my reasons), with Annexure A thereto being the Department's proposed conditions, which I also recommend.

On the Question of Costs of the Interlocutory Application

201 The remaining matter in dispute is the question of the costs of the Interlocutory Application.

202 The Objector sought a costs order in respect of being forced to respond to the Interlocutory Application in circumstances where it was framed in a manner which, it was submitted, could not succeed.

203 In my opinion, there is a degree of force in the submission of the Objector when considered in isolation. However, in all of the circumstances presented, I am of the view that there is no basis to make an order for costs in this matter.

204 The application for costs was made by the Objector on the basis I ought determine that the Interlocutory Application as commenced was frivolous, as that word is used in Regulation 165(4)(a) of the Regulations, as a result of its framing, which could not possibly have succeeded on its terms.

205 No other basis for a costs order was advanced.

206 It was further said that the manner in which the Interlocutory Application was then dealt with, was of no moment, as the outcome achieved might have arisen in any number of different ways.

207 The Applicant's position was that the Interlocutory Application was not frivolous, as it had resulted in effect, and as the matter proceeded on 16 May, 13 June and then on 25 July 2022, in an outcome which significantly narrowed the issues in dispute, and had the effect of curtailing the hearing of the dispute from potentially a complete substantive hearing of several days, to one involving a largely legal argument over a very small number of conditions which remained in dispute over the course of a morning.

208 "*Frivolous*" as used in Regulation 165(4)(a) is not defined. In submissions, counsel for the Objector advanced a definition in the following terms[4]:

> a. *The ordinary meaning of 'frivolous', in relation to a claim, is, relevantly, having no reasonable grounds for the claim.*

209 I did not understand the meaning of "*frivolous*" to be in any real dispute. The Applicant simply submitted that when considered in totality, the Interlocutory Application simply could not be characterised as "*frivolous*" for the purposes of Regulation 165(4)(a).

210 The Objector also relied upon the authority of ***Commissioner of Police v AM*** [2010] WASCA 163 (S) at [27] – [29] (***Commissioner for Police v AM)***, to seek to support its contention that the commencement of the Interlocutory Application was frivolous.

211 In that case, which involved the consideration of section 90 of the *Industrial Relations Act 1979* (WA), the unsuccessful appellant in the substantive matter was the Commissioner of Police. I note his Honour Justice of Appeal Pullin dissented on costs.

212 Relevantly for my purposes, at [35] of that same decision, the following appears, per Buss P, with whom Le Miere AJA agreed:

> a. *35 As Kennedy, Rowland & Nicholson JJ noted in Tip Top Bakeries, s 86(2) must be applied in the context of the Act as a whole and having regard to the relative informality of proceedings before the Commission and the general policy of not awarding costs (27). In Clark, Kennedy, Rowland and Franklyn JJ said that the policy envisaged within s 86(2) indicates that it will only be on 'very rare occasions' that the costs of a legal practitioner will be awarded (335).*
>
> b. *36 It is plain from the earlier decisions of this court to which I have referred that something substantially more than either a lack of success, or the prospect of a lack of success, must be established before an unsuccessful party can be held to have frivolously or vexatiously instituted or defended, as the case may be, an appeal under s 90. So, relevantly to the present case, not every appeal which is determined to be without merit,*

[4] Objectors submissions, filed 15 July 2022, paragraph 39.

either because this court does not have jurisdiction or otherwise, will necessarily have been instituted frivolously or vexatiously.

c. *37 In the present case, the respondent did not suggest (and it could not properly have been suggested) that the appeal was instituted with the intention of annoying or embarrassing the respondent or for an impermissible collateral purpose. Rather, the respondent contended, in essence, that, viewed objectively, the appeal was at all material times so obviously untenable or manifestly groundless as to be utterly hopeless.*

d. *38 Although the appellant failed because, on analysis, none of his grounds of appeal was a ground in respect of which an appeal lies under the limited right of appeal conferred by s 90, this appeal was not one of those very rare occasions on which the costs of a legal practitioner should be awarded. I would not characterise the appellant's grounds of appeal as being 'so obviously untenable that they cannot possibly succeed', 'manifestly groundless' or 'so manifestly faulty that they do not admit of argument'. Accordingly, the appeal was not instituted frivolously or vexatiously. The respondent's application for costs should be dismissed.*

213 In the matter before me, the Orders which were made on 13 June 2022 have been referred to above.

214 That position was arrived at, following brief skirmishes on the 16 May and 13 June 2022, which for all intents and purposes, resolved into an agreed course of action as determined by the Orders made, with the Final Orders Hearing to subsequently occur on 25 July 2022.

215 Prior to 13 June 2022, counsel appearing for the Applicant had previously made submissions from the bar table that there had been attempts at conferral to try and advance the Application, however that they had been unsuccessful as the Objector was asserted as acting in an unresponsive manner.

216 At the hearing on 25 July 2022, counsel for the Objector stated that one of the alternative ways in which the issues might have been able to be resolved (thereby obviating the need for the Interlocutory Application) was by way of appropriate conferral.

217 There is great force in that submission, encompassing as it does by analogy, the sorts of obligations which exist in other jurisdictions in the form of for example, Order 59 rule 9 of the *Rules of the Supreme Court 1971* WA.

218 It is also trite to say that conferral is not arguing at cross purposes where both parties adhere to a stated partisan position without the prospect of any resolution or compromise.

219 Conferral requires the exploration the possibilities of appropriate compromises, so as to aid in the efficiency of any determination which might need to ultimately be made.

220 There is an expectation in this jurisdiction that such conferral (indeed, any conferral) will be treated by practitioners appearing in the jurisdiction in a manner consistent with the following excerpt from the recent decision of ***Murray Riverside Pty Ltd v Toscana (WA) Ravenswood Estate Pty Ltd*** [2022] WASCA 67 (per curiam at [56 -57]):

> a. *56 As should be well understood, ordinarily at least, discharge of the obligation to confer will require oral communication. That is because, as we observed above, the object of the rule is to promote constructive discussion. As Martin CJ observed more than 15 years ago, the 'exchange of furious correspondence' is not meaningful conferral.[25] Nor is it consistent with the object of the rule for a party's solicitors to seek to unilaterally impose conditions on the other party's solicitors before they are prepared to engage in any discussion.*
>
> b. *57 On appeal, the respondents assert the legal correctness of the position they adopted in conferral, namely that the implied undertaking did not prevent the appellant's solicitors from disclosing the documents for the purposes of conferral. The respondents describe the appellant's position in this respect as misconceived. That response misses the point of conferral. One of the purposes and effects of conferral can be to dispel a misconception on the part of one of the parties. What is significant for present purposes is that the respondents' solicitors made no attempt to speak to the appellant's solicitor to explain their position to the appellant's solicitor, and rebuffed the repeated requests by the appellant's solicitor to confer. The respondent's solicitors acted in this manner despite having given no explanation of the basis on which they asserted that the implied undertaking did not prevent the appellant's solicitors providing the requested information for the purposes of conferral.*

221 Despite the comments by both sides as to alleged poor conferral, no evidence of any conferral (or the failure thereof) was put before me.

222 I will confess that that development was somewhat surprising to me. However, as a result, I do not consider it appropriate to express a view as to the adequacy or otherwise of conferral, without that evidentiary basis. I make no findings as to same.

223 What I have is that the first Application was commenced on 2 December 2019.

224 On 24 December 2019, the Objector filed the first of the Objections.

225 Following that, little appears to have occurred on the matter until 22 December 2021, when the Interlocutory Application was filed.

226 True it is that the Interlocutory Application was drafted in a manner which may be described as ambitious, and really should have been drafted as containing at least an alternative claim that in the event that the primary relief sought failed, that the matter be narrowed into an argument about conditions, in a manner consistent with the existing principles, and with what ultimately actually occurred.

227 Nevertheless, in the various mentions conducted in the lead up to the hearing on 13 June 2022, it was plain that the alternative position I have articulated immediately above was being advanced by the Applicant, as indeed then occurred on 13 June 2022, resulting in the conduct of in effect, the Final Orders Hearing on 25 July 2022.

228 Counsel for the Applicant described it as a "*pivot*". With respect, it was not a pivot, it was an alternative position, which in blunt terms, was not in the Interlocutory Application as filed, which is regrettable.

229 However, there can be no doubt that the matter as heard on 25 July 2022, was argued and advanced in that manner, with the active and entirely beneficial participation of the Objector.

230 Further, the Orders that were made at the hearing prior to that, unambiguously narrowed the issues in dispute.

231 The position can be further tested in this manner. Had the alternative position been clearly articulated in the Interlocutory Application, it is difficult to see how any application for costs would be able to made in the manner now advanced. It follows from that, that in truth I consider the application for costs is heavily focused on questions of form rather than substance.

232 Applying the reasoning in ***Commissioner of Police v AM***, as applicable to the similar policy considerations of the Act before me, I consider that such an approach on this question (a heavy focus on form in respect of costs), is not appropriate, and certainly does not give rise to a basis to determine the Interlocutory Application was frivolous as commenced when the context of this matter is considered.

233 In my opinion, and given how it was advanced by the Applicant, the Interlocutory Application can be said to have always been intended to flush out the result that it in fact did.

234 As a result, whilst it may be said the Interlocutory Application might have been more elegantly crafted, I am not satisfied that it may be regarded as frivolous.

235 In outcome too, after an initial skirmishes on 16 May and 13 June 2022, both parties proceeded on the basis that in effect, that alternative position was what was to be argued on 25 July 2022. As a result, again, in my opinion there is no capacity to come to a view that the Interlocutory Application as it was substantively determined, was frivolous.

236 I consider also that outcome is also consistent with a determination of the matter pursuant to the application of Regulation 152(1) of the Regulations, and had it not occurred in an informal manner, I consider that an application to amend the Interlocutory Application to reflect the manner in which the matter was argued by both parties and determined on 25 July 2022, would have been irresistible.

237 It follows that I will dismiss the Objector's application for costs.

238 No other reason was advanced by the Objector for a basis for costs, and the Applicant did not seek any costs.

239 It follows there is no basis to depart from the application of Regulation 165(1) of the Regulations that each party ought meet their own costs of the Interlocutory Application, and I will so order.

Conclusion & Orders

240 As a result of the above analysis, I consider that the correct outcome in this matter is that the Application M28/400 should be recommended for grant, subject to the conditions contained in Schedule 3 with Annexure A.

241 Application M28/401 should be recommended for grant in respect of the ground not forming part of M28/400, again subject to the conditions contained in Schedule 3 with Annexure A.

242 Both Objections ought be dismissed.

243 I further expressly draw the Minister's attention to the fact that the Applicant will at some point be required to provide a detailed mining proposal should they wish to undertake mining operations, and that steps ought be taken to provide the Objector a right to be heard as a stakeholder, on what further conditions, if any, might be considered reasonable in light the detail of the mining proposal becomes available, for the purposes of the operation of section 84 of the Act.

244 Upon consideration of that mining proposal, the Minister may wish, in a manner consistent with the proper exercise of his power under Section 84 of the Act, to impose such further conditions as he considers to be reasonable at that time.

245 In light of the nature of my determination in respect of costs detailed above, the only remaining matter for consideration is whether any party wished to advance an application for the costs of the conduct of the matter generally (excluding the conduct of the Interlocutory Application), and in particular, the final orders

hearing conducted on the 25 July 2022, and subsequent events as described above.

246 As a result, in the event any party wishes to make any consequential application, and same cannot be agreed in light of these reasons, a Minute of Orders sought and accompanying short submission must be provided within 14 days of the publication of these reasons.

247 In the event Minutes and submissions are filed, the matter may be placed into the subsequent Friday mention list before me, not before 12, for the programming and determination of those remaining matters.

248 In the event no such further Minutes and submissions are filed as directed, the matter will stand completed.

249 In any event, I direct the Mining Registrar to convey my recommendation to the Minister or his delegate, upon publication of these reasons, and without further delay.

250 I am grateful for the assistance of counsel in this matter, and the work of their instructors.

_____

Warden Tom McPhee

21 October 2022

SCHEDULE 1

BEFORE THE WARDEN
AT PERTH

Applications for Mining Leases 28/400 and 28/401
Objections 569539 and 617255

BETWEEN:

AC MINERALS PTY LTD

Applicant

and

COWARNA DOWNS PTY LTD Objector

AIDE MEMOIRE
SUMMARY OF THE PARTIES POSITION ON PROPOSED CONDITIONS
FOR THE HEARING ON 25 JULY 2022

Date of Document:	22 July 2022
Filed on behalf of:	The Applicant
Date of Filing:	22 July 2022

Prepared by:
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As an aide to the Warden, this document summarises what Proposed Conditions are agreed, not agreed and no longer pressed by the Objector.

Agreed Conditions have been shaded in green. The parties agree that these conditions should be imposed on the grant of the Applications and therefore form part of the Warden's recommendation.

Proposed Conditions no longer pressed by the Objector have been shaded in dark grey colour to be clear that the proposed conditions do not require consideration by the Warden and should not be imposed on the grant of the Applications.

The parties adopted consistent numbering in their submissions for the Proposed Conditions.

Agreed Conditions: 1, 2, 3, 4, 12 and 18.

Proposed Conditions for determination by the Warden: 7, 8, 10, 11, 13, 15 and 17.

Not pressed by the Objector: 5, 6, 9, 14, 16 and 19.

No.	Applicants Proposed Conditions	Objectors Proposed Conditions	Position of Parties
1	DMIRS Standard Conditions/Endorsements as set out in the Draft Tenement Endorsement and	DMIRS Standard Conditions/Endorsements as set out in the Draft Tenement Endorsement and	Agreed

No.	Applicants Proposed Conditions	Objectors Proposed Conditions	Position of Parties
	Conditions Extract attached hereto (the **Standard Conditions**)	Conditions Extract attached hereto (the **Standard Conditions**)	
2	Take all reasonable steps consistent with mining operations to minimise interference with the holder of the underlying pastoral lease's pastoral conditions and to minimise disturbance to stock, vegetation, water sources, water courses and the land within the underlying pastoral lease	Take all reasonable steps consistent with mining operations to minimise interference with the holder of the underlying pastoral lease's pastoral conditions and to minimise disturbance to stock, vegetation, water sources, water courses and the land within the underlying pastoral lease	Agreed
3	Consult with the pastoral leaseholder concerning the most appropriate access and haulage routes to mining areas and the establishment of new roads and tracks	Consult with the pastoral leaseholder concerning the most appropriate access and haulage routes to mining areas and the establishment of new roads and tracks	Agreed
4	Immediately, upon becoming aware of it, report in writing to the holder of the pastoral lease any damage caused to pastoral improvements on the pastoral lease	Immediately, upon becoming aware of it, report in writing to the holder of the pastoral lease any damage caused to pastoral improvements on the pastoral lease	Agreed
5		Not do or omit to do anything which may place the pastoral lease in jeopardy or render it liable to termination	Not pressed by Objector
6		Comply with the reasonable health and safety procedures and directions imposed by the holder on the pastoral lease on the pastoral lease	Not pressed by Objector
7		Maintain pastoral access roads on the pastoral lease that are used by the holder, at the holder's cost, to the satisfaction of the pastoral leaseholder	Not Agreed
8		Comply with any reasonable precautions which the pastoral leaseholder may impose against the spread of any disease or noxious weed or vermin on the pastoral lease	Not Agreed
9		Not to allow any cats, dogs or firearms to be taken onto the land within the pastoral lease without the prior consent of the pastoral leaseholder	Not pressed by Objector
10		Take all reasonable precautions consistent with mining operations to minimise soil erosion on the pastoral lease	Not Agreed
11		Keep all drill holes, costeans, trenches, excavations, shafts and other workings on the pastoral lease secure and safe and properly maintained and, where necessary, fenced	Not Agreed

No.	Applicants Proposed Conditions	Objectors Proposed Conditions	Position of Parties
12		Repair any fencing on the pastoral lease damaged by the holder or its employees, agents or contractors, and not to make any breaks in any fences without prior consultation with pastoral leaseholder, and ensure that gates effective to keep stock in or out as the case may be, are installed at the holder's cost at any such breaks	Agreed
13		Install and maintain new and existing fencing to protect station livestock from any hazards on the pastoral lease such as dumps, tailings dams, open pits, water storage dams and the like, and install and maintain cattle grids at agreed points along such fencing	Not Agreed
14		Provide reasonable notice to the pastoral leaseholder of any work programs	Not pressed by Objector
15		At the request of the pastoral leaseholder, with reasonable notice, temporarily suspend operations on roads as necessary to allow for mustering of livestock	Not Agreed
16		Not directly take any water from any water bore, pump or other water infrastructure on the pastoral lease without the pastoral leaseholder's prior written consent	Not pressed by Objector
17		Construct and maintain water diversion culverts, and/or other water course diversion infrastructure on the pastoral lease as directed by the pastoral leaseholder	Not Agreed
18		In the event of a livestock strike, notify the pastoral leaseholder within 24 hours	Agreed
19		maintain insurance policies including but not limited to, broadform public liability for a minimum of $20,000,000, relevant statutory workers compensation insurances, comprehensive motor vehicle, plant and equipment and fleet insurances, as well as any other insurances required by law with such insurance policies to be extended to cover sub-licencees, agents, contractors and consultants	Not Agreed

SCHEDULE 2

BEFORE THE WARDEN
AT PERTH

Applications for Mining Leases 28/400 and 28/401
Objections 569539 and 617255

BETWEEN:

AC MINERALS PTY LTD

Applicant

and

COWARNA DOWNS PTY LTD Objector

APPLICANT'S ALTERNATIVE WORDING OF PROPOSED CONDITIONS 8, 10, 11, 13, AND 15
PURSUANT TO THE ORDERS OF WARDEN MCPHEE ON 25 JULY 2022

Date of Document: 25 July 2022

Filed on behalf of: The Applicant

Date of Filing: 25 July 2022

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At the hearing on 25 July 2022, the Applicant made submissions that each of Proposed Conditions 7, 8, 10, 11, 13, 15, and 17 advanced by the Objector were unnecessary and therefore unreasonable.

Only if the Warden considered, contrary to the Applicant's primary position, that some form of condition was reasonable and appropriate (which is denied), the following alternative wording was provided by the Applicant in respect of Proposed Conditions 8, 10, 11, 13, and 15.

No alternative wording is provided in respect of Proposed Conditions 7 and 17.
The purpose of this document is to provide in electronic form the alternative wording that was provided in oral submissions and is provided subject to the primary position advanced by the Applicant.

No.	Objector's Proposed Conditions	Applicant's Alternate Wording
7	Maintain pastoral access roads on the pastoral lease that are used by the holder, at the holder's cost, to the satisfaction of the pastoral leaseholder	Not Applicable.
8	Comply with any reasonable precautions which the pastoral leaseholder may impose against the spread of any disease or noxious weed or vermin on the pastoral lease	The lessee to take reasonable precautions against the spread of any disease or noxious weed or vermin on the mining lease in accordance with DMIRS approvals.
10	Take all reasonable precautions consistent with mining operations to minimise soil erosion on the pastoral lease	Subject to the lessee being able to optimally conduct mining operations on the mining lease, the lessee to take reasonable precautions to minimise soil erosion in accordance with DMIRS approvals.

No.	Objector's Proposed Conditions	Applicant's Alternate Wording
11	Keep all drill holes, costeans, trenches, excavations, shafts and other workings on the pastoral lease secure and safe and properly maintained and, where necessary, fenced	The lessee to keep all drill holes, costeans, trenches, excavations, shafts and other workings on the mining lease safe in accordance with DMIRS approvals.
13	Install and maintain new and existing fencing to protect station livestock from any hazards on the pastoral lease such as dumps, tailings dams, open pits, water storage dams and the like, and install and maintain cattle grids at agreed points along such fencing	The lessee to take reasonable steps to protect livestock from mining operations on the mining lease.
15	At the request of the pastoral leaseholder, with reasonable notice, temporarily suspend operations on roads as necessary to allow for mustering of livestock	At the request of the pastoral leaseholder, with reasonable notice, and if practicable so as not to impede mining operations, temporarily suspend operations on roads for a singular period of no more than 2 hours to allow for mustering of livestock.
17	Construct and maintain water diversion culverts, and/or other water course diversion infrastructure on the pastoral lease as directed by the pastoral leaseholder	Not Applicable.

SCHEDULE 3

BEFORE THE WARDEN
AT PERTH

Applications for Mining Leases 28/400 and 28/401
Objections 569539 and 617255

BETWEEN:

AC MINERALS PTY LTD

Applicant

and

COWARNA DOWNS PTY LTD Objector

FINAL ORDERS

Date of Document: 22 July 2022

Filed on behalf of: The Applicant

Date of Filing: 22 July 2022

Prepared by:
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Upon hearing from counsel for the Applicant, Mr Masson, and counsel for the Objector Mr Russell, it be determined that the Application for M28/401, be recommended for grant by the Minister subject to the following conditions:

No.	Recommended Conditions
1	DMIRS Standard Conditions/Endorsements as set out in the Draft Tenement Endorsement and Conditions Extract attached hereto (the **Standard Conditions**) as Annexure A.
2	Take all reasonable steps consistent with mining operations to minimise interference with the holder of the underlying pastoral lease's pastoral conditions and to minimise disturbance to stock, vegetation, water sources, water courses and the land within the underlying pastoral lease
3	Consult with the pastoral leaseholder concerning the most appropriate access and haulage routes to mining areas and the establishment of new roads and tracks
4	Immediately, upon becoming aware of it, report in writing to the holder of the pastoral lease any damage caused to pastoral improvements on the pastoral lease
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

No.	Recommended Conditions
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
12	Repair any fencing on the pastoral lease damaged by the holder or its employees, agents or contractors, and not to make any breaks in any fences without prior consultation with pastoral leaseholder, and ensure that gates effective to keep stock in or out as the case may be, are installed at the holder's cost at any such breaks
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
18	In the event of a livestock strike, notify the pastoral leaseholder within 24 hours
[redacted]	[redacted]

**Note: For ease of reference within these reasons, the final conditions recommended to be applied have not been renumbered.

Annexure A

Department's
Schedule of Endorsements/ Conditions
Mining Lease 28/401

	ENDORSEMENTS
1	The Lessee's attention is drawn to the provisions of the Aboriginal Heritage Act 1972 and any Regulations thereunder.
2	This mining lease authorises the mining of the land for all minerals as defined in Section 8 of the Mining Act 1978 with the exception of uranium ore.
3	The Lessee'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.
4	**In respect to Water Resource Management Areas (WRMA) the following endorsements apply:** • 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
5	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.
6	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.
7	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).
8	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.
9	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.
	In respect to Proclaimed Ground Water Areas the following endorsement applies:
10	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.
	CONDITIONS
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.
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.
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.
4	The Lessee making verbal or written contact with the holder of any underlying pastoral or grazing lease within a reasonable time prior to undertaking airborne geophysical surveys or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.
5	The Lessee or transferee, as the case may be, shall within thirty (30) days of receiving written notification of:- • the grant of the Lease; or • registration of a transfer introducing a new Lessee; advise, by registered post, the holder of any underlying pastoral or grazing lease details of the grant or transfer.
6	The lessee submitting a plan of proposed operations and measures to safeguard the environment to the Executive Director, Resource and Environmental Compliance, Department of Mines, Industry Regulation and Safety for their assessment and written approval prior to commencing any developmental or productive mining or construction activity.
7	Mining on any road, road verge or road reserve being confined to below a depth of 15 meters from the natural surface.

* Note: The Departmental conditions for M28/400 were identical (save for naming particulars) to those suggested for M28/401 and are not reproduced.