
JURISDICTION : MINING WARDEN

LOCATION : PERTH

CITATION : BLUE RIBBON MINES PTY LTD V ROY
HILL INFRASTRUCTURE PTY LTD AND
ORS [2022] WAMW 3

CORAM : WARDEN T W McPHEE

HEARD : 2 December 2021, 28 January 2022

DELIVERED : 3 February 2022

FILE NO/S : Fifth Objector's Application for referral of a case
stated pursuant to section 146 of the Act.

TENEMENT NO/S : Exploration Licence 45/5041

BETWEEN : **BLUE RIBBON MINES PTY LTD**
ACN 133 208 581
(Applicant)

AND

ROY HILL INFRASTRUCTURE PTY LTD
ACN 130 249 633
(First Objector)

AND

THE PILBARA INFRASTRUCTURE PTY LTD
ACN 103 096 340
(Second Objector)

AND

FMG MAGNETITE PTY LTD

ACN 125 124 405

(Third Objector)

AND

PILBARA GAS PIPELINE PTY LTD

ACN 163 526 207

(Fourth Objector)

AND

BHP MINERALS PTY LTD & ORD

ACN 008 694 782

(Fifth Objector)

*Catchwords: Application for a Case Stated, Absence of a Contradictor,
Excision Condition, No Mining Condition, Hardiman
Principle*

Legislation:

- *Mining Act 1981* (WA) (the Act) s. 63AA, 146.
- *Mining Regulations 1981* (WA) (the Regulations) regulation 68.

Result: *Application Granted.*

Representation:

Counsel:

Applicant	:	Mr Kavenagh
First Objector	:	Mr Gentilli
Second Objector	:	Mr Masson
Third Objector	:	Mr Masson
Fourth Objector	:	Mr Masson
Fifth Objector	:	Mr S K Dharmananda SC with Ms Nadilo

Department of Mines
Industry Regulation
and Safety
(by invitation of the
Warden)

:	Mr Shuy
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Solicitors:

Applicant	:	Kavenagh Legal
First Objector	:	Jackson MacDonald
Second Objector	:	Ensign Legal
Third Objector	:	Ensign Legal
Fourth Objector	:	Ensign Legal
Fifth Objector	:	King & Wood Mallesons

Department of Mines
Industry Regulation
and Safety
(by invitation of the
Warden)

:	State Solicitor's Office
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Cases referred to:

- ***Hawks & Anor v Shadmar Pty Ltd & Anor*** [2004] WASC 252 (26 November 2004)
- ***R v Australian Broadcasting Tribunal; Ex parte Hardiman*** [1980] HCA 13; (1980) 144 CLR 13
- ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd and Another*** [2007] 34 WAR 403
- ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153 at [97]-[98]
- ***Commissioner Of State Revenue v Abbotts Exploration Pty Ltd*** [2014] WASCA 211 (14 November 2014)
- ***Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd*** (2007) 34 WAR 403
- ***Goldrange Pty Ltd v Western Australian Planning Commission*** [2018] WASC 350 (14 November 2018)
- ***Cable Sands (WA) Pty Ltd and Charles Chodorowski (friends of Giblett)*** WA Warden's Court, Warden Calder, 6 March 1998, Vol 13 Folio 6, 14-15
- ***Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd and Ors*** [2021] WAMW 20
- ***Forrest & Forrest Pty Ltd v Wilson*** (2017) 262 CLR 510

Introduction

- 1 The parties in this matter jointly seek orders pursuant to section 146 of the Act, to refer a case stated to the Supreme Court on a number of questions of law.
- 2 The Application was formally brought by the Fifth Objector, and is dated the 26th of November 2021 (the Application). I heard submissions on the Application on 2 December 2021 and 28 January 2022.
- 3 I will grant the Application; however, subject to the condition that I will hear from the parties on the final form of the case stated before I transmit it.
- 4 I will also hear the parties in the event there is a view that there ought be any other consequential orders.
- 5 As a consequence of my granting the application for a case stated, I will vacate the currently listed hearing dates in late February 2022.
- 6 My reasons for coming (reluctantly) to the view I do, are set out below.

Background & Minutes of Programming Directions

- 7 This dispute concerns the use of so called Minutes of Programing Directions (MOPDs).
- 8 It is not in dispute that MOPDs are a mechanism commonly utilized by industry participants and the Department of Mines Industry Regulation and Safety (the Department), to resolve possible conflicts between tenement applicants and parties with objections.
- 9 A copy of an MOPD is attached to these reasons as Schedule 1 as an example.

- 10 If regard is had to the content of the MOPD, it will be immediately realized the use for such a document. In short terms, it records an agreement between an applicant and an objector, whereby an applicant will be able to be (subject to Ministerial discretion) granted a tenement, though with a degree of restriction.
- 11 Those restrictions, classically, arise to ensure the protection of infrastructure of the existing tenement holder (the objector), or indeed the protection of resources on an existing tenement.
- 12 The use of MOPDs historically, has been widespread within the industry, facilitated by the Department and given the consent involved by all parties, has been largely uncontroversial to date.
- 13 However, following the decision in *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, and the clear statement therein as to the need for strict compliance with the jurisdictional requirements as determined in that case, it appears the Department (quite properly in my view) has engaged in a process of review of existing processes to ensure sanctity of the tenement grants.
- 14 Relevantly for the matter before me, that review appears to have led to a concern being expressed by the Department as to the lawfulness of an MOPD condition which seeks the grant of a license subject to either of:
- a. An excision from the application of a part of a block over which the application is made (the Excision Condition); or,
 - b. A condition precluding mining on a certain part or part of the license (the No Mining Condition).
- 15 The rationale behind the use of those two types of condition is readily apparent in light of my comments above, and they simply act to preclude

an applicant from conducting mining related operations in areas considered sensitive to an existing tenement holder or objector.

- 16 At its simplest, the MOPD provides an efficient mechanism to address a circumstance, where an applicant, for example, has applied for the grant of an exploration license over land, through which a railroad has been established by an objector pursuant to a miscellaneous licence. The objector may have no objection to the exploration license, save as might be required to ensure that there is no possible interference in the operation of the railway.
- 17 In the example referred to above, the Excision and No Mining Conditions provided (at least until recently) an efficient mechanism to simply exclude that sensitive ground from the relevant application, allowing it to proceed expeditiously.
- 18 Another important aspect of the MOPD process, is that in the event there is disagreement from either the Warden or the Department as to the nature of the conditions agreed, the matter would return back to the Warden for consideration of that dispute, and conduct a hearing if necessary.
- 19 That way, it would never be the case that the parties would have imposed upon them, the grant of a license which was inconsistent with the conditions which had been agreed between them, without the opportunity to be heard.
- 20 Failing agreement, the application and objection would have to be the subject of the standard processes of hearing, determination and recommendation (depending on the precise nature of the application). That necessarily, is a longer process than that flowing from the use of the MOPD.
- 21 In the matter before me, the Department has appeared to express the view to the Parties that the MOPD (in particular in respect of the Excision Condition and the No Mining Condition) might not be able to be lawfully supported.

- 22 As a result of the intervention of the Department at that time, a dispute arose as to the capacity of the Department to intervene in the grant process in such a way, which culminated in the decision of Warden Maughan in *Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd and Ors* [2021] WAMW 20. That decision contains some of the more detailed background to the dispute before me.
- 23 That decision resulted in the provision of a request from the learned Warden to the Department for a report to respond to certain queries sent by way of a request for a report pursuant to regulation 68 of the Regulations.
- 24 That request appeared to have been directed toward equipping the Warden with the information required to enable a view to be taken on the legal questions which had by then crystalized, into a series of preliminary legal questions which had been listed before the Warden as a preliminary issue to be determined, on dates listed for that purpose in late February 2022.
- 25 The report in response from the Department, dated 7 January 2022 (the Report), was provided to the Warden's chambers on that day.
- 26 The Report was also provided to the parties in this matter.

The Application

- 27 On the 2nd of December, I heard a first mention of Application filed by the Fifth Objector dated 26 November 2021.
- 28 In substance the Application sought orders that dates programmed, on 22 & 23 February 2022 for the hearing to determine a series of questions of a legal nature as preliminary issues, be vacated, and that those same questions be referred to the Supreme Court as a case stated pursuant to section 146 of the Act.
- 29 The Fifth Objector seeks orders by way of an Application dated 26 November 2021 supported by the affidavit of David Stewart Graham of that

same date and the affidavit of Sarah Anne Grace McCauley also of the same date, that those February dates be vacated, and that the questions that had been listed for the determination of a preliminary issue be referred to the Supreme Court.

- 30 Upon receipt of the Application the matter was listed for directions before me on 2 December 2021.
- 31 On 1 December 2021 I received further submissions from the Fifth Objector, seeking to argue the substantive Application on 2 December 2021.
- 32 I did not receive any submissions from any other party. At the hearing on the 2nd of December 2021, I was informed that the other Objectors closed ranks around the Fifth Objector, and the tenement applicant did not oppose the course in question.
- 33 The reason for the listing on 2 December 2021, was that in the circumstances I had come to the view that it was appropriate to give the parties the capacity to be heard on a question of whether or not the Department, and or the Minister responsible for the administration of the relevant Act, be given the opportunity to be heard if they so wished, on the legal issues in question.
- 34 The reason I was of that view, was that at that time it was not clear to me what the attitude of the Department was.
- 35 In this respect I note from the affidavit of Ms. McCauley that there is included in it an annexure (ASGM10) being correspondence that appears to have been sent by the State Solicitor's Office acting on behalf of the Department in relation to this matter, in which a number of questions were asked. This is a letter dated 24 March 2021.

36 At the hearing on the 2nd of December 2021, counsel appearing for the Department at my invitation, indicated that he had not received a response to that correspondence. The Affidavit material however, demonstrated what could only be described as a vigorous response by the Objectors, which it appears however, may only have been sent to the Department, not the State Solicitor's Office.

37 It is apparent that the communication protocols between the parties and the Department may have caused a degree of confusion and delay in the matter.

38 It was in that state that the matter appeared before me on 2 December 2021.

39 Before me it was said in submissions by the Fifth Objector, that it would serve the Minister, if the matter was referred to the Supreme Court.

40 I take that to be a concession that the Minister has an interest in the issues in dispute. In my view that simply must be so.

41 The Fifth Objector, in their written submissions at that time, appeared to express a desire to reserve a capacity to make submissions on the issue of whether the Minister should be served if I did not refer to the matter to the Supreme Court.

42 At the hearing on 2 December, I advised that if there was to be a different position taken as to whether the Minister should be served at the hearing of reserved questions before the Warden in the event I declined to refer the case stated, then I was desirous of that position being known.

43 I indicated to Senior Counsel appearing for the Fifth Objector, that that was the reason why I had called the matter for directions on 2 December, and tentatively listed the hearing of the Applications for 20 December.

44 Senior Counsel for the Fifth Objector sought to proceed to argue the BHP Application on 2 December 2021.

- 45 As indicated, the Applications sought orders to refer the reserved questions that His Honour Warden Maughan had referred to the hearing of a preliminary issue, to instead be referred to the Supreme Court.
- 46 In very broad terms the questions are those set out in a document titled the Interlocutory Application filed by Fifth Objector in particular, Annexure B.
- 47 Annexure B contains what might be described as a broad chronology and then refers to the preliminary hearing questions as questions reserved at paragraph 31 of that document and are as follows:
- a. Does the Minister have power under the Mining Act to excise areas the subject of a miscellaneous licence (eg. L45/332) from the grant of an application for an exploration licence (eg. E45/5041)?
 - b. Does the Minister have power to excise private land (eg. the land the subject of General Lease 1154279 (erroneously referred to as 1154278)) from the grant of an application for an exploration license (eg. E45/5041)?
 - c. Does the Minister have power to impose conditions which prohibit mining or exploration activities upon the grant of an exploration licence (eg. E45/5041) in respect of any area overlapping a miscellaneous license (eg. L1SA (also known as AL 70/1), L4SA (also known as AL70/4), L45/318, L45/319 and L45/332) or private land (eg. General Lease 1154279), or areas adjacent to the overlapping areas?
 - d. Does the Minister have power to impose conditions which:
 - i. prohibit certain actions unless consent is obtained from the Minister or other parties, such as proposed at paragraphs 3(a) and 3(d) of the minute of programming directions lodged in respect of objection 515714 and at paragraphs 6(c), 6(d), 6(f)

and 6(g) of the minute of programming directions lodged in respect of objection 517470), including where any such consent is to be provided as part of a consultation process;

or

- ii. require the applicant to comply with conditions imposed in the future by the Minister, such as proposed at paragraph 3(g) of the minute of programming directions lodged in respect of objection 515714 and at paragraph 6(i) of the minute of programming directions lodged in respect of objection 517470),

48 In paragraph 15 of the substantive submissions filed on 1 December 2021, the BHP parties raised 4 points which were said to be in favor of the referral of the matter as a case stated. They were:

- a. The questions of law are significant;
- b. Second, the questions of law are not answered by the legislation or existing precedent;
- c. The Supreme Court's opinion cannot be set aside; and,
- d. The Supreme Court opinion has precedential value.

49 As indicated the reserved questions are currently listed for determination before a Warden on 22 and 23 of February 2022.

50 I did not intend initially, to sit on the 2nd of December 2021 to make a determination as to that referral issue, however the Fifth Objector pressed the Application (with the support of all of the other parties), and no adjournment was sought by any other participant.

- 51 Considering the matter on the 2nd of December 2021, and after hearing from the parties, I adjourned the Application to 28 January 2021. I did so for largely two reasons.
- 52 The first was that there was a related matter, Volt Lithium, with similar legal complications. The objecting parties in the Volt Lithium matter were common with those in this matter.
- 53 Immediately prior to the hearing on 2 December 2021 however, an additional difficulty developed with the Volt Lithium matter, which need not be gone into. Nevertheless, it was apparent that my original intent to program this matter and the Volt Lithium matter together given the commonality of the primary legal issues faced, could not actually occur.
- 54 A delay was appropriate to enable the parties to clarify the position of the Volt Lithium matter.
- 55 Further, in this matter, as indicated, the Department had been asked to provide the Report.
- 56 As at 2 December 2021, the Report had not been provided. I came to the view that the content of that report might be of moment in respect of the Application, given the difficulties that all participants were having in clearly understanding the issues which had developed.
- 57 The submissions of the Fifth Objector referred to the decision in ***Cable Sands (WA) Pty Ltd and Charles Chodorowski (friends of Giblett)*** WA Warden's Court, Warden Calder, 6 March 1998, Vol 13 Folio 6, 14-15, referring to the exercise of the power under section 146 of the Act:
- a. " . . . *should only be exercised where there is a significant question of law the answer to which is not contained clearly within the relevant legislation or within relevant judicial precedent. In respect of judicial precedent a factor which should be taken into account is whether or not there are other persuasive judicial authorities which express or suggest a view which is*

contrary to or inconsistent with the ratio decidendi of the decisions which set out the current state of the law.”

- 58 With respect to the learned Warden, I accept the above as a statement of relevant principle.
- 59 At the hearing on the 2nd of December 2021, I expressed to the parties what might be fairly described as a reluctance to engage the section 146 mechanism, however I did not determine the issue on that day, pending, principally, the provision of the Report.
- 60 Accordingly, the matter was adjourned and came back before me on the 28th of January 2022. At the commencement of that hearing, I reiterated my reluctance.
- 61 In the intervening period, the Department had provided the Report on the matter.
- 62 The Report does not provide a direct clear response to the queries raised. Viewed fairly, the Report in essence seeks to preserve the capacity of the Minister (quite properly) to consider the relevant decision required to be made at the time following the proper application of the processes of the Act.
- 63 Consequently however, there was an absence of detail as to the basis for the legal view expressed in the Report as to the legal doubts expressed by Department as to the lawfulness of an Excision Condition, and the No Mining Condition generally.
- 64 On the 27th of January 2020, the 5th Objector filed a further Affidavit, being that of Mr James Wang dated 27 January 2022. That Affidavit contained some recent correspondence between the Fifth Objector and the Department.

- 65 On 28 January 2022, Senior Counsel for the Fifth Objector pressed the Application for referral of the preliminary questions to the Supreme Court, without repeating the substance of the submissions made on the 2nd of December.
- 66 Senior Counsel for the Fifth Objector, with whom all other parties effectively joined, pressed in particular, the point that in light of the position taken by the Department in the Report (and the correspondence attached to the Affidavit of Mr Wang), the absence of a contradictor in the matter was such as to compel the referral pursuant to section 146 of the Act of the legal issues previously identified.
- 67 I will say at this point that I would ordinarily, not be persuaded that a matter such as this should be referred to the Supreme Court as a case stated.
- 68 Whilst there is no doubt that the Supreme Court has jurisdiction to hear the matter, in my view there is no compelling legal reason why it ought be referred, save in this case for the absence of a contradictor.
- 69 It had been my expectation in the genesis of this matter and my preliminary consideration of the Application, that the Department, having raised the discreet legal question, would be prepared to take the role of a contradictor on the legal issues to be determined.
- 70 As it transpired, that expectation was misconceived.
- 71 The reserved questions appear on their face to be discreet questions of law, as to the construction of the relevant Act and the determination of the powers of the Minister in the context of the relevant application.
- 72 In this respect, whilst it may be accepted that the consequences of a determination will be important (or in the language of Warden Calder, “*significant*”), as they are in the resolution of any dispute involving

statutory interpretation, they are questions which could be determined by me, were I assisted with fulsome submissions.

- 73 It was said to me, on this Application which had been pressed on for hearing on 2 December 2021, that there is no authority on the point in question. I accept that submission.
- 74 That submission however does not mean that the point is incapable of being resolved in this jurisdiction.
- 75 Further, it was not put to me that the determination of the questions would require me to elect one authority or line of reasoning over another, ie, where there was a conflict in what might be said to have been the accepted approach, that would have been of great weight. That however, is not the case before me.
- 76 It is also said there is no clear answer in the legislation, and here I will demur; that conclusion requires a more detailed consideration of the relevant provisions than was provided to me in this Application or at the hearings of either 2 December 2021 or 28 January 2022.
- 77 However, on this point, on 2 December 2021, I asked Senior Counsel for the Fifth Objector whether the Act was silent on the Minister's powers in respect of the relevant questions. The answer was no.
- 78 At the hearing on the 28th of January 2022, Senior Counsel for the Fifth Objector indicated that it was not clear to the parties in the matter, as to the basis for the position taken by the Department.
- 79 Senior Counsel for the Fifth Objector referred to the Affidavit of Mr Wang, as a basis for indicating that the Department was not being as forthcoming as it could be in respect of the legal position taken. Given the response provided by the solicitors for the Department, that observation has force.

80 At the same hearing, counsel appearing for the Department provided a brief overview of the position which might be advanced.

81 Based on the oral submission made, the position appears to be that there is a concern that the process of excision of part of a block (for the purposes of sections 57(2c – 2f) of the Act), may not be permissible given the drafting of the Act, and in particular the effect those sections, referring to a narrow set of circumstances where the Minister is empowered to grant a licence over part of a block, possibly being determined to be the only mechanism by which excision may occur.

82 I note also however that section 63AA of the Act, seems on the face of it, to provide an additional basis for a broader discretion to impose conditions. I raised this with counsel for the Department on 28 January 2022, and the response was (as I understood it) that that provision related to preventing injury to land. That view is consistent with the heading of the section. However, I note in particular the following emphasized words in section 63AA(1):

- a. *“On the granting of an exploration licence, or at any subsequent time, the Minister may impose on the holder of the licence reasonable conditions for the purpose of preventing or reducing, or making good, injury to the land in respect of which the licence is sought or was granted, **or injury to anything on or below the natural surface of that land** or consequential damage to any other land.”*

83 On the face of the provision, I must say it seems to me on an initial consideration that the effect of section 63AA is potentially broader than a restriction to simply injury to the land. It appears to contemplate conditions preventing or reducing injury to things on or below the natural surface of the land, which may well include established infrastructure (being a thing on the land), or mineral resources (being a thing below the natural surface of the land).

- 84 I hasten to add though, that my view immediately above is a preliminary view, as I have not had the benefit of a complete argument on the question.
- 85 Relevantly though, it appears to me that the legal issue in question is one of the proper construction of sections 57 and 63AA of the Act, applying the accepted approach to statutory interpretation (see for example, *Goldrange Pty Ltd v Western Australian Planning Commission* [2018] WASC 350 (14 November 2018) which provided a (with respect) helpful summary of the approach to be taken on questions of statutory construction; per Quinlan CJ at [60 – 61])), and of course, keeping in mind the overarching purpose of the provisions of the Act, as discussed for example in *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* (2007) 34 WAR 403 at per Pullin JA at [21]-[25] and *Commissioner Of State Revenue v Abbotts Exploration Pty Ltd* [2014] WASCA 211 (14 November 2014) (Abbotts) per Buss P from [56].
- 86 Notwithstanding the events of the 28th of January 2022, given the position the Department takes, I am really none the wiser (save for my own supposition referred to above) as to how the detailed argument in support of the Department’s legal position is to be framed in the context of the Act.
- 87 Given the gravity of the consequences of the legal determination which does need to be made on this issue, I do not consider it is appropriate to conclude at this juncture in the absence of detailed submissions, as to the strength or otherwise of the assertions of difficulty made, save to indicate that there does not appear to me at least, to be a clear prohibition on the utilization of the Excision Condition, or the No Mining Condition.
- 88 That, it seems to me at the least, makes the legal position of the interpretation of that issue somewhat different to the starker jurisdictional question dealt with in *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510.

- 89 It follows that in my view it is not clear to me at all, that there is no answer to the questions sought to be answered which might fall from a detailed consideration of the relevant provisions following fulsome submissions on the matter.
- 90 On the third point raised in support of the Application (which in my view is effectively the same as the fourth point raised); there is no doubt the Supreme Court's (or Court of Appeal as the case may be) opinion on the legal questions would be binding.
- 91 What is not immediately clear to me however is whether there is a significant hazard which would follow a determination by the Warden (either me or any other Warden) on the reserved questions, following which a recommendation containing that view as to the extent of the Minister's powers in respect of the Excision Condition and or the No Mining Condition, would be transmitted to the Minister.
- 92 The hazard said by the objecting parties to exist, is based on a hypothetical view as to the predicted course that the Minister may choose to take in the future, and is not one, I think, which should move me to, in effect, skip the step of the Minister considering the Warden's recommendation in the ordinary course.
- 93 Further, I do not consider that legal novelty alone is a justification or sufficient basis to refer a matter pursuant to section 146 of the Act, which is otherwise squarely within the Warden's jurisdiction and able to be the subject of fulsome submissions.
- 94 It has been said on many occasions that that Warden has a filtering and management role (*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]) in respect of matters

moving through the jurisdiction, and in my view I ought only depart from that principle (in respect of this Application) if I considered that there was an compelling or exceptional reason to do so.

- 95 Should any of the parties be aggrieved by the nature of the decision made by the Warden, or recommendation given, or any subsequent conduct by the Minister, appropriate other steps would always remain open to the parties, in particular on what may be fairly described as strictly legal questions.
- 96 On the question of the urgency of the matter, it was put to me that the urgency was such as to warrant an immediate referral. No evidence was put before me to indicate that a hearing on those questions might be available prior to the dates currently listed in February before this Court.
- 97 The Objecting parties sought to take the course of seeking to ventilate the preliminary issue at the hearing on 2 December 2021. However, on the 28th of January 2022, Senior Counsel for the Fifth Objector made a firm submission that if the Application to refer was not granted, then the hearing dates listed in late February 2022 would have to be deferred (Senior Counsel with a somewhat poetic flourish urged me: *“If you do not refer, you must defer”*), given what was said to be the view expressed in the Report as to the No Mining Condition.
- 98 That view was said to require in response, the marshalling of evidence by the Objectors, a requirement which had not been appreciated by the parties prior to the provision of the Report. I accept the Objectors submissions in this respect.
- 99 In respect of the question of urgency though, it follows, that while I accept there is a strong desire on the part of the Objectors to advance the determination of the legal issue in question for what might be described as the need for broader commercial and legal certainty, in particular the

question as to the lawfulness of the Excision Condition and the No Mining Condition, I do not consider there is specific urgency displayed in the specific case before me. It is the applicant in question (Blue Ribbon) which is suffering prejudice by the delay, not the objecting parties.

100 It is submitted however, and I accept, that there an extremely urgent need to address the current impasse which has been reached between the Department and industry participants in respect of the use of MOPDs in a broad sense, and the capacity to utilize the mechanism of the Excision Condition and the No Mining Condition specifically.

101 At this time there appears to be a difficulty within the Department as to the future use of those possible conditions which appears to be insurmountable, as a result of seemingly something of a paralysis as to how to advance the issue to determination and resolution.

102 In this respect, and to perhaps highlight the apparent difficulty faced by the Department, the Report refers to possible future legislative intervention to address the impasse.

103 In my view, it is entirely possible that there might be future legislative intervention, however that does not address the difficulty faced by the parties in this matter now.

104 Certainly in my view, the nebulous notion of a possible legislative intervention at some unknown point in the future cannot inform the manner in which the dispute before me is being addressed.

105 The reasons above are directed to address the arguments raised in the Application in support of the referral of a case stated, largely on 2 December 2021.

106 As a result of a consideration of them, I was not persuaded by the bulk of the arguments raised prior to 28 January 2022, that there was a basis for a referral pursuant to section 146 of the Act.

107 That however, does not address the principle issue raised on the 28th of January 2022, namely the issue of the absence of a contradictor.

The Position of the Department and the Need for a Contradictor on Serious Questions of Law

108 On 28 January 2022, the Department, through counsel, expressed a view that it could not properly be a fulsome contradictor in an argument before me on the legal questions involved.

109 In the Affidavit of Mr Wang, the Department through correspondence from solicitors, also expressed a view that was decidedly non-committal about its possible participation in any future Supreme Court proceeding.

110 At the hearing, when directly queried on this position, counsel for the Department indicated that it would likely be the Department's view that it could not appear and participate fully in the dispute, as to do so would involve a degree of partisanship which would offend the so called *Hardiman* principle, falling from *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13.

111 Before me on the 28th of January 2022, in my view the strongest submission of the Fifth Objector in support of the Application was that the legal questions ought to be referred principally as a result of the unwillingness of the Department to take the necessary role as a contradictor on an important legal construction issue.

112 In my view the absence of a contradictor for this issue is determinative in the particular context of the position faced, and amounts to the compelling or exceptional circumstances which I consider are necessary to be shown

to warrant a referral pursuant to section 146 of the Act. I provide further reasons for this view immediately below.

113 I will add that I do not agree with the submission that in the very particular circumstances of this case, that the *Hardiman* principle would preclude the Department or the Minister, from presenting fulsome submissions on their view of the extent of the relevant legal power to action the Excision Condition or the No Mining Condition either before me, or before the Supreme Court.

114 A possible solution to the difficulty of there being no contradictor, was suggested at the 28 January 2022 hearing by the parties (and seemingly counsel for the Department), that the process of judicial review inevitably involved the Attorney General appearing as an amicus. That, it was said, would occur here, following a referral pursuant to section 146 of the Act.

115 I accept that submission as far as it goes. However, the Application before me does not seek to engage a process of Judicial review. It is not immediately clear to me why the reliance placed on the practice in respect of Judicial review applications, is entirely referable to the circumstances of a case stated pursuant to section 146 of the Act, as to the extent of the legal powers of the Minister under the Act.

116 In this respect, I will add that counsel for the Department advised that the Attorney's view on the relevant questions of law, was not currently known.

117 The position arrived at is, with respect to all involved, a most unsatisfactory state of affairs.

118 The Department appears to have taken a legal view which has resulted in the manifestation of this dispute. There can be no doubt that view is held in good faith, however the fact remains the intervention has disrupted an accepted status quo between the industry participants and the Department generally, and completely derailed this matter specifically.

- 119 As the position is presented to me though, the Department is not prepared to advance that legal view to a vigorous contest and resultant determination in this jurisdiction.
- 120 As indicated above, it was said by counsel appearing for the Department that its participation in the conduct of the preliminary legal matters might contravene the principle identified by the High Court in *Hardiman*.
- 121 The relevant principle to which counsel was referring was the observation made by the High Court that if a decisionmaker becomes a protagonist in a proceeding to challenge the validity of one of its decisions and actively engages in the defence of its decision, a risk of endangering its impartiality might arise, and lead to an issue of apprehended bias on its part.
- 122 Having considered the matter, in my view the concerns expressed in this respect, in the very particular circumstances of this case as to the effect of the *Hariman* principle, are somewhat overstated.
- 123 Here, there is on foot a purely legal dispute, as to the extent of the Minister's powers under the Act to grant a license between commercial parties which are otherwise in complete agreement. Precisely how any apprehended bias arises from Departmental participation in a hearing as the legal issues, is in not immediately clear to me.
- 124 In the particular circumstances of this case, were a Warden to rule on the legal questions following a fulsome argument, and provide a recommendation to the Minister, the Minister would have the benefit of that determination on the legal question.
- 125 Of course, the Minister may or may not follow the recommendation. In the event the parties disputed the outcome of the Ministers decision on the application of law, then there are avenues open to them.

- 126 In such a circumstance, there would be no need for any suggestion of apprehended bias, as the position being advanced by any aggrieved party would simply be that the Minister, in either following or declining to follow the legal view expressed by the Warden (as the case may be), had simply made an error of law.
- 127 It follows, in the very particular circumstances of this case, that I do not consider that the *Hardiman* principle precludes the Department or the Minister's involvement in the legal argument in question, in a fulsome manner to assist the Warden formulate the appropriate recommendation. .
- 128 That view however, does not assist me in a circumstance where the Department has indicated it would not engage in a fulsome manner in this jurisdiction. The Department is not a party to this matter, and no party seeks them to be formally joined. It is a most vexing conundrum.
- 129 It was for this reason that counsel appearing for the Department was pressed, (perhaps somewhat sternly), on the issue as to whether the Department would take the role as a contradictor in the matter. The answer provided, as I understood it and shorn of qualifications, was no.
- 130 Thus I am left in a position where the Department it seems, is unwilling to be a contradictor in the dispute to determine what the parties and the Department consider to be an important question of statutory construction impacting this and many other matters.
- 131 I should mention for completeness that that leaves only the applicant in the matter (Blue Ribbon) as the only other possible contradictor.
- 132 The applicant is a reluctant party to the dispute currently being ventilated. That is entirely unsurprising, given their position I infer, is that they had reached a consent agreement with the objectors which they might have anticipated would proceed without hindrance, which is now seemingly imperiled by the Department's intervention.

133 That is important in my view for three reasons:

- a. It means that, in real terms and given the Department's stated view, there is currently no contradictor to the legal position being advanced by the Objectors, as to the manner in which the important relevant legal controversy ought be determined;

and,
- b. It must be accepted that it is the understandable intervention by the Department which has triggered this dispute;

and,
- c. It is difficult to envisage a situation whereby the process of the MOPD, which is an efficient consent mechanism utilized by industry participants to address objections generally, will ever come before a Warden with two opposing parties prepared to conduct the fulsome argument required.

134 The commercial imperative that Blue Ribbon is no doubt under, would compel a conclusion that it has no interest in engaging in a pitched struggle with the objector's interests over the esoteric issue as to whether the Minister has the power inter alia to excise portions of land from its application, the doing of which is entirely supported by Blue Ribbon.

135 It is largely for these reasons that I sought to involve the Department in the hearings of 2 December 2021 and 28 January 2022.

136 That was undertaken in the expectation of crystallizing the Departmental or Ministerial position to the requisite degree to enable the ventilation and determination of the legal issue before me, without the need for a referral pursuant to section 146 of the Act.

- 137 As indicated above, on 28 January 2022, this position was fleshed out, with the parties and the Department indicating a largely uniform view that the neither the Department nor the Minister ought be heard in respect of the question of the relevant powers, before me, given I would then be required to give a recommendation to the Minister based on a question of extent of the Ministers powers.
- 138 Prior to that hearing on 28 January 2022, I sought an indication from the parties as to the desired outcome from the hearing. That is presumably what prompted the further Affidavit from Mr Wang. Save for the Report, I received nothing from the Department.
- 139 As I understood it from oral submission though, Counsel for the Department indicated the primary reason for the position being taken was that the Department was disinterested in the outcome and did not wish to be seen as partisan.
- 140 This, properly understood, in my view, was again a manifestation of the *Hardiman* principle.
- 141 I accept that the Department (and the Minister) is required to be disinterested in the matter in the sense of having no partisan view as to the success or failure of the particular application, and I further accept the need for great care to be taken by decision makers in accordance with the *Hardiman* principle.
- 142 As indicated above however, I do not understand the *Hardiman* principle to operate as a blanket exclusion upon all decision makers from participating in any dispute, at all times. In my view the position to be taken may be somewhat more nuanced than that, depending on the particular circumstances faced.
- 143 Being disinterested from the point of view of concern as to subsequent suggestions of apprehended bias, is in my view a different proposition to a

notion that the Department and the Minister are disinterested in the outcome of a dispute relating the extent of the Ministers powers, such as to mean that neither should be heard as to the extent of the Ministers powers under the Act.

- 144 The Department exists to assist the Minister in the exercise of those powers, and in my view, in the very particular circumstances of this case, there would be no infringement of the *Hardiman* principle for the Department or the Minister to participate fully in any legal dispute as to the interpretation of the Act on the question of the relevant powers.
- 145 Applying that view to the current scenario, hypothetically, had the Department (or Minister) participated in a hearing before a Warden and been unsuccessful in the sense the Warden had rejected the legal position advanced by the Department (or Minister), it seems to me that there would likely be a Judicial review avenue open on the relevant legal view informing the subsequent recommendation.
- 146 Alternatively, the Minister might exercise a discretion in a way which demonstrated a disagreement with the legal view of the Warden. Again, in such a circumstance, any party aggrieved by that decision would have an avenue open to it, which in no way relied upon any notion of apprehended bias, rather only on consideration of the appropriate approach to a novel question of law.
- 147 Further, once that question of law had been determined in a superior Court following the usual processes, it is difficult to see how a subsequent application of the by then settled principle by the Minister could involve a degree of apprehended bias; rather, if the Minister acted in contravention of an established principle, he would be simply making a decision where it would be said he made an error of law.

- 148 It follows that the *Hardiman* principle ought not, in my view, preclude Departmental or Ministerial involvement in a legal dispute as to the legal parameters of the Ministers legal powers on the grant of an Excision Condition, or a No Mining Condition, in this case.
- 149 As indicated above though, in the circumstances I face, that view I express does not assist me at this time.
- 150 Ultimately, what is relevant and important to me is that there is a need for a contradictor to the legal position advanced by the parties to the dispute. That dispute is delaying the determination of this (and many other) matters, and is of legal significance.
- 151 There is currently no contradictor, and the Department has declined the invitation to engage in a fulsome manner with the legal issue at large in this jurisdiction.
- 152 Given the importance of the matter, and the potential, wide reaching ramifications for MOPD matters currently under consideration, and indeed, matters which have been actioned already on the basis of the accepted (to date) status quo, it is my respectful view that there is an urgent need for a determination to be made.
- 153 In coming to a final view as to the appropriate course, I will add that I have given serious consideration to dismissing the Application and pressing on to issue a recommendation in the likely absence of the Department, and thereby any true contradictor.
- 154 However on reflection, in my view in due course, that approach would inevitably lead to an outcome where the matter returned to me, for the reasons touched upon in paragraph [18] of these reasons above.
- 155 The MOPD process is a mechanism to assist in the efficient administration of objections and has at its heart the notion that neither the Department nor

the Warden will impose a condition different to that agreed, without notice to the parties.

156 As a result, were I to simply issue a recommendation in the current circumstances consistent with the legal view of the objectors interests (assuming I was satisfied by them in the absence of a contest as to the appropriate construction), I have no doubt given the view expressed by the Department, that the recommendation would simply return to me in a manner largely identical to that which triggered the dispute before Warden Maughan.

157 Conversely, were I to accept the largely unarticulated position alluded to by the Department, I would be taking a course to alter the previously accepted status quo, potentially impacting many, many other matters, without the benefit of fulsome submissions on a strictly legal issue. That would almost certainly lead to error of some kind.

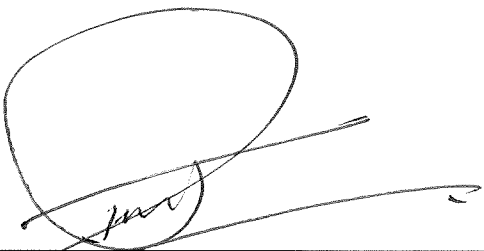
158 What is required therefore, is to break the existing impasse in a different way.

159 Whilst it is not entirely clear (to me at least) as to whom might take the mantle of the contradictor in the matter before the Supreme Court, I am content to express a view that a Supreme Court Judge hearing the case stated on the questions of law, has a greater capacity to compel the attendance of an appropriate contradictor than I do (at least on the state of the law as I understand it, and based on submissions made by all parties and the Department to me), sitting administratively as the warden of mines.

160 It follows, on balance, I have formed the view that taking that course referred to above at [153], in light of the Departmental reluctance to make the required legal arguments, would be counterproductive overall, and result in a longer delay in the determination of the important legal issues live in this matter and others.

- 161 That in turn will as a result of the accepted uncertainty which currently exists in respect of this issue generally, also impact upon many other matters.
- 162 Had the Department expressed a willingness to take the role of contradictor to advance the legal view it appears to be taking on the questions of the Excision Condition and the No Mining Condition, I would likely have dismissed the Application and heard the relevant arguments in late February.
- 163 Given it has not accepted the invitation to take that role, and I cannot see any other path whereby this matter may be efficiently moved forward, I have reluctantly formed the view that the circumstances are exceptional, and relevantly therefore warrant a referral pursuant to section 146 of the Act.
- 164 They are questions of law, which are significant in nature.
- 165 I will however hear the parties as to the final form of the case stated, prior to it being transmitted to the Principal Registrar pursuant to section 146(2) of the Act.
- 166 In this respect, I refer the parties to the decision in *Hawks & Anor v Shadmar Pty Ltd & Anor* [2004] WASC 252 (26 November 2004), per Le Miere J at [43] & [44].
- 167 It is my view the questions to be transmitted ought be framed in a manner to enable, insofar as possible, a clear and concise legal argument to be advanced for determination before the Supreme Court in as efficient a manner as possible.
- 168 Noting the content of the draft case stated provided by the Fifth Objector on 27 January 2022, I will hear the parties further as to what is considered to be the appropriate course as to the content of the documents to be

submitted as the case stated, and the clear identification of the documents required to be sent in support of the case stated, before I take the step of transmitting it.



Warden T W McPhee

3 February 2022

BEFORE THE WARDEN
IN PERTH)

Application for Exploration Licence 45/5041
Objection 517470

BETWEEN

BLUE RIBBON MINES PTY LTD
ACN 133 208 581

Applicant

and

BHP BILLITON MINERALS PTY LTD
ACN 008 694 782

ITOCHU MINERALS & ENERGY OF AUSTRALIA PTY LTD
ACN 009 256 259

✓ MITSUI - ITOCHU IRON PTY LTD
ACN 008 702 761

Objectors

MINUTE OF PROGRAMMING DIRECTIONS SOUGHT BY CONSENT

Date of Document: 29 August 2018

Filed on Behalf of: the Objectors

Date of Filing: August 2018

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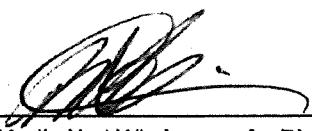
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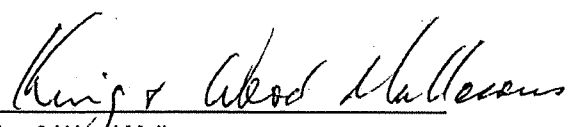
BY CONSENT the parties seek the following directions and subject to the determination of all other
Objections to this Application:

1. Subject to directions 2, 4 and 9 below, the application for E45/5041 (the Application) is to be determined in chambers without further evidence or submissions from either the Applicant or the Objectors.
2. For the purpose of these directions, the Applicant and the Objectors agree the following facts:
 - (a) the Application encroaches to the extent of 14.8822 hectares onto General Lease 1154279 (the Objectors' Tenure);

- (b) on the land the subject of the Objectors' Tenure, the Objectors have constructed and operate a rail line and associated infrastructure known as the Mount Newman Railway; and
 - (c) the Applicant has in all respects complied with the provisions of the *Mining Act 1978* (WA) and the *Mining Regulations 1981* (WA) (as amended) in respect of the Application.
- 3. The Applicant agrees to the Application being granted over only that part of the application area that excludes the Objectors' Tenure and subject to the complete excision of the part of the application area that encroaches onto the Objectors' Tenure.
- 4. The Mining Warden will give consideration to recommending that the Application be granted over only that part of the application area that excludes the Objectors' Tenure and subject to the complete excision of the part of the application area that encroaches onto the Objectors' Tenure.
- 5. The Mining Warden will give consideration to recommending the imposition of the following endorsement which the parties agree ought be imposed (the **Agreed Endorsement**):
 - (a) The land subject to General Lease 1154279 is completely excised from Exploration Licence 45/5041.
- 6. The Mining Warden will give consideration to recommending the imposition of the following conditions which the parties agree ought to be imposed (the **Agreed Conditions**):
 - (a) the rights of ingress to and egress from the Objectors' Tenure, being at all times preserved to the Objectors as lessee and no interference with the purpose or installations (either present or future) connected to the Objectors' Tenure;
 - (b) no use of access roads constructed within the area the subject of the Objectors' Tenure without the prior written consent of the operator of the Mount Newman Railway;
 - (c) no mining or construction within 100 metres of either side of the centreline of the Mount Newman Railway, associated rail lines and access roads (the **Safety Zone**), without the prior written approval of the Minister responsible for the *Mining Act 1978* (WA);
 - (d) no surface excavation approaching closer to the boundary of the Safety Zone than a distance equal to three times the depth of the excavation without the prior written approval of the State Mining Engineer, Department of Mines and Petroleum (DMP);
 - (e) mining below the surface of the Safety Zone being approved by the State Mining Engineer, DMP, in consultation with the operator of the Mount Newman Railway;
 - (f) the licensee shall not excavate, drill, install, erect, deposit or permit to be excavated, drilled, installed, erected or deposited within the Safety Zone, any hole, pit, well, pavement, foundation, building or other structure or installation, or material of any nature whatsoever without the prior written consent of the State Mining Engineer, DMP, in consultation with the operator of the Mount Newman Railway;
 - (g) no explosives being used or stored within one hundred and fifty (150) metres of the Mount Newman Railway and associated rail lines without the prior written consent of the Director, Dangerous Goods Safety Branch, DMP;

- (h) blasting operations being controlled so that no damage or injury can be caused to the Mount Newman Railway, associated rail lines or the installations (either present or future) connected to the Objectors' Tenure, (including the Mount Newman Railway, associated rail lines or related infrastructure, such as communication towers), by fly rock, concussion, vibration or other means; and
 - (i) such further conditions as may from time to time be imposed by the Minister responsible for the *Mining Act 1978* (WA) for the purpose of protecting the land and infrastructure (including the Mount Newman Railway) within the Safety Zone.
- 7. If the Mining Warden determines that the Application is to be recommended for grant only over that part of the application area that excludes the Objectors' Tenure and subject to the complete excision of the part of the application area that encroaches onto the Objectors' Tenure, and with a recommendation that the Agreed Endorsement and the Agreed Conditions be imposed and such of the Department of Mines & Petroleum Standard Conditions / Endorsements as may be relevant be imposed, no notice to the parties is required.
- 8. If the Mining Warden is minded either:
 - (a) not to recommend the grant of the Application;
 - (b) to recommend the grant of the Application but not:
 - (i) over only that part of the application area that excludes the Objectors' Tenure; and
 - (ii) subject to the complete excision of the part of the application area that encroaches onto the Objectors' Tenure;
 - (c) to recommend the grant of the Application but without the Agreed Endorsement being imposed;
 - (d) to recommend the grant of the Application but without the Agreed Conditions being imposed; or
 - (e) to list the Application for hearing in relation to any other objection associated with it, the Mining Warden will give the Applicant and the Objectors notice of this and an opportunity to be heard prior to the Mining Warden providing such recommendation to the Minister.
- 9. There is no order as to costs.


Signed by Martin Kurt Wiedemann for **Blue Ribbon Mines Pty Ltd (the Applicant)** under registered Power of Attorney No. 22751 dated 27 October 2018 and which has not been revoked.


King & Wood Mallesons
Solicitors for the Objectors



