[2022] WAMW 12

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	COCKATOO ISLAND MINING INFRASTRUCTURE PTY LTD V PEARL GULL IRON LIMITED (FORMERLY, PEARL GULL PTY) AND SILVER GULL IRON PTY LTD [No 2] [2022] WAMW 12.
CORAM	**:**	WARDEN T W McPHEE
HEARD	**:**	18 March 2022, 5 May 2022
DELIVERED	**:**	9 May 2022
FILE NO/S	**:**	Objection to an Application for Miscellaneous Licence
TENEMENT NO/S	**:**	Application for Miscellaneous Licence 04/117
BETWEEN	**:**	Cockatoo Island Mining Infrastructure Pty Ltd (Applicant) AND Pearl Gull Iron Limited (Formerly, Pearl Gull Pty) and Silver Gull Iron Pty Ltd (Objectors)

Catchwords: *Application to re-open. After publication of reasons but prior to final orders, fresh evidence.*

Legislation:

- *Mining Act 1981* (WA) s. 42(3), 94(3)
- *Mining Regulations 1981* WA Reg. 94(3), 152

Result: ***Application successful***

Representation:

Counsel:

Applicant	:	Mr Davies SC, with Mr Lawton
Respondent	:	No Appearance.

Solicitors:

Applicant	:	Pragma Legal
Respondent	:	Ensign Legal

Cases referred to:

- ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Limited (Formerly, Pearl Gull Pty) And Silver Gull Iron Pty Ltd*** [2022] WAMW 5
- ***Hancock Prospecting Pty Ltd v Hancock*** [2013] WASC 290 (6 August 2013)
- ***Lowes v AMACA Pty Ltd (Formerly James Hardie & Co Pty Ltd)*** [2011] WASC 287 (12 July 2012)
- ***Smith v New South Wales Bar Association*** [1992] HCA 36; (1992) 176 CLR 256 (13 August 1992)
- ***Hawks & Anor v Shadmar Pty Ltd & Anor*** [2004] WASC 252
- ***Process Minerals International & Ors v BHP Minerals Pty Ltd & Ors*** [2021] WAMW 16

Introduction

1 On 1 March 2022 I delivered reasons in this matter in ***Cockatoo Island Mining Infrastructure Pty Ltd v Pearl Gull Iron Limited (Formerly, Pearl Gull Pty) And Silver Gull Iron Pty Ltd*** [2022] WAMW 5. These reasons ought be read in conjunction with those earlier reasons.

2 Following the delivery of those reasons, the matter was adjourned for a period to enable appropriate conferral as to the form of final orders, and any consequential orders which were sought.

3 The matter came before me again on 18 March 2022.

4 On that day, the form of the final orders was contested.

5 In addition, the Applicant in the matter filed (on 17 March 2022), an Interlocutory Application, in effect seeking leave to adduce additional evidence, being evidence of the fact of the existence of missing Ministerial consent (the Application).

6 As a result, on 18 March 2022, the Applicant was in effect seeking leave to reopen its case, and adduce additional evidence, after the publication of reasons, but prior to the pronouncement of final orders.

7 The Objector was taken by surprise by this development and required additional time to consider the position.

8 As a result, I made programming Orders on the 18th of March 2022.

9 On 8 April 2022, the matter returned before me for a 'health check'. On that day, counsel appearing for the Respondent advised the Court that the Respondent would neither consent nor oppose the Application and would make no submissions.

10 Upon being pressed, counsel for the Respondent indicated that the Respondent would not appear at the hearing of the Application.

11 Unsurprisingly, the Respondent sought to expedite the Application, and I listed it for determination on 5 May 2022.

12 Submissions were filed by the Applicant. No submissions were filed by the Objector.

13 On 5 May 2022 the Respondent did not appear. The Applicant pressed the Application.

14 Having considered the submissions of the Applicant in some detail, and in addition, considered the position independently in terms of jurisdiction, I granted the Application on 5 May 2022, and received into Evidence the Affidavit of Mr Garry Lawton, dated 16 March 2022 (the Lawton Affidavit).

15 As an aside, Mr Lawton has appeared as junior counsel in this matter. Upon the tender of the Lawton Affidavit, Mr Lawton indicated he would take no further part as counsel.

16 I add, though it is not necessary, that no criticism may be made of Mr Lawton in the circumstances presenting.

17 In addition to accepting into evidence the Lawton Affidavit, I made further programming orders, dated 5 May 2022.

18 I indicated I would provide my reasons for the decision, and programming orders in due course. These are those reasons.

The Applicant's Position on the Application

19 The Applicant's position was that the tender of the Lawton Affidavit ought be permitted, and was within jurisdiction.

20 Section 42(3) of the Act, states:

> *. . . The warden shall hear and determine the application for the prospecting [re miscellaneous] licence on a day appointed by the warden and may give any person who has lodged such a notice of objection an opportunity to be heard."*

21 Relevantly, the submission was made that in the discharge of a function in an administrative capacity like that referred to above, the receipt by the decision maker of material relevant to the discharge of the function, but prior to its completion, is entirely consistent with the obligation to be fulfilled.

22 I accept that submission.

23 Having regard to the authorities referred to below on the question of when it is appropriate to permit a party to reopen in a judicial setting, in my opinion, and considering the administrative setting this matter resides in, the key questions to be determined in this matter are:

a. *Has the function been discharged?; and,*

b. *If no, is the material relevant? And,*

c. *Is there any other consideration or reason not to permit the provision of the material?*

24 In written submissions the Applicant also indicated a view that I could determine the Application and make a further determination on the underlying substantive question as to the impact of the reopening, without the need to provide further reasons.

25 I do not accept that submission, for reasons set out more fully below.

The Objectors Position

26 As indicated above, the Objector elected to neither consent nor oppose the Application.

27 As a result, the Objector did not advance a positive case to argue that I did not have jurisdiction to hear the Application to reopen. Rather it was put to me at that I had to be satisfied that I had jurisdiction.

28 Asked a direct question as to the Objector's position at an earlier mention, the response was ambiguous.

29 As a result, I was left with the argument advanced by the Applicant, and my own views.

30 As also indicated, the Objector elected not to appear for the hearing on the 5th of May. In the circumstances, that must have been a tactical determination, though the reason for so electing was (and remains) opaque.

Analysis and Consideration

Jurisdiction

31 It was not in dispute that I had not made final Orders.

32 It follows that I consider that the words "*hear and determine*" as used in section 42 of the Act, includes the conduct of the hearing until the relevant point where I become functus officio, having determined the matter in a formal, final manner by the pronouncement of final orders. In my opinion I retain jurisdiction to that point.

33 That point, relevantly in this matter as an application for a miscellaneous licence, is upon the pronouncement of my final orders. That has not yet occurred, and as a result, I therefore consider I have statutory jurisdiction to entertain the Application.

The Nature of An Application to Re-open in the warden's Administrative Jurisdiction

34 The Regulations are silent on the manner in which I might address an Application to reopen. I note however that Regulation 154 provides:

> *154. Conduct of hearings generally*
>
> *(1) In conducting any hearing the warden —*
>
> *(a) is to act with as little formality as possible; and*
>
> *(b) is bound by the rules of natural justice; and*
>
> *(c) is not bound by the rules of evidence; and*
>
> *(d) may inform himself or herself of any matter in any manner he or she considers appropriate.*

35 I consider that Regulation 154 applies to a hearing occurring pursuant to section 42 of the Act, and to the Application before me.

36 In addition, and whilst care ought be taken in respect of any suggested wholesale importation of legal principles from judicial jurisdictions, I consider it appropriate to refer to that existing body of judicial authority relevant to the principles applicable in respect of re-opening, to provide guidance as to how such questions ought to be determined.

37 On the question of the appropriateness to reconsider or reopen in the circumstances (or not), I am therefore guided by the sort of approach detailed in ***Hancock Prospecting Pty Ltd v Hancock*** [2013] WASC 290 (6 August 2013), ***Lowes v AMACA Pty Ltd (Formerly James Hardie & Co Pty Ltd)*** [2011] WASC 287 (12 July 2012) and ***Smith v New South Wales Bar Association*** [1992] HCA 36; (1992) 176 CLR 256 (13 August 1992).

38 Per Pritchard J in ***Hancock Prospecting Pty Ltd v Hancock*** [2013] WASC 290 (6 August 2013) at [183] – [184]:

> *A variety of factors will be relevant to the exercise of the discretion to reopen. The guiding principle is whether the interests of justice are better*

> *served by allowing, or rejecting, the application to reopen.*[76] *Other factors which will be relevant include:*
>
> *(i) the time at which the application is made (leave to reopen will more readily be given where the application is made after judgment has been reserved and before judgment has been given*[77]*);*
>
> *(ii) the likely prejudice to the party resisting the application;*
>
> *(iii) the public interest in the finality of litigation and the clear expectation that parties will advance all of their arguments at the time of the hearing;*
>
> *(iv) case management principles, especially the need for the Court to manage litigation efficiently, having regard to the limited resources of the courts and the demand for those resources.*
>
> *184 In the case of an application to reopen to admit fresh evidence, additional factors will be relevant, including:*
>
> *(v) why that evidence was not called at the hearing, and in particular whether a deliberate decision was made not to call it, or whether the evidence would have been available had reasonable diligence been exercised;*
>
> *(vi) the materiality of the evidence to the issues in dispute and whether the admission of the evidence would have produced a different result.*
>
> *185 In addition, in a case where the argument sought to be advanced concerns whether the court has jurisdiction, in my view a court would be slow to refuse leave to reopen and determine that question, at least where it appeared that the jurisdictional argument may have some merit, or was at least arguable.*

39 In my opinion, and noting the breadth of the application of Regulation 154, I consider that a warden hearing an application to re-open ought give consideration to the whole of the circumstances presented in coming to a view. The considerations outlined by her honour Justice Pritchard are a useful guide as to the sorts of matters to take into account.

40 I will also add, that in a circumstance such as this one, where reasons had been given but final orders had not been made, that in my opinion the reasons provided for reopening should be of an overall exceptional nature, having regard to all of the circumstances presented, in order to succeed.

41 In this matter, it is in the interest of justice and the efficient conduct of proceedings, for me to reopen the matter for the limited purpose proposed, of considering a piece of fresh evidence contained in the Lawton Affidavit.

42 I consider it is fresh evidence, as the key aspect (the fact of the Ministerial consent) it did not exist at the time of the relevant substantive hearing.

43 Furthermore, it (the evidence of the consent) was wholly dependent on the exercise of a discretion by the relevant Minister.

44 Whilst efforts may have been made to obtain the consent prior to the conduct of the underlying application, there is nothing before me to indicate that a firm view can be taken that it would have been forthcoming. Further, no submission to that effect was made by the Respondent.

45 In the Lawton Affidavit there is a frank concession that the manner in which the underlying application had proceeded, absent the Ministerial Consent, had been largely as a result of a view expressed by the Applicant's representatives as to how that issue would be addressed.

46 As indicated, there is no evidence before me that any earlier application to the Minister might have succeeded in a more timely manner.

47 What the Lawton Affidavit does show, is that prompt steps were taken to address the absence of the Ministerial consent in a timely manner, once the importance of it became apparent to the Applicant's representatives.

48 Thus the discretionary aspect of the question really becomes whether I ought visit the consequence of the erroneous decision made by the Applicant's representatives, to close out the Applicant itself from leading the evidence which I have already found in my substantive reasons, would be of seminal importance (at the least) in finally determining the dispute in respect of the Airstrip.

49 I do not consider that I should.

50 I am further fortified in my view by the decision in ***Hawks & Anor v Shadmar Pty Ltd & Anor*** [2004] WASC 252, per Le Miere J at [82]:

> a. *"The power of a court to reopen or reconsider its decisions has no application to the decision of the warden. It might be argued that the warden, acting administratively, has implied power to reconsider his decisions. Whatever the position may have been before the Minister acted upon the warden's recommendation, the warden does not have such a power after the Minister has so acted. The provisions of ss 98, 99, and 100(2) of the Act indicate that the power of the warden is spent when it has been acted upon by the Minister and is not available to be exercised from time to time. The warden is then functus officio and any attempt to re-exercise the power is ultra vires."*

51 As I have indicated, in this case, final orders have not been made. In short, in my opinion no formal determination has been made pursuant to section 42 of the Act.

52 I consider that it is important to note expressly that it is my view that I therefore retain sufficient statutory jurisdiction to reopen the matter at this time, given the fact final orders had not been made.

53 Had final orders been made, I do not consider it likely that I would have come to a view that I retained any statutory jurisdiction to reopen, irrespective of the merits of the discretionary considerations which might have been applied in a judicial setting.

Relevance of the Material

54 On one view of the substantive reasons, and with the consent now in hand, it might be said that the Applicant would have a strong argument that the presence of the ministerial consent, being the missing piece of the puzzle in respect of the Airstrip, ought now entitle the Applicant to a grant with no further impediment.

55 However, I expressly do not make such a determination in these reasons, and have not formed a concluded view on that question.

56 That is so based on the very particular circumstances presented in this hotly contested piece of litigation.

57 No stone was left unturned by the Objector, and the existence of the Ministerial consent would not materially have altered the conduct of the hearing. All that would have occurred is that the Objector would not have been able to raise it as the first line of its complex defence on the underlying application in respect of the Airstrip.

58 However, for reasons set out more fully below, I consider it appropriate to provide the Respondent with a further opportunity to be heard on the secondary question of the impact (if any) on the substantive matter following the success of the Application.

59 In any event, it simply cannot be said that evidence as to the grant of the consent is not relevant to the determination of the matters before me. It plainly is.

Any other consideration or reason

60 Considering that (in my opinion) I have power to permit the reopening, and turning back to the practicalities of the question of whether I should permit a reopening, I note that were I to decline to permit the re-opening, the Minister would no doubt be faced with a prompt appeal pursuant to section 94(3) of the Act.

61 That would place the Minister in a position of seeking to consider the impact of the fact of the consent in the context of my substantive reasons, without the assistance of my view on the matter.

62 In accordance with the long established filtering role of the warden, I consider that if I have the power to consider a relevant matter, I ought to do so, and not deliberately leave the Minister to address such a matter unassisted.

63 Alternatively, it was open to the Applicant to commence a new application. The Applicant may in effect, start again in respect of its applications for a miscellaneous licence in respect of the Airstrip and the use of the Roads, with the Ministerial consent now in its possession.

64 In my opinion, that would not be an efficient use of the relevant administrative processes of the Warden's Court and the Department, and indeed, would be something of a triumph of form over substance in the circumstances.

65 In addition, it would amount to woefully inefficient manner in which to approach the underlying issues in conflict between the parties, as well as being contrary to the purposes and objects of the Act generally.

66 I will note again, that the Respondent did not appear, and so relevantly, made no reference to any prejudice it may suffer, were the Application to be granted. That prejudice, had any been identified, would have been taken into account in the exercise of the relevant discretion.

67 Accordingly, I considered that the circumstances presented are of an exceptional nature, and it is therefore appropriate to grant the Application, and permit the tender of the Lawton Affidavit, which will become Exhibit 20.

Consequence of the Permitted Tender

68 In the circumstances, where the Respondent elected not to attend the hearing of 5 May 2022, I did give consideration to formally determining the impact of the tender of Exhibit 20 upon the substantive matter, in the Respondent's absence.

69 Given the Respondent's absence from the 5 May 2022 hearing was a deliberate tactical decision, there was a certain attraction to taking that course.

70 On balance though, I considered that it would be erroneous for me to do so, as it may have precluded the Respondent being heard on the matter; if they had not expected that I would permit the tender.

71 Whilst the Respondent in such a circumstance would face a difficult task in providing a sensible explanation as to why they had elected not to attend, in keeping in mind the overarching requirement for procedural fairness to be afforded to the parties, I determined that the appropriate course was to provide an opportunity to the Respondents to consider whether they wished to be heard on the second question of whether the substantive determination in this matter, as set out in my reasons of 1 March 2022, was in any way impacted by the tender of Exhibit 20.

72 In those circumstances, and after hearing from Senior Counsel for the Applicant, I made programming orders dated 5 May 2022 which included a direction that the Respondents be served with a copy of the directions which had been made on that day.

73 Those directions themselves are largely self-explanatory, however one matter calls for comment, namely the orders compelling conferral in respect of conditions, in the event there was to be a grant of a miscellaneous licence over the Airstrip.

74 The direction itself states that at that date, no such grant had been made, however, and consistent with my comments at the hearing of 5 May 2022, I will add for the avoidance of doubt, that my intent in making such an order is to seek to advance the matter to overall completion as soon as possible.

75 Obviously, after considering any further submissions (if any) and considering the matter, in the event I determine that Exhibit 20 does not materially impact the substantive determination, then the outcome of the conferral in respect of the Airstrip will be moot.

76 Nonetheless, I consider that as the parties will be conferring in any event (about the conditions as to Roads), I consider that the path directed is the most efficient manner in which to seek to finally determine this dispute (before me at least).

77 Save for the unexpected, following 20 May 2022, I ought to be equipped with the necessary materials to come to a view as to the final disposition of the matter.

78 In any event, it will be noted that I also granted liberty to apply to the parties on short notice if there was any difficulty.

79 With the benefit of hindsight, I have formed the view that I ought to have compelled the attendance of the Respondent at the hearing of 5 May 2022, to enable the question of whether the Respondent wished to be heard on the impact of the tender of Exhibit 20 (which was a logical possible consequence of the Application being determined) to be squarely put and answered by the Respondent on that day.

80 I will also take this opportunity to note that in addition, and upon review of my reasons dated 1 March 2022 for the purposes of these reasons, it became apparent that a typographical error had been made in those reasons.

81 In paragraph [308] of those reasons (and in the authorities list) there was a reference to an authority; ***Process Minerals*** [2022] WAMW 3. That reference is erroneous, and ought be: ***Process Minerals International & Ors v BHP Minerals Pty Ltd & Ors*** [2021] WAMW 16.

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Warden Tom McPhee

9 MAY 2022