[2023] WAMW 1

JURISDICTION	**:**	MINING WARDEN
LOCATION	**:**	PERTH
CITATION	**:**	A.C.N. 629 923 753 Pty Ltd v Leanne Margaret Corker & Ors [2023] WAMW 1
CORAM	**:**	WARDEN GM CLEARY
HEARD	**:**	12 July 2022
DELIVERED	**:**	6 January 2023
FILE NO/S	**:**	Objections 590897, 593992, 618956 – 618958, 618961-618963, 618991, 626720
TENEMENT NO/S	**:**	Application for Miscellaneous Licences 08/214, 08/219, 08/231, 08/232 and 08/253
BETWEEN	**:**	A.C.N. 629 923 753 PTY LTD (Applicant) AND LEANNE MARGARET CORKER First Named Objector JOHN DIGBY CORKER Second Named Objector DYLAN PETER CORKER Third Named Objector CARDOO HOLDINGS Fourth Named Objector

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Catchwords: Costs; Reg 165(4); Objections withdrawn; Private or public interest objections; Vexatiously and frivolously commencing or defending proceedings

Legislation:

- *Mining Act 1978* (WA) s 20(5), 42, 92, 123.
- *Mining Regulations 1981 (WA) r 165(4).*

Result:

Named objectors ordered to pay costs of the applicant incurred after 31 December 2021, to be taxed if not agreed.

Representation:

Counsel:

Applicant	:	M McKenna
Respondent	:	D Chandler

Solicitors:

Applicant	:	Gilbert + Tobin
Respondent	:	Lawton Macmaster Legal

Cases referred to:

AC Minerals Pty Ltd v Cowarna Downs Pty Ltd [2022] WAMW 22.
Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker [2021] WAMW 11.
Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd [2022] WASC 362.
Bond v Maughn [2018] WASC 162.
Brosnan & Others v Meridian Mining [2013] WAMW 1.
Cartstens v Pittwater Council (1999) 111 LGERA 1.
FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation [2011] WAMW 13.
Forrest & Forrest Pty Ltd v Onslow Resources Ltd [2022] WAMW 13.
Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum [2017] WASCA 153; (2017) 51 WAR 425.
Golden Pig Enterprises Pty Ltd v O'Sullivan [2021] WASC 396.
Hogan v Hinch (2011) 243 CLR 506.
Landtec Pty Ltd v Dixon & Ors (No 2) (Costs) [2012] WAMW 41.
Leanne Margaret Corker, John Digby Corker, Dylan Peter Corker, Cardoo Holdings Pty Ltd v A.C.N. 629 926 753 Pty Ltd [2022] WAMW 11.
MCA Nominees Pty Ltd v Paul Brandon Lambrecht [2021] WAMW 21(S).
McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423.
Nova Resources NL v French (1995) 12 WAR 50.
Pastoral Management Pty Ltd v Mineralogy Pty Ltd [2014] WAMW 13 (Costs).
Premier Coal Ltd v Brockwell [2013] WAMW 17.
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355.
Re Roberts; Ex Parte Western Reefs Ltd v Eastern Goldfields Mining Company (1990) 1 WAR 546.
Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc) (1997) 18 WAR 320, 327

Re Western Australian Planning Commission; Ex Parte Solomon [2010] WASCA 236 (S).
Sinclair v Mining Warden at Maryborough and Another [1975] HCA 17; (1975) 132 CLR 473, 487.
South Western Sydney Local Health District v Gould [2018] NSWCA 69; (2018) 97 NSWLR 513.
Staley v Pivot Group Pty Ltd (No 6) [2010] WASC 228.
The Commissioner of Police of Western Australia v AM (2010) 197 IR 441; [2010] WASCA 163.
The State of Western Australia v Williams [2022] WASCA 105.
Thiess v Collector of Customs [2014] HCA 12; (2014) 250 CLR 664.
Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries (1994) 75 WAIG 9.
Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark T/A Mike Clark Contracting (1995) 62 IR 334; (1995) 75 WAIG 1820.

1 Leanne and John Corker hold a pastoral lease on Red Hill Station, on which they and Dylan Corker and Cardoo Holdings run a beef cattle business. A.C.N. 629 923 753 Pty Ltd applied for several miscellaneous licences for the construction of a haul road and some associated infrastructure, partly transecting Red Hill Station. The primary purpose of the road is to transport iron ore.

2 Leanne and John Corker, Cardoo Holdings and Dylan Corker lodged objections to the applications on the basis that the road, whether on their lease or not, would facilitate the spread of biodiversity and environmental threats to their land, cattle business and flora and fauna on their lease, threaten or alter flood plains and eco systems on their lease, interfere with their business, risk injury to cattle and personnel and create noise and dust pollution. They queried whether it would be in the public interest to grant the applications in light of those threats, and also to grant licences where there were multiple applications or already granted tenements, covering the same ground, which some of the applications did.

3 There were other objectors, however their concerns were resolved and the objections withdrawn.

4 The hearings of the applications for the miscellaneous licences, and the objections thereto by the Corkers and Cardoo, were to take place on 31 May 2022. The hearing was not required when those objections were withdrawn on 30 May 2022. The applicant seeks costs of the proceedings under reg 165(4) of the *Mining Regulations 1981* (WA).

5 The substantive application was an application under Part IV of the *Mining Act 1978* (WA), being an application for miscellaneous licences under s 91 of the Act, and objections thereto. Under reg 165(1) of the *Mining Regulations 1981* the starting point in relation to costs for applications under Part IV of the *Mining Act* is that each party is to bear its own costs, irrespective of the outcome.[1]

6 However, under reg 165(4) if the court is satisfied that, relevantly, the objector frivolously or vexatiously commenced or defended the proceedings, or any step in the proceedings or otherwise occasioned undue delay in the proceedings, costs may be awarded to the applicant, as a departure from that starting position.

[1] ***Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2022] WAMW 13 [84]-[89].

WHAT IS TO BE DETERMINED IN THIS CASE?

7 In this case, the applicant for costs says that the objectors behaved in a frivolous and vexatious manner and that their conduct in the proceedings caused undue delay. The applicant says that the objectors acted vexatiously and frivolously by:

a. Making objections which had no proper basis or chance of success, and

b. Having lodged objections which had no proper basis or chance of success, they pursued those objections to generate commercial pressure on the applicant.

8 The applicant claims that undue delay occurred within the proceedings, and within the commercial negotiations occurring between the parties apart from the proceedings themselves. It claims a lack of communication at various times, the objectors failing to comply with programming orders, relying on their 'unrepresented' status when from time to time they were represented in the proceedings, and the objectors requesting vacating hearing dates and being unavailable for hearing for significant amounts of time.

9 The question in this case is whether the objectors behaved in that way, and, if they did, whether the conduct supports a departure from the starting point of each party bearing their own costs in this case.

10 To determine whether the objectors frivolously or vexatiously commenced or defended the proceedings or a step in the proceedings, I will examine the meaning of the terms 'frivolous' and 'vexatious,' the substantive application and the grounds of objection, and whether those grounds had merit.

11 To determine whether the objector otherwise occasioned undue delay in the proceedings I will examine the course the proceedings took, and whether there was delay, and, if there was delay:

a. whether that was 'undue' delay, and

b. whether that can be attributed to the objector.

12 In preparation for the costs argument Ms Corker provided an undated affidavit. It outlined the negotiations between the parties and annexed without prejudice correspondence. The applicant opposed the use of the contents of that

correspondence. In reviewing the information regarding discussions between the parties I have not had regard to the correspondence annexed to Ms Corker's undated affidavit or the content of the negotiations. In my view it was unnecessary to resolve the dispute of whether I could or not for the purposes of determining this application for costs.

13 If I am satisfied that the objector frivolously or vexatiously commenced or defended the proceedings or occasioned undue delay, I then will determine, in the exercise of my discretion, whether a departure from the principle in reg 165(1) is warranted in this case.

REGULATION 165(4)

Whether to award costs is a discretion

14 Under reg 165(4) the warden "may" make an order for costs against a party if the warden is satisfied the party has done certain things. The use of the word "may" denotes a discretion. The discretion can only be exercised when enlivened by the warden being satisfied that the party has done one or more of those things. Even if the warden is satisfied that the party has done some or all of those things, the warden may still determine that the starting point in reg 165(1) should not be departed from.[2] A determination of whether to depart from the starting point requires a consideration of all of the facts and circumstances of the case.[3]

Of what do I have to be satisfied to enliven my discretion?

15 To enliven the discretion, I must be satisfied that the objector frivolously or vexatiously commenced or defended the proceedings, or any step in the proceedings or otherwise occasioned undue delay in the proceedings. It is for the party applying for costs to satisfy the court of those matters.[4]

How do I determine if the objectors have been frivolous or vexatious or caused undue delay?

16 'Frivolous' and 'vexatious' are not defined in the Act, however they are commonly used words in litigation. The meaning of a word used in a statute

[2] ***Landtec Pty Ltd v Dixon & Ors (No 2) (Costs)*** [2012] WAMW 41.
[3] ***Forrest & Forrest Pty Ltd v Onslow Resources Ltd*** [2022] WAMW 13 [106].
[4] ***Premier Coal Ltd v Brockwell*** [2013] WAMW 17.

depends on the context and purpose of the legislation in which it appears.[5] In attributing meaning the court's task begins and ends with the statutory text as a whole, considered in its context, including its objectively discerned statutory purpose.[6] Therefore, in determining the meaning of the words in the context of the Act, the court must have regard to the words used and the context in which the words appear, and the apparent intention of the section, as contained in the Act, in which they appear.[7]

17 Reg 165 is contained within the mining legislative regime, although it governs costs. To consider the context of reg 165(4) it is necessary to consider the principles and purposes of the Act and the mining regime generally, objections to applications and costs.

The purpose of the Mining Act and regime

18 The 'primary object' of the *Mining Act* is to encourage and promote exploration for, and the mining of, mineral deposits.[8] Having regard to the oft-cited cases of ***Nova Resources NL v French***[9] and ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum***[10] in summary, the primary principle of the Act is that land should be open for mining, or being mined.

19 There is no limitation on who may object to a tenement application other than an objection must be lodged appropriately and be relevant to the grant of the application in the context of the *Mining Act*.[11] Objections to applications for tenements, in general, may come from a wide variety of entities, not restricted to those whose land or other property, or business or mining activities may be

[5] ***South Western Sydney Local Health District v Gould*** [2018] NSWCA 69; (2018) 97 NSWLR 513 [81].
[6] ***The State of Western Australia v Williams*** [2022] WASCA 105 [40], referring to ***Thiess v Collector of Customs*** [2014] HCA 12; (2014) 250 CLR 664 [22] - [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).
[7] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [59]-[61].
[8] ***Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd*** [2022] WASC 362 [151].
[9] ***Nova Resources NL v French*** (1995) 12 WAR 50.
[10] ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 425.
[11] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 327.

effected by the grant. Relevant to this case, pursuant to sections 92 and 42 of the *Mining Act*, the only requirement or precondition to an objection is that "A person who wishes to object…shall lodge a notice of objection within the prescribed time and in the prescribed manner." There are no other factors circumscribing or defining who has standing to lodge such an objection.

20 In that sense, the *Mining Act* regime in Western Australia has built into it a degree of self-regulation. It is, in general, for anyone who has a concern about the potential grant, or the effect of the grant, either personally or more generically, and has some evidence about that effect, to raise their concerns and to ensure compliance,[12] and object to the application being granted.[13] The process of objecting to applications is to facilitate the regulation of the industry. The wide nature of the standing and ability to object to an application for a tenement infers that the industry and the Department rely on objectors to raise concerns on their own behalf but also on behalf of others.

The purpose of costs

21 As a general rule in litigation, the successful party is entitled to their costs of the litigation.[14] Also generally, the award of costs should not be a punitive measure, unless specifically awarded under certain orders available to courts, such as indemnity costs, which have punitive consequences.[15]

22 Generally in litigation, where the litigation settles prior to a hearing, and each party has apparently behaved reasonably to settlement, the proper exercise of a discretion is that each party bears its own costs; it is only where one party has acted unreasonably in pursuing the litigation that costs will be awarded to the other. [16]

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[12] ***Pastoral Management Pty Ltd v Mineralogy Pty Ltd*** [2014] WAMW 13 (Costs) [15].
[13] Although there have been some limitations identified by the case law, they are not relevant in the present case.
[14] ***Re Western Australian Planning Commission; Ex Parte Solomon*** [2010] WASCA 236 (S) [9].
[15] ***Staley v Pivot Group Pty Ltd (No 6)*** [2010] WASC 228 [5] and [14] and the cases cited therein.
[16] ***Re Western Australian Planning Commission; Ex Parte Solomon*** [2010] WASCA 236 (S) [9].

23 In the present case, reg 165 exists to facilitate the closure of proceedings, once the substantive matters have been resolved. It enshrines in the *Mining Act* regime the principles by which a party may seek reimbursement of its costs in taking part in the litigation. Regulation 165(1) varies the general application of the discretion to award costs to the successful party, in that even if the matter has proceeded to hearing, and there is a 'successful party,' unless the factors in 165(2) or (4), as relevant, are satisfied, there should nevertheless be no order as to costs in Part IV proceedings.

24 In ***Brosnan & Others v Meridian Mining***[17] Warden Calder referred to policies under the Act in the context of costs. Although that was a case about exemption from expenditure and forfeiture, in my view those comments are relevant to the general policies behind reg 165(1), and any departure from the starting point therein. He noted that there is a general principle that given the policy of industry self-regulation or "self-policing," applicants who seek to advance such policies should not be deterred or prevented from advancing that self-regulation because of the risk of prohibitive costs ordered against them if the forfeiture, as relevant to that case, was unsuccessful but was not frivolous or vexatious.[18]

Having regard to the purposes of the Mining Act *and regime and costs, what is the context in which the court determines the meanings of 'frivolous,' 'vexatious' and 'undue delay'?*

25 Combined, the principles of the Act and those of costs suggest the following:

a. The industry, and the State, rely on a degree of self-regulation which should not be curtailed by the risk of costs being routinely awarded to the 'successful party' if an application is granted, or recommended for grant.
b. However, that is not to say that it is never the case that a successful party is not entitled to their costs.
c. While the primary objective of the Act is supported by the system of objections to applications for tenements, it may also be unjustifiably thwarted by them - objections to applications in many cases halt the

[17] ***Brosnan & Others v Meridian Mining*** [2013] WAMW 1.
[18] ***Brosnan & Others v Meridian Mining*** [2013] WAMW 1 [15].

process of mining, and result in the ground over which the application is sought not being mined, and not being open for mining to any other applicant.

d. Therefore, the primary objective of the Act may be thwarted by objections which are vexatious or frivolous themselves, or the proceedings related to the objection have in some way been frivolous or vexatious.

e. The primary objective and principles of the Act may also be thwarted by an objection the resolution of which is unduly delayed.

26 Accordingly, the costs regime in reg 165 balances the self-regulation of the industry with the need for the promotion of the primary objective of ground being open for mining, or being mined.

27 By virtue of its concurrency with other licences,[19] mining may continue on ground if there is an underlying tenement present when an application for a miscellaneous licence is lodged but objected to. Therefore, an objection to an application for a miscellaneous licence may not necessarily halt all mining on the primary tenement, and thereby thwart the primary objective of the Act. Whether it does or not depends on who is applying for the licence, the purpose of the proposed licence, and the nature, purpose and process of the underlying tenement or a tenement elsewhere.

28 It is in that context that the words 'frivolously' and 'vexatiously' and the concept of 'undue delay' must be viewed.

When does a party, then, frivolously or vexatiously commence or defend proceedings?

29 Seen in the context of the principles I have set out above, particularly in relation to the wide basis for objections, the words 'frivolous' and 'vexatious' can be seen as creating a qualification to an objection, or objector. Objections are in themselves designed to thwart or delay mining, or mining in a particular way, at least until the objector's concerns have been addressed, either by a refusal or recommendation of refusal, or the imposition of conditions, or an agreement by the parties without the need for the warden's intervention. The objection may also be resolved by the warden's rejection of that objection.

[19] *Mining Act 1978* sections 91 and 94A.

30 Mindful that dictionary meanings are only of limited utility in statutory construction,[20] I have had regard to the dictionary meanings of the words.

31 The Macquarie dictionary meaning of vexatious is 'causing vexation; vexing; annoying' and to vex is to annoy, torment, irritate, provoke, make angry.

32 The Oxford English Dictionary definition is 'Of legal action: instituted or taken without sufficient grounds, purely to cause trouble or annoyance to the defendant.'

33 The Macquarie dictionary meaning of frivolous is 'something of little or no weight, worth or importance; not worthy of serious notice.' Therefore to act frivolously is to act in a manner that does not require serious notice because the action is of no weight.

34 In the past wardens have had regard to the industrial relations regime and legislation, and the statutory interpretation in that regime of the words 'frivolous' and 'vexatious.' In my view it has not been necessary to do so, or to adopt the particular definitions set out in ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries***[21] and ***The Commissioner of Police of Western Australia v AM***[22] in the present case. Used as a starting point, the dictionary meanings, within the context of the *Mining Act* and its regime and principles, can be used as a guide in the present case.

35 Neither am I satisfied that under the *Mining Act* costs will only be awarded on 'very rare occasions,' as was suggested in ***The Commissioner of Police of Western Australia v AM***[23] and ***Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark***,[24] or that there must be a finding that this is an 'exceptional' case such that there should be a departure

[20] ***Golden Pig Enterprises Pty Ltd v O'Sullivan*** [2021] WASC 396 [55].
[21] ***Transport Workers Union of Australia Industrial Union of Workers, WA Branch v Tip Top Bakeries*** (1994) 75 WAIG 9.
[22] ***The Commissioner of Police of Western Australia v AM*** (2010) 197 IR 441; [2010] WASCA 163.
[23] ***The Commissioner of Police of Western Australia v AM*** (2010) 197 IR 441; [2010] WASCA 163 [35].
[24] ***Western Australian Builders' Labourers, Painters and Plasterers Union of Workers v Clark T/A Mike Clark Contracting*** (1995) 62 IR 334; (1995) 75 WAIG 1820.

from reg 165(1).[25] It may be that, empirically, that is what occurs, however those words were said, and that parameter was set, in the context of industrial relations legislation, which is a different regime to that under the *Mining Act*, and do not in my view guide my decision-making in the present case.

36 An example of applying the words in the context of the Act and regime appears in ***MCA Nominees Pty Ltd v Paul Brandon Lambrecht***[26] where the warden found as proved the applicant's intentions not to use the tenements in accordance with the principles of the Act. His Honour found that the applications for tenements were characterised as applications "the predominant purpose of which was to cause trouble or difficulty to other persons engaged in mining activities consistent with the Act, in an effort to obtain a commercially advantageous position."[27] In ***MCA*** the application was not in furtherance of the principles of the Act and regime; there was no nexus between the application and the Act and regime, despite the application being under the Act, and the application should never have been lodged. The objector who brought that to the attention of the warden deserved its costs for doing so. Accordingly, the warden found, the applications were vexatious. While he adopted the meanings attributed to the words from the cases I have referred to, his explanation of his finding is clearly underpinned by an independent and context-based application of the terms of the *Mining Act*.

37 In summary, as relevant to the present case:

a. 'Frivolous' and 'vexatious' have different meanings, although 'frivolous' is a subset of 'vexatious.'[28]

b. Regulation 165(4) allows for costs to be awarded where actions are frivolously commenced or defended or vexatiously commenced or defended.

c. A frivolous objection will have no merit, and therefore no weight. That is, not only would there be no purpose in the warden hearing the objector pursuant to the warden's discretion under, relevantly, section 42 of the

[25] ***Brosnan & Others v Meridian Mining*** [2013] WAMW 1 [14].
[26] ***MCA Nominees Pty Ltd v Paul Brandon Lambrecht*** [2021] WAMW 21(S).
[27] ***MCA Nominees Pty Ltd v Paul Brandon Lambrecht*** [2021] WAMW 21(S) [29].
[28] ***The Commissioner of Police of Western Australia v AM*** [2010] WASCA 163(S) [29].

Mining Act in relation to the substantive objection, but neither would a hearing have any bearing on conditions to be imposed. An objector may know this at the commencement of proceedings, and therefore be acting frivolously in lodging the objection, or later, and therefore will be acting frivolously when continuing to pursue the objection.

d. While objections may generally be irritating or annoying to the applicant who is keen to pursue its mining project, in the context of the mining regime, there must be more to the actions of an objector than merely objecting, for their behaviour to be vexatious. An example, following MCA ***Nominees Pty Ltd v Paul Brandon Lambrecht***[29] is where the objection is lodged or pursued or defended to cause difficulty to the applicant so as to obtain a commercial advantage in negotiations with the applicant.

When is there undue delay?

38 Undue delay in the context of the *Mining Act* regime is excessive delay.[30]

WHY SHOULD THE OBJECTORS PAY THE APPLICANT'S COSTS IN THIS CASE?

39 The applicant complains that:

a. The grounds of objection had no merit, being, in reality, objections based on private interests;

b. The objectors used the objection process to exert commercial pressure on the applicant, that is, to extract a favourable commercial settlement, only withdrawing the day prior to the hearing date;

c. The objectors objected to an application for an extension of time for service of the application on another entity where they had no standing or relationship with that entity, and which delayed the entire proceedings, including the resolution of other objections;

[29] ***MCA Nominees Pty Ltd v Paul Brandon Lambrecht*** [2021] WAMW 21(S).
[30] ***Premier Coal Ltd v Brockwell*** [2013] WAMW 17 [13].

d. There was no real engagement with the grounds of the application in the proceedings to hearing, and there was a late ground of objection raised which had no legal basis;

e. Unlike other objectors in these proceedings, these objectors continuously attempted to circumvent programming orders and dates for hearing, resulting in the resolution of all the objections being delayed and for which the lack of legal representation from time to time was no excuse, and

f. The objectors had "large swathes" of unavailability when attempting to set the matter for hearing.

40 As examples of the frivolous nature of the objections, the applicant says:

a. Some of the objections are environmental, and were "resoundingly"[31] addressed by the applicant in its lay and expert evidence;
b. Some of the objections were based on a private interest, the objector Dylan Corker knowing such objections would not succeed because of his involvement in ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker***,[32] a case in which private interests did not succeed, and
c. The Corker objectors failed to engage with the applicant's submissions or evidence in their own submissions.

41 As examples of the objections being pursued vexatiously, the applicant says:

a. The objectors sought delays of the hearings listed to determine the applications;
b. While there was correspondence between the parties attempting to resolve the objections, the correspondence from the objectors was predominately prompted by the proximity of a hearing;
c. The objections were withdrawn the day before the hearing, without explanation, and
d. The objectors opposed extensions of time applications brought by the applicant where the extension did not effect the objectors.

42 As examples of the undue delay, the applicant says:

[31] Applicant's written Submissions as to Costs, 17 June 2022, [5(a)].
[32] ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker*** [2021] WAMW 11.

a. The objectors "continuously"[33] sought extensions of time to comply with programming orders,
b. their objections and failure to properly conform to programming orders delaying resolution of the other objections, and
c. The objectors provided "unreasonably large blocks of unavailability for the hearing of the applications at multiple stages of the proceedings."[34]

43 The applicant's illustrations appear to be of three classes:

a. The types of objections and the manner in which the objectors approached them;
b. The wardens proceedings, and the manner in which the objectors approached them, and
c. What occurred between the parties.

What are the types of or bases for the objections?

44 The applicant lodged applications for tenements to predominantly build a haul road, with associated infrastructure, the haul road being part of a larger, ongoing project, named the Ashburton Infrastructure Project. While several applications for miscellaneous licences to build the roads were lodged, the applicant proposed to build only one of the roads, "seeking to identify which of the alignments has the least environmental impact and avoids any sensitive areas to the maximum extent possible,"[35] or, depending on "finalisation of environmental, heritage and regulatory approvals."[36] Maps such as the one annexed as DWK-1 to the affidavit of Darren William Killeen show that:

a. The haul road to be built on L 08/214 is not on Red Hill Station, but feeds into the haul road that is proposed on L 08/231, which is on Red Hill Station, and has been nominated as the 'northern route.' This route crosses the Warramboo floodplain.
b. The haul road to be built on L 08/219 is not on Red Hill Station, but feeds into the haul road that is proposed on L 08/232, which is on Red Hill Station, and has been nominated as the 'southern route.'

[33] Applicant's written Submissions as to Costs, 17 June 2022, [7].
[34] Applicant's written Submissions as to Costs, 17 June 2022, [7].
[35] Affidavit of Darren William Killeen affirmed 18 May 2021 [8].
[36] Affidavit of Paul Aiden Mullan sworn 8 October 2021 [8].

c. The haul road to be built on L 08/253 adjoins L 08/231 and appears to be an alternative route for about 8 km of the eastern end of L 08/231.

45 The objections in relation to the present case were lodged between 23 November 2020 and 26 March 2021.

46 In summary, the objections are as follows:

OBJECTION	TENEMENT	REASON STATED IN OBJECTION	SUMMARY OF PARTICULARS
590897	L 08/214	Environmental impact of haul road	Infestation potential of weeds of national importance: mesquite, Parkinsonia, coral cactus, which will in turn damage the pastoral industry and the 'ecological health and biodiversity of the rangelands.' The objectors' grazing business will be significantly damaged and may cause them to be unable to comply with their pastoral lease, and threaten the prospects of renewal.
593992	L 08/219	Environmental concerns with the proposed use of the tenement	No separate particulars provided
618956 618957 618958 618961 - 618963	L 08/231 L 08/232	Public interest Environmental impacts Biosecurity risks Damage to pastoral business Damage to pastoral land Animal welfare safety	In addition to the factors particularized for objection 59897, L 08/231 will cross a flood plain, interfering with natural water flow, altering and damaging the ecosystem and the habitat for "several threatened species" such as the endangered northern quoll and the threatened Pilbara olive python, and also several types of bat, who use the area for foraging. There will also be threats to particular flora with a conservation code. There will also be: • damage to pastoral infrastructure, stock and grazing management, productivity, cost effectiveness • interfere with the ability to pass over the land and have quiet enjoyment of the land • risk of collision and accident to stock and personnel, • pollution

			• interference with water It is not in the public interest to grant a tenement for the purposes particularized when the applicant already holds tenure for a haul road.
626720	L 08/253	Injuriously effect, hinder or obstruct the rights granted by the pastoral lease Will interfere with the objector's operations and enjoyment of the pastoral lease Not in the public interest Compliance not admitted	No separate particulars provided

47 Therefore, the objections, in my view, are based on:

a. Environmental grounds

b. Other risk of disruption to the pastoral business

c. Not in the public interest for the applicant to have more leases.

48 In their affidavit evidence and objections the objectors make no distinction between the various applications regarding the biosecurity risk, noting that each of the 'feeder' roads to the proposed haul roads on Red Hill Station first comes through Peedamulla Station or other areas known to be infested with identified weeds.[37] L 08/231 attracts an additional objection, in that it will risk the floodplain.

49 In their written submissions filed on 2 May 2022 in preparation for the substantive matter the objectors propose three alternative routes to the haul road over miscellaneous licences already granted or alternatively the granting of only a portion of L 08/231. The latter option would be effectively to grant the 'southern route' and is proposed to protect the Warramboo flood plain "and

[37] Affidavit of Leeanne Margaret Corker sworn 18 November 2021 [55].

reduce the impact on the Objectors' pastoral business and land management practices."[38]

50 Further, the objectors provided standard conditions and other conditions they say should be imposed upon grant. The objectors also acknowledged the effect of s 20(5) of the *Mining Act* which restricts mining activities around stockyards, water works, races, dams, wells or bores on pastoral leases without the written consent of the occupier or as the warden otherwise directs and upon the provision of compensation under s 123. A late affidavit was filed on behalf of the objectors regarding the positions of bores and a dam, with amended suggested conditions.[39] As the applicant noted in a letter to the objectors' lawyers on 24 May 2022, if that was intended as a late objection, leave of the warden was required to pursue that objection.[40]

51 Of the environmental objections, while on the face of them, as can be seen by the summary in the table above, they appear to be of a public interest, they only partly relate to the interests of the public; they are, otherwise, relevant to the pastoralists, in that the threat to the environment will directly effect the objectors' business, that is, their private interests.

52 While the starting point is that any person may object, the warden's ability to consider objections is constrained by the principles, objects and provisions of the Act, and the context in which the application and objection sit. It may be that those matters therefore constrain the type of objection which may be lodged or which proceeds. Having regard to the previous consideration by wardens of pastoralists' objections, there is such a constraint, and it is relevant to the present case. I address this later in these reasons.

Are the environmental objections in reality public interest objections?

53 Having regard to ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)***,[41] environmental concerns are in the public interest, and therefore environmental and public interest objections are not

[38] Objectors' written submissions dated 2 May 2022 [66].
[39] Affidavit of Cecilia Camarri affirmed 19 May 2022, attached to the Affidavit of Jemimah May Pullin sworn 17 June 2022 as annexure JMP11.
[40] Annexure JMP12 to Affidavit of Jemimah May Pullin sworn 17 June 2022.
[41] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 332.

separate categories of objection. Therefore, I will address any objections that purportedly relate to the environment as purported public interest objections.

54 While it is settled in Western Australia that the Western Australian mining warden has the power to receive and hear objections to exploration and mining leases based on environmental concerns, which are said to be in the public interest, the law is not settled on whether there is a place for the public interest objection before the warden to an application for a prospecting or miscellaneous licence.[42]

55 However, the applicant in the present case intended to run its case by accepting that public interest objections may be lodged against miscellaneous licences.[43] The applicant's case was that the 'public interest' objections were, in truth, private interests and such are not objections that would have been entertained by the warden. Therefore, I must determine whether the objections are, in reality, public interest objections.

What is the difference between private and public interest?

56 There is no discernible definition of 'public interest' in connection with the mining regime. Instead, the public interest is a balancing of all the relevant principles and policies connected to mining within the context of the application. The principles of the *Mining Act* have been developed through relevant government policy, applied at the time of drafting the legislative instruments, and identified and set out in case law numerous times.[44] As I have identified the primary object of the *Mining Act 1978* (WA) is that as far as is practicable land that has either known potential for mining or is worthy of exploration will be available for mining or exploration, or is mined or explored.[45]

57 Therefore, the starting point is that that the application should be granted, if it ensures that land will be mined; the disturbance of the land is warranted. However, an objection may, "*relate to a matter …of such a nature as to being*

[42] ***FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation*** [2011] WAMW 13 [40]-[42].
[43] Applicant's submissions to substantive matter, 12 April 2022 [17].
[44] See, for example, the summary in ***Bond v Maughn*** [2018] WASC 162 [17] – [18].
[45] ***Nova Resources NL v French*** (1995) 12 WAR 50, 57-58.

reasonably capable of giving rise to a question whether it is in the public interest that the ground should not be disturbed or that the application… be refused."[46]

58 A consideration of whether something is 'in the public interest' requires consideration of competing arguments and competing general interests[47] and the term 'public interest' derives its content from the subject matter and scope and purpose of the enactment in which it appears.[48] It is also in the public interest, when making a determination under an enactment, to give effect to the objects of the Act.[49]

59 Therefore, a consideration of the 'public interest' in an objection is affected by weighing up the competing factors of policy and principle, and the upholding of such an objection results from a finding that the principles and polices underpinning the mining regime will give way to, or are outweighed by, other matters of public policy and principle favouring the ground not being disturbed.

60 Therefore, the 'public interest' objection is broad, and the "public interest may tell against the grant of a mining lease even though the particular interests of an individual are the only interests primarily effected."[50] The interests of a small section of the public may therefore nevertheless be a public interest, going to the question of the interest of the public as a whole, although the weight given to that public interest may be less because of the small size of the section.[51] Given that, and the lack of constriction in the *Mining Act* as to who may object, an objection may be lodged over land that is not the objector's, but is adjacent to that land, where there is a genuine public interest concern over the proposed activity.

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[46] ***Re Warden Heaney; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association (Inc)*** (1997) 18 WAR 320, 332.
[47] ***McKinnon v Secretary, Department of Treasury*** [2006] HCA 45; (2006) 228 CLR 423 [55].
[48] ***Hogan v Hinch*** (2011) 243 CLR 506 [71].
[49] ***Cartstens v Pittwater Council*** (1999) 111 LGERA 1, 25.
[50] ***Sinclair v Mining Warden at Maryborough and Another*** [1975] HCA 17; (1975) 132 CLR 473, 487.
[51] ***Sinclair v Mining Warden at Maryborough and Another*** [1975] HCA 17; (1975) 132 CLR 473, 487.

Objections relating to land use

61 However, that does not mean that all objections that do not challenge 'form' are in the public interest. The warden in ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker***[52] relied on ***FMG Chichester Pty Ltd v Rinehart & Ors***.[53] In the latter Warden Calder made it clear that the parliament, by inserting compensation provisions to be applied when conflicting land use claims constituted an objection, meant for the primary resolution method to be compensation, not an objection to the application. In ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker***[54] Warden O'Sullivan ultimately found that part of the objection lodged by Dylan Corker was an abuse of process because of the duplicity which would occur should he be allowed to protest activities that were most likely covered in an existing compensation agreement between the applicant and Leanne and John Corker. However, in my view it is clear from both cases, and subsequent recent cases such as ***AC Minerals Pty Ltd v Cowarna Downs Pty Ltd***[55] that pastoralists have no right of veto, their objections being commercial rights so protected by compensation. Where an objector has no right of veto, the objection has no basis. The appropriate method of resolution is under Part VII of the *Mining Act*, not Part IV. Land use is a private function, and therefore competing land use is a private matter between two users, albeit that the *Mining Act* provides for resolution of that conflict, with compensation, in the Wardens Court.

62 Therefore, where the objections in the present case relate to:

- damage to the pastoral business,
- interference with quiet enjoyment of the lease,
- Increased costs of production,
- Reduced productivity of the pastoral land,
- The risk of contamination or death of livestock, and
- The risk of accident or injury to station personnel,

such as objections 590897, 618956 - 618958, 618961 – 618963 and 626720, they are of no weight, or merit.

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[52] ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker*** [2021] WAMW 11.
[53] ***FMG Chichester Pty Ltd v Rinehart & Ors*** [2010] WAMW 7.
[54] ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker*** [2021] WAMW 11.
[55] ***AC Minerals Pty Ltd v Cowarna Downs Pty Ltd*** [2022] WAMW 22 [123] – [125].

63 Because of their nature, the objections lodged by the objectors relating to that concern had no weight from the time of lodgement. Neither the emergence of the evidence, particulars or legal argument has brought an understandable realisation of that position. Lodgement and pursuit of the objection with those particulars was unnecessary, and therefore those grounds of objection were of no merit, and were frivolous at lodgement. This weighs in favour of a finding that the objectors acted frivolously in lodging them.

Objections claiming injurious affection

64 The objectors also claim 'injurious affection' to the rights granted under their pastoral lease. That term has a specific legal meaning under the *Mining Act.* An objection based on injurious affection, or detriment, generally relates to the detriment to the activities of an existing tenement, including where the proposed tenement is a miscellaneous licence.[56] However, there must be a primary or existing tenement over which the proposed tenement will have some detriment. The relevant objections do not purport to protect existing or primary tenements.

65 Therefore, objection 626720 has no merit, or weight, as it appears to be misconceived. Alternatively, the objection relates to the private interests of the objectors by repeating the risks to the pastoral business. Either way, because of its nature, it had no weight, from the time of lodgement. Further, neither the emergence of the evidence, particulars or legal argument has produced an understandable realisation of that position, and pursuit of the objection was unnecessary, and therefore frivolous. This weighs in favour of a finding that the objectors acted frivolously in lodging this objection.

Are the remainder of the objections public interest objections, or are they private interest objections dressed up as public interest objections?

66 There is no doubt that it is a matter of public concern, and interest, that threatened and endangered species are protected, that certain activities do not contribute to climate change or interfere with valuable assets such as water, or, to some at least, that the cattle industry remains viable in Western Australia. Given what has been said in past cases about the breadth of the legislation governing objections,

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

concerned citizens, land holders or other groups may raise concerns over those matters. One way of raising those concerns is to lodge an objection.

67 The applicant in the present case submitted that while the objections relating to the environment may look like public interest objections, they are not, relating only to the Corker's station and business.

68 To determine whether the environmental objections raised are in fact private interest concerns, I have reviewed the details of the objections. In an expansion of their particulars, the objectors raised in more detail their apparent public interest objections in the Affidavit of Leeanne Margaret Corker, sworn 18 November 2021 under the following headings, which I address in some detail below:

a. Biosecurity threat to Red Hill
b. Biosecurity risk – declared pests in Western Australia
c. Biosecurity risk – weeds of national significance
d. Biosecurity risk – Mesquite
e. Biosecurity risk – Parkinsonia
f. Biosecurity risk – current and potential distribution of the declared plants
g. Biosecurity risk – management and control of the declared plants
h. Biosecurity risk – environmental and biosecurity obligations of pastoral lessees
i. Biosecurity risk – pastoral lease renewal.

Biosecurity threat to Red Hill

69 The biosecurity threat identified by Ms Corker is by the commencement of the haul road passing through areas known to be infested with declared weed species of a particularly invasive nature, mainly mesquite, Parkinsonia and coral cactus.[57]

70 Ms Corker summarises the general impacts of the weeds at [36] – [52] and the detrimental impact on Red Hill from the weeds at [34] and [86] of her affidavit. Each factor identified by her in [36] relates to the Cardoo beef cattle business, damage to vehicles, the impediment of access by stock and people to infested areas and the economic viability of the business by reducing the grazing value of the land and increasing costs. Further, she complains at [35] that all of this will

[57] Affidavit of Leeanne Margaret Corker sworn 18 November 2021 [27].

put the leaseholders to extra cost in relation to compliance. I accept, for the purposes of this application that at the time of swearing her affidavit, at least, there were declared weeds in areas close to Red Hill Station, and that the haul road would traverse some of those areas.[58]

The biosecurity threat generally

71 Ms Corker also set out in her affidavit sworn 18 November 2021 at [60] that the spread and infestation of the weeds has known and considerable economic and social loss. The document she relies on to support that conclusion is annexure LMC-17 to her affidavit, produced by the Pilbara Mesquite Management Committee, a not-for-profit organisation. The general comment about loss, on page 3 of that document, is not referenced, however, I accept for the purposes of this costs application that the spread of all 3 weeds is an environmental challenge requiring the concerted efforts of not only individual pastoralists on their own land, but pastoralists together, other agencies and those who risk spreading them with their activities.

72 In paragraph [86] of her affidavit Ms Corker summarised the effect of "infestations of the Declared Plants of Red Hill." Largely, like the summation in [36] of her affidavit, they are focused on the effects on the business of Cardoo.

73 However, there are effects which have a broader effect in [86] of her affidavit:

> (c) outcompete and displace native vegetation, albeit in reference to reduction in grazing value;
>
> (i) alter ecosystems impairing the biodiversity of the range lands and degrading and precluding access to culturally significant sites and landscapes;
>
> (j) alter water flow and lower the water table;
>
> (k) cause erosion;
>
> (l) reduce availability of food and habitat for native animals;
>
> (m) provide shelter for feral animals.

[58] Affidavit of Leeanne Margaret Corker sworn 18 November 2021 [55] – [58].

74 Ms Corker also set out the responsibilities of a pastoralist to the state government in her affidavit at [62] – [77] and the consequences of those responsibilities on lease renewal at [78] – [82].

75 From her evidence I accept that:

a. Pastoralists, like miners, use land which they do not own to run a business. With a licence to so exploit state land and resources, they have responsibilities.

b. Some of the responsibilities relate to the maintenance and management of the state land, not for the maintenance and management of the pastoralist's own business, but for the preservation of the land or its flora, fauna and water and future users.

c. Some of the responsibilities relate to the spread of potential threats not only to the pastoralist's business, but in general, to the amenity of the land, to the native vegetation, flora and fauna and other animals.

76 John Digby Corker lodged an affidavit sworn 18 November 2021 in support of the objections. Like Ms Corker, he attests to having significant practical experience in farm management, pastoral management and rangeland natural resource management and has been involved in agencies and organisations dedicated to land conservation and biosecurity. However, also like Ms Corker, his evidence underpinning the objections largely addresses private interests, with headings to his evidence:

Damage to Red Hill pastoral business
Death and injury of livestock by collision, contamination and disease
Interference with the objectors' ability to pass over the land
Accident of injury to Red Hill personnel and visits
Impact on pastoral infrastructure
Impact on stock and grazing management
Impact on cattle mustering
Damage to pastoral land and loss of productivity
Introduction of weeds and declared plants
Impacts of taking water
Impacts that will increase the pastoral cost of production
Interference with objectors' quiet enjoyment of the tier pastoral lease.

77 However, as with Ms Corker's affidavit, there are some effects listed by Mr Corker which have a broader effect:

> [111] Clearing, earthworks and drainage will interfere with water, leading to erosion, water channeling, water ponding, flooding, and areas of water starvation, damaging ecosystems and degradation of land.
>
> [113] The increased risk of fire.
>
> [114] Materials used effecting the chemical composition of the environment.
>
> [116] The infestation of weeds causing severe land degradation and will:
>
> (c) outcompete and displace native vegetation, albeit in reference to reduction in grazing value;
>
> (i) alter ecosystems impairing the biodiversity of the range lands and degrading and precluding access to culturally significant sites and landscapes;
>
> (j) alter water flow and lower the water table;
>
> (k) cause erosion;
>
> (l) reduce availability of food and habitat for native animals;
>
> (m) provide shelter for feral animals.

78 Neither Ms nor John Corker particularise further in their evidence the risks they have identified to the Warramboo flood plain.

79 In addition to similar matters raised by Ms Corker and John Corker, Dylan Peter Corker, in his affidavit sworn 21 November 2021, raises the following issues regarding the use of the haul roads:

a. Interference with the usual use of the roads in the area by many road users
b. Interference with the Warramboo Flood Plain, an unusual hydrological formation with unusual soil and vegetation systems in the area
c. Interference with natural water
d. Interference with the habitat of native wildlife, some of which are declared endangered or vulnerable.

80 As this is a review of the objections and evidence to determine whether the objections are in the public interest, I have not decided whether the objections

would be upheld. In my view I must decide whether they had some weight, or merit, as being of interest to the public. Whether that weight would have outweighed the merit of the application I cannot say as none of the evidence was ultimately tested. However, I am of the view that the objections relating to the spread of the weeds, the interference with water and the effect of the activities on the ecosystems and environment are of a public interest nature, albeit they may also have a direct effect on the private interests of the objectors. While John and Ms Corker largely referenced the damage back to their business and general enjoyment of that business and the land, the objectors in their affidavit evidence also listed broader concerns, from which it could be said:

a. it is in the public interest that native vegetation is not overtaken by weeds, no matter where it is, and what the private consequences are.
b. it is not in the public interest that erosion occur, or that the water table be depleted, that ecosystems be altered or there is an increased risk of fire.
c. The government oversees pastoral leases, as it oversees mining. It has constructed and implements a significant framework within which pastoralists must work, including management of their environment, and the greater environment in safeguarding against the spread of disease and pests. While this may be to protect primarily the cattle industry, it also protects the environment in which the pastoralist exists, driven by competing public policy considerations. In any event, the pastoralist industry, like the mining industry, brings benefit to the state.

81 Accordingly, being partly of a public interest nature, the objections, or parts of objections raised by the objectors which relate to public policy and public interest matters, are objections in the public interest.

82 I am therefore not satisfied that all of the objections relate to private interests only.

Did the objectors commence or defend the private interest objections frivolously or vexatiously?

83 The parts of the objections which are not in the public interest, relating to private interests and conflicting land use, as I have identified, are frivolous, and would have had no weight in the hearing of the application.

84 While it is not relevant to whether the objections have merit, or weight, that the Corker's have been involved in litigation over the ground in the past, it is relevant

to the question of whether the objectors, or some of them, by lodging and pursuing the objections, were doing so in a frivolous or vexatious manner.

85 The definition of vexatious in my view contains an element of intent, understanding, or knowledge, or at least a lack of insight into one's behaviour. It may be that an objector is not aware of the lack of merit to the objection until certain procedural steps occur, such as particulars, or the exchange of evidence, particularly expert evidence, or legal submissions have been filed. It could not be said that an objector, without that awareness, has nevertheless acted vexatiously.

86 On the other hand, if a warden has previously set out, for at least one of the same objectors, that where the objection is by a pastoralist relating to mining operations interfering with pastoral activities, causing damage to infrastructure and property, generally such risks are dealt with by a compensation agreement, rarely with a grant with conditions,[59] and, the inference being, not at all with a refusal, at least that objector is taken to understand that such objections will not result in a refusal, and will rarely result in conditions. As is clear in the present case, and as was explained by the warden in ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker***,[60] delivered on 12 July 2021, Leanne and John Corker are related to, and run a business with, Dylan Corker, that business being Cardoo Holdings. In ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker***[61] Dylan Corker's objections covered Red Hill Station, the same station as in the present case. His Honour refers to input from Leanne and John Corker in the proceedings before him.[62] Therefore, it is highly unlikely that each of the objectors in the present case were not aware that the warden said that neither pastoralists nor an objector who lives on the same ground "at their pleasure" have veto over mining operations because of competing land usage.

87 Even if Ms and John Corker did not know that from his Honour's determination, his Honour reminded the objectors of that in the present proceedings, at the mention hearing of L 08/214 and L 08/219, on 23 July 2021 when the warden said to Ms Corker, who was appearing on behalf of all Corker objectors, "It's generally

[59] ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker*** [2021] WAMW 11 [28].
[60] ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker*** [2021] WAMW 11.
[61] ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker*** [2021] WAMW 11.
[62] ***Aquila Steel Pty Ltd & AMCI (IO) Pty Ltd v Corker*** [2021] WAMW 11 [22].

not the case…that pastoralists can veto mining."[63] Ms Corker admits that "I do understand the process and that we can't veto the application. We are seeking to protect our interests and have our concerns addressed through this process so we do wish to proceed."[64]

88 As can be seen in the table at [46] of these reasons some of the objections are directed towards a complaint of competing land use and private business rights. Therefore, each of the objectors must have known that their objections and the defence of those objections could not have any relevance on the present wardens proceedings. If it was compensation or conditions they sought, resort could have been had to the process under sections 20 and 123 of the *Mining Act*. The presence of those processes means that it is not appropriate to use an objection to protect private interests. The admission by Ms Corker and the law relating to the available processes are factors that weigh in favour of a finding that the objectors were frivolous and vexatious in lodging the objections relating to private interests and competing land use. The warnings given by his Honour, added to those factors, adds more weight to a finding that the objectors were vexatious in pursuing those objections or parts of objections subsequent to those warnings.

Did the objectors commence or defend the public interest objections frivolously or vexatiously?

89 Where the objections raise public interest concerns, they have, at their highest, some relevance to the application, relating to the area on and surrounding the Corker's pastoral lease, pastoralists generally and the Pilbara flora and fauna, and therefore they were not of no merit when lodged.

90 In an alternative to the submission that all of the objections effectively relate to private interests, the applicant claims that even if the objections can be said to be in the public interest, the objectors did not engage with any of the applicant's submissions or evidence in the preparation of documents for the hearing. It claims that that meant that the Corker objectors either had no response to the applicant's

[63] T 23.7.21, 4, annexure JMP2 to the Affidavit of Jemimah May Pullin sworn 17 June 2022.
[64] T 23.7.21, 5, annexure JMP2 to the Affidavit of Jemimah May Pullin sworn 17 June 2022.

evidence and arguments or only invested minimal effort because there was never any intention to proceed to hearing, having vexatiously pursued the proceedings.

91 This submission requires a review of the evidence lodged.

92 Ms Corker's affidavit dated 18 November 2021 provides general information about the weeds and the consequences of the weeds spreading, being industry papers, organisation policy documents, maps and frameworks and scientific papers. Many are published by the Pilbara Mesquite Management Committee.

93 Ms Corker then addressed the applicant's evidence, in paragraphs [88] to [91], and in some cases, the applicant has responded. Neither John nor Dylan have responded to the applicant's evidence, Ms Corker doing so on their behalf. The form of the response is as follows:

The applicant's evidence

Adam John Parker

94 Adam John Parker is the Manager of Environmental Approvals for the applicant. His affidavit, affirmed on 12 May 2021 sets out the steps the applicant will take regarding the threat of weeds. He annexes the applicant's weed hygiene and control procedures, the certificate required to be completed by all vehicles entering the licences and a management plan. He says that the applicant is seeking an Environmental Impact Assessment and preparing management plans, particularly on the haul road proposed on L 08/214 and L 08/219.

95 The objectors' response to that evidence is that the objectors cannot be satisfied that any environmental impact assessment and management plan will be sufficient to mitigate the risk of the weeds establishing and spreading along the haul road corridor until they have had the opportunity to review them.[65] In that respect, I note that the referral and assessment procedure under the *Environmental Protection Act 1986* provides for extensive public consultation and public review, allowing the Corkers, and any organisation associated with them or concerned with the spread of, for example, weeds, to make their own submissions direct to the Authority. The outcome of the assessment and any management plans or directions resulting in conditions imposed on the grant are out of the hands of the applicant. Weight is added to a submission that an objection has been pursued or

[65] Affidavit of Leeanne Margaret Corker sworn 18 November 2021 [89].

defended frivolously and vexatiously when an objection is maintained simply because the objector claims, effectively, that an expert public agency independent of the applicant may arrive at an outcome that the objector does not agree with, or may not trust.

96 On 8 October 2021 Adam John Parker affirmed a further affidavit addressing the proposed haul road on L 08/231 and L 08/232. He sets out the steps the applicant will take regarding the threat of weeds. He annexes the applicant's updated weed hygiene and control procedures, the certificate required to be completed by all vehicles entering the licences and a management plan. He also annexes a working, and, according to him, successful, example of the weed management plan being the applicant's plan in relation to Yilgarn Operations. He reiterates that the applicant is seeking an Environmental Impact Assessment and preparing management plans.

97 The management and weed control protocols, he says, have been developed from baseline surveys undertaken along the proposed haul roads.[66]

98 The objectors have 2 complaints about that evidence:

a. The Yilgarn example is not comparable to the Red Hill site, the topography, soil type, rainfall being different and the current presence of mesquite and Parkinsonia along the proposed haul road meaning that the risk of transfer is much higher than at the Yilgarn site.[67]

b. No surveys or other activities on Red Hill were authorised by the objectors.[68]

99 Those complaints are not relevant complaints, in that they do not properly address the proposed evidence of Mr Parker. This adds weight to a finding that the defence or pursuit of the objections is frivolous and vexatious.

100 Mr Parker swore a third affidavit on 20 January 2022. He acknowledges that plans are only as good as the commitment of the company to consistently comply with them, but maintains that the applicant, by the example of the Yilgarn measures, and the steps the applicant has taken in relation to these applications, has that commitment.[69] That proposition is not one which can be tested by the

[66] Affidavit of Adam John Parker affirmed 8 October 2021 [15].
[67] Affidavit of Leeanne Margaret Corker sworn 18 November 2021 [90].
[68] Affidavit of Leeanne Margaret Corker sworn 18 November 2021 [90]-[91].
[69] Affidavit of Adam John Parker affirmed 20 January 2022 [10]-[12].

calling of opposing evidence, or even cross examination of Mr Parker. The making of that complaint adds weight to a finding that the pursuit of the objections is frivolous and vexatious.

Darren William Killeen

101 On 18 May 2021 Darren William Killeen affirmed an affidavit. He is the Executive General Manager Construction for the applicant. His affidavit sets out the steps the applicant will take to construct the haul road proposed on L 08/214 and L08/219, the tenements outside of but abutting Red Hill Station, and feeding the proposed haul roads on L 08/231 and L 08/232, and the uses of the haul road.

102 The objectors' response to that evidence is that it confirms their fears that the construction of the haul road will require significant soil disturbance and earthworks by large machinery, an activity which introduces a high risk that the weeds will be transported along the corridor.[70] While that complaint is unresponsive to the case itself, I recognise that the experts to be called in the present case were to address the consequences of that disturbance and accordingly this response does not add weight to a finding that the pursuit of the objections was frivolous or vexatious, however, neither does it add weight that they were not as the complaint is, as I have said, not responsive.

The applicant's expert evidence

103 The applicants lodged affidavits of 3 experts:

a. Simon Colwill, Botanist, 20 January 2022
b. Lisa Adams, environmental approvals specialist, 21 January 2022 and
c. Scott Walker, environmental specialist, 21 January 2022.

Simon Douglas Colwill

104 Mr Colwill managed the flora and vegetation component of the surveys conducted at Red Hill station relied on by Adam Parker. He recorded the presence of particular weeds, although none of the detected weeds were considered weeds of National Significance or declared pests. Mesquite was not recorded within the survey area at Red Hill although he accepted that mesquite is known to occur sparsely outside the survey area. He formed the opinion that the further spread of

[70] Affidavit of Leeanne Margaret Corker sworn 18 November 2021 [88].

weeds present would not be expected notwithstanding further mining or infrastructure development in the area.[71]

Lisa Anne Adams

105 Ms Adams is an environmental approvals specialist, and attaches to her affidavit the Ashburton Infrastructure Project referral under s 38 of the *Environmental Protection Act 1986*. She confirms that the construction and operation of linear infrastructure has the potential to spread or introduce weeds through earthworks and vehicle movements. As such the Environmental Protection Authority assessment process requires information regarding the proposed project, an assessment of the potential for the introduction and/or spread of weeds and the management of that risk by the applicant. In her experience the Environmental Protection Authority may request additional information and require public review of environmental assessment documents depending on the environmental risk and public interest.[72]

Scott Nathan Walker

106 Mr Walker is the ecology group leader who also took part in the Red Hill survey. His evidence goes to the methodology of the survey and responds to the evidence of John Digby Corker[73] in his affidavit sworn on 18 November 2021, Dylan Peter Corker[74] in his affidavit sworn 24 November 2021 and the evidence of Ms Corker.[75] He confirms that:

a. Introduced flora were already well established in the large numbers within and outside the Red Hill application survey area however no declared pests or weeds of National significance were recorded within that area. Therefore, he forms the view, weeds are already present and well-established in the local and regional areas surrounding and on Red Hill Station and any suggestion that the applications may cause weeds and declared plants to become established is negated.

[71] Affidavit of Simon Douglas Colwill affirmed 20 January 2022 [8]-[12].
[72] Affidavit of Lisa Anne Adams affirmed 21 January 2022 [19]-[22].
[73] Affidavit of Scott Nathan Walker affirmed 21 January 2022 [12]-[15].
[74] Affidavit of Scott Nathan Walker affirmed 21 January 2022 [19]-[26].
[75] Affidavit of Scott Nathan Walker affirmed 21 January 2022 [16]-[18].

b. Neither mesquite, Parkinsonian or coral cactus were recorded in the survey area.

c. The risk of spreading declared plants by natural means from neighbouring landowners is low to moderate.

107 Mr Walker also responds to John Corker's criticisms in his affidavit of the applicant's current procedures for weed management. He formed the opinion that the applicant's procedures and protocols are sufficient to mitigate the risk of infestations of declared plants onto Red Hill Station.[76]

108 Mr Walker responds to the issues raised by Dylan Peter Corker in his affidavit sworn on 24 November 2021 regarding the Emu Apple tree. Mr Walker did not find any Emu Apple trees in the survey area, however, I note that Agreed Fact 23(b), prepared for the substantive hearing, is that there is one Emu Apple tree within the area of the applications. Further, Mr Walker formed the opinion that it is not correct to say that the application has the potential to spread the declared plants along hundreds of kilometres of water systems, and then the surrounding areas by cattle.[77]

109 Mr Walker also responds to the independent expert reports lodged by the objectors. In relation to Jo-Anne Williams Mr Walker accepts that her report is comprehensive however notes that any criticisms in her report have now been negated, in his view, by new weed hygiene and control and management plans, attached to Mr Adams affidavit of 20 January 2022.[78] In relation to Professor van Leeuwen's report, Mr Walker, from his expertise and research, noted that the presence of two particular grasses identified by Prof van Leeuwin, which are not declared pests or Weeds of National Significance are seen by pastoralists as an advantage for cattle fodder and to guard against soil erosion. Therefore, he says, a comment from Prof van Leeuwin that those two grasses are of great biosecurity risk to the Warramboo floodplain is incorrect. He does agree, however, with the professor's opinion that the greatest risk of introduction of Weeds of National Significance will be during haul road construction and maintenance. However, he

[76] Affidavit of Scott Nathan Walker affirmed 21 January 2022 [15].
[77] Affidavit of Scott Nathan Walker affirmed 21 January 2022 [26].
[78] Affidavit of Scott Nathan Walker affirmed 21 January 2022 [27]-[32].

reiterates his comments that in his view the plans put in place by the applicant satisfactorily mitigate that risk.[79]

The objectors' experts

110 The objectors lodged reports by two experts:

a. Jo-Anne Nichole Williams, ecologist, November 2021 and
b. Professor Stephen van Leeuwen, 23 December 2021.

Jo-Anne Williams

111 In summary, Ms Williams finds[80]:

a. The earth works specifications produced by Mr Killeen "provides some sound direction for management of weeds and biosecurity during the construction phase." The protocols and practices in Mr Parker's affidavit of 18 May 2021 are generally sound and successful, although have not had sufficient time in practice to truly test their success.
b. The value of a plan is only as good as the ability to implement and maintain it. Ms Williams provides reasons why construction workers and the site team may not be able to recognise weeds nor comply with the plan of management. Largely they relate to education and interest.
c. The reports of the applicant only address the proposed tenements, not the larger project.
d. The current risk of movement of weeds is low however the significant ground disturbance and movement of machinery and people and the structure of a linear infrastructure will increase that risk significantly.
e. Training could be incorporated into management plans, and the management plans do not cover actions that will be taken upon breach. Suggested remedial action, in her view, was unreasonable.
f. In any event, some suggested amendments and inconsistencies to plans would most likely be covered by the Environmental Impact Assessment.
g. Some of the methods and reporting by Mr Parker and others who have provided information is questionable, and the lack of specifics on area

[79] Affidavit of Scott Nathan Walker affirmed 21 January 2022 [33]-[39].
[80] Williams report section 5 (the report is not paginated).

locations over the whole project made it difficult for her to be specific on likelihood of risk to biodiversity.

Professor Stephen van Leeuwin

112 Relevant to the public interest objections, Prof Leeuwin notes that the effects of the project crossing the Warramboo flood plain are:

a. A degradation in the quality of habitats, such as altered hydrological and fire regimes, encroachment of environmental weeds and the possible introduction of weeds of National significance, in a reduction in the abundance of particular native shrubs and consequently supporting and protecting fewer mammals and birds.
b. Mortality from vehicle strikes to a large amount of fauna.
c. Enhancement in grassy weed encroachment such as the kapok bush and Buffel grass, the professor acknowledging that Buffel grass, while a pervasive weed, is also critically important fodder.
d. The development of a haul road and other infrastructure will provide a corridor facilitating enhanced entry to feral cats.
e. The construction of roads and other infrastructure and the clearing required will itself damage native vegetation and habitats, particularly to the endangered northern quoll, the Pilbara olive python, the vulnerable Pilbara ghost and leaf-nosed bats, and the Emu Apple tree.

113 Professor Leeuwin lists controls such as the Mitigation Hierarchy (government of Western Australia 2014, Commonwealth of Australia 2016) that in his view may minimise the effects on flora, fauna and ecological communities.[81] Professor Leeuwin also acknowledges that the deleterious effect of infrastructure developments has been recognised by environmental regulators and managers and studies have been embarked upon to provide management solutions. Management plans and engineering designs have been tailored accordingly. He acknowledges that mitigation strategies in relation to roads are complex and describes methods in which haul roads are built to ensure minimal impediment to water flow and the integrity of the road.[82]

[81] Report of Professor Stephen van Leeuwen, 23 December 2021, 6.
[82] Report of Professor Stephen van Leeuwen, 23 December 2021, 7.

114 He notes that Rio Tinto Ore implemented offset plans regarding effects on the Pilbara olive python and northern quoll, in compliance with environmental approvals under an Environmental Impact Assessment, and that mitigation plans are possible regarding ecosystems such as limiting the travel times and speed on the roads.[83] Further, there is current environmental advice under the various biodiversity conservation enactments and significant scientific research and mitigation strategies regarding the Pilbara ghost and leaf-nosed bats, having been declared vulnerable.[84]

115 Like Ms Williams, Prof Leeuwin criticises Mr Parker's evidence for lack of planned remedial information but notes the applicant's commitment to ensuring minimal impacts on the natural flows of the flood plains.[85] He says he is disappointed with the applicant's lack of proactivity, but appears to accept that protection will nevertheless be afforded to threatened species by conditions imposed by the environmental regulator.[86] Further, he notes that the proposed weed hygiene control procedures produced by the applicant are "in line with industry best-practice,"[87] and that many of the risks he has identified can be mitigated or minimised by appropriate strategies and that appropriate biosecurity and quarantine protocols and procedures are standard practice for the Pilbara mining industry, having historically a high rate of success.[88]

116 Having regard to Ms Williams and Professor Leeuwin's reports, and the proposed evidence of the applicant, it appears that the parties are largely in agreement about:

a. The risk to environmental features of Red Hill Station under the current proposals.
b. The significant research and awareness of those risks.
c. The best practice in relation to mining companies mitigating and controlling those risks, and that, with some qualms about managing

[83] Report of Professor Stephen van Leeuwen, 23 December 2021, 8, 9.
[84] Report of Professor Stephen van Leeuwen, 23 December 2021, 10, 11.
[85] Report of Professor Stephen van Leeuwen, 23 December 2021, 18.
[86] Report of Professor Stephen van Leeuwen, 23 December 2021, 19.
[87] Report of Professor Stephen van Leeuwen, 23 December 2021, 19.
[88] Report of Professor Stephen van Leeuwen, 23 December 2021, 21.

compliance breaches and education, the evidence provided by the applicant about its intended strategies follows that best practice.

d. The high likelihood of the Environmental Protection Authority and other regulatory agencies imposing conditions in accordance with current environmental requirements and guidelines.

e. That plans are only as good as the commitment of the miner.

117 Given that summation of the agreement of the parties, it appears that the only matters really in contention between the parties were the conditions that may be imposed, although even that argument may have had limited utility given the project had already been referred to the Environmental Protection Authority and the experts largely agree with the steps and processes proposed by the applicants and its experts.

118 All expert evidence was prepared by 21 January 2022 and there was a further affidavit filed sworn by Mr Mullan on behalf of the applicant on 25 January 2022.

119 Therefore, after the exchange of expert evidence, at least, there could have been, in my view, a finding that there was no need for the objectors to be heard under s 42 of the *Mining Act*, as it applies to the application for a miscellaneous licence pursuant to s 92 of that Act in relation to the substantive nature of the public interest objections. Further, given the content of the expert reports and the acceptance of the majority of the processes proposed by the applicant and the likely responses of the regulators, would there have been any utility in a hearing in relation to proposed conditions. The concerns raised by the public interest objections have been addressed by the experts and the responses from the applicant's witnesses.

120 This adds weight to a finding that the public interest objections were pursued frivolously.

121 Further, the acknowledgement by Ms Corker at the mention hearing on 23 July 2021 that the objectors are using the objection process to "protect our interests" adds weight to a finding that in reality their primary interest was their business. While I accept that "our" interests could also mean the "public interest," that admission comes after an acceptance that the objections will not veto the application. A public interest objection may veto the application, and while I acknowledge that Ms Corker is not a lawyer and was unrepresented at that

hearing, I infer that she was referring to the Corker's private interests in that exchange. This adds weight to a finding that the public interest objections were incidental to the private interest objections. Once the expert evidence was exchanged showing even the public interest objections would likely have no bearing on the ultimate outcome of the application, other than perhaps on conditions, the pursuit of those objections was vexatious.

122 However, even prior to the applicant's experts providing their opinions, the objectors must have had an understanding that their public interest objections had no weight. As I have set out, even the objectors' experts, whose evidence was finalised in December 2021, largely acknowledge the suitability of the proposed mechanisms to reduce the identified risks by the applicant and the suitable protective oversight or regulatory agencies. It could be argued that the applicant's experts were unnecessary in that regard. This is a factor that adds wait to a finding that the pursuit of the public interest objections from the lodging of the objectors' expert reports was frivolous and given the factors I have previously referred to in relation to the objectors' attitude to the public interest objections, also to a finding that that pursuit was vexatious.

The decision of the applicant not to pursue the 'northern route' on L 08/231

123 I am aware from the undated affidavit of Ms Corker prepared for the application for costs that from at least November 2020 the objectors highlighted to the applicant their concerns over the 'northern route.'[89] In January and February 2021 a preference was expressed for the 'southern route.'[90] Ms Corker says that on 17 March 2022 the objectors told the applicant that "any agreement would be conditional upon [the applicant] abandoning the northern route option," with a "revised position" maintaining the dislike for the northern route sent on 19 April 2021.[91]

124 The objectors' written submissions dated 2 May 2022 suggested alternative positions for the haul road not the subject of the applications before the warden, and the identification of the southern route as the preferred route, if at all. No concession was made by the objectors that their concerns had been addressed, or

[89] Undated affidavit of Ms Corker [11].
[90] Undated affidavit of Ms Corker [18] and [22].
[91] Undated affidavit of Ms Corker [25] and [27].

that the only concern was then the conditions to be imposed, or the preferred route. None of the objections was withdrawn.

125 On 13 May 2022 the applicant alerted the objectors to the fact that they were prepared to abandon the northern route on the basis that there was acceptance of other terms proposed by the applicant in April 2022.[92] The objectors did not accept those terms, and the objections remained on foot. On 23 May a draft deed of settlement was received by the objectors outlining the applicant's intention to exclude the northern route, adjust construction plans to minimise further identified risks, and further assurances regarding weeds. However, the 'commercial' terms were not accepted by the objectors.[93] Nevertheless, the objectors were at that stage, according to Ms Corker, of the view that "the main reason for the objections had been resolved"[94] and resolved to withdraw the objections.

126 They did not, however, in those terms, do so.

127 The objectors then told the applicant that the objections would be withdrawn only if a list of requests was met. Those requests included additional requirements regarding the land, roads and weeds, and that the applicant pay "an amount to account for cost and legal fees."[95] The applicant counter-offered, however negotiations ceased, without agreement, on 27 May 2022.

128 Ms Corker says that the objections were withdrawn on 30 May 2022 because the withdrawal of the northern route option "resolved the Objectors main environmental concerns" and the applicant had refused to "settle on agreeable terms."[96]

129 Having said that, however, she goes on to say that during the negotiations the applicant "neglected to seriously address the Objectors environmental concerns," and had it done so in relation to the northern route earlier, "it is possible that the objections may have been resolved much sooner."[97]

130 I do not accept either proposition, because:

[92] Undated affidavit of Ms Corker [34].
[93] Undated affidavit of Ms Corker [37] and [38].
[94] Undated affidavit of Ms Corker [39].
[95] Undated affidavit of Ms Corker [40].
[96] Undated affidavit of Ms Corker [44].
[97] Undated affidavit of Ms Corker [46] and [47].

a. Having reviewed the evidence earlier in these reasons, I am satisfied that much of the concern raised by the objectors and their experts was addressed by the applicant's experts and its proposed witnesses, and, in fact, by the objectors' experts, and
b. As Ms Corker admitted, the objectors rejected the proposed settlement of the objections because the commercial terms were not agreeable. Having said that the objections were not withdrawn earlier because of the lack of attention to the environmental concerns, saying that the objections were then withdrawn because the applicant had refused to "settle" on agreeable terms is incongruous.

131 That rejection of those propositions adds weight to my finding that it was the private interests, safeguarded by commercial terms, which were the primary focus of the objector.

132 All of these factors, including the summation of the evidence and the exchange between Ms Corker and the warden at the mention hearing add weight to a finding that the public interest objections were of minimal concern to the objectors, and that they invested minimal effort in pursuing those objections, withdrawing all of the objections despite the lack of settlement on commercial terms at the very last moment. This also adds weight to a finding that the objectors had no real intention to proceed to hearing on the public interest factors, and adds weight to a finding that the objectors pursued the public interest objections predominately to extract a commercial settlement, and therefore frivolously and vexatiously.

133 Therefore, I have concluded that:

a. The objections regarding private interests and competing land-use were commenced frivolously and vexatiously;
b. The objections regarding the public interest were not commenced frivolously;
c. The objections regarding private interest and competing land use were defended frivolously and vexatiously;
d. The objections regarding public interest were pursued after the end of December 2021 frivolously and vexatiously.

Were the public interest objections lodged frivolously and vexatiously?

134 There remains to determine whether the public interest objections were, as the applicant alleges, commenced to exert commercial pressure on the applicant. If they were, then they were commenced vexatiously.

135 I cannot be satisfied that the public interest objections were frivolous when lodged by having regard to the subsequent agreement between the experts. In my view placing the burden on an objector, even where that objector has considerable experience and expertise in pastoral management as well as some experience in objections to applications, to assume the outcome of expert reports such that costs may be imposed against a party when lodging objections would be to curtail too greatly the self-regulating policy of the Act and this weighs against costs being awarded to the applicant prior to the exchange of expert reports in the present case.

136 While I recognise that undue delay is a separate factor under reg 165(4)(b) in my view the behaviour as a whole of the objectors is relevant to determining, by inference, whether they commenced and pursued to the end of December 2021 the public interest objections vexatiously, that is, to exert commercial pressure on the applicant.

137 I am not satisfied that the applicant has shown that any delays in bringing the matter to hearing were caused by the objectors specifically to exert commercial pressure on the applicant or to delay the proceedings in order to gain some other benefit.

138 I have had regard to the transcripts of proceedings provided as annexures JMP1 and JMP2 to the affidavit of Jemima May Pullin sworn 17 June 2022. While it may be that the objectors chose not to have their lawyers present from time to time in proceedings, they are not lawyers and although, as Warden O'Sullivan pointed out on 23 July 2021, once a person elects to object, the responsibility of pursuing their objections in a time frame and manner which may not be entirely convenient to the objector is something they cannot complain of, the objectors engage in a business which does not relate to mining. Accordingly, their pursuit of an objection is secondary to their primary business. Further, the tenements and purposes proposed by the applicant and the number of applications, both granted

and to be granted, covering similar or the same ground meant that this matter was not particularly straightforward.

139 Even with some experience of previous objections, I'm not persuaded that non-compliance with programming orders, the request to vacate a hearing and the subsequent, once lawyers were engaged, application to join the objections, and unavailability, in the present case, is behaviour from which I can infer that the objectors from the time of lodgement of the objections, were prepared to proceed in an obstructive and therefore vexatious way.

140 Further, given my finding that there was, at least at lodgement, some apparent merit to the environmental objections, I'm not persuaded that the lodging of the public interest objections, or the parts of the objections which incorporated the public interest, was, on balance, frivolous or vexatious.

Did the objectors cause undue delay

141 'Undue' delay is greater than mere delay. I accept that not complying with programming orders and vacating hearing dates causes delay.

142 On 9 May 2022 Warden McPhee delivered a determination in which he determined that the Corkers had objected to an application for an extension of time from another objector who does not relate to them "to take advantage of …error which does not impact on them directly, to support their own resistance to the Applications."[98] Some of the applications in that matter are the applications in the present case.

143 There is an inference available from the objectors' behaviour in failing to comply with programming orders, seeking vacating of hearings and being unavailable for some time for hearing dates, and objecting to an extension of time on an objection that did not concern them, with the background of my finding that the objections were pursued predominantly to exert commercial pressure on the applicant that there was a purpose behind the delays.

144 However, there is also an inference available that their lack of sophistication in relation to complex applications and objections, their perhaps understandable need to attend to their business and lack of understanding as to the need to

[98] ***Leanne Margaret Corker, John Digby Corker, Dylan Peter Corker, Cardoo Holdings Pty Ltd v A.C.N. 629 926 753 Pty Ltd*** [2022] WAMW 11 [53].

commit to the wardens process[99] and the lack of legal advice from time to time all contributed to the delays. Having regard to the dates of the objections, a two-year process through the wardens jurisdiction is not so unusual that it is excessive, particularly when there are several objectors of differing kinds. Neither can I find that the other objections would have been commercially settled faster had it not been for the Corkers. That seems to be an immeasurable valuation.

145 Therefore, I am not satisfied that the delays caused by them were so considerable or extensive that they would attract an order which departs from the starting point that each party bear its own costs.

HAVING FOUND THAT THE OBJECTORS BEHAVED FRIVOLOUSLY AND VEXATIOUSLY, SHOULD I EXERCISE THE DISCRETION TO AWARD COSTS?

146 As I have set out above, I have found that any objections relating to private interests were frivolous and vexatious from lodgement and the applicants behaved frivolously and vexatiously in commencing them and pursuing them.

147 I have also found that the objections relating to the environment, being public interest objections, were not commenced frivolously or vexatiously but were pursued frivolously and vexatiously from the end of December 2021. While the objectors' intentions became apparently clear in the exchange between the warden and Ms Corker on 23 July 2021, I am not persuaded that the public interest objections were pursued frivolously or vexatiously after that exchange. While that exchange added to my findings that, eventually, the pursuit was frivolous and vexatious, it was not until the objectors' experts provided their evidence that I would be so satisfied.

148 I have not addressed the objection that it is not in the public interest for the applicant to have applications over similar tenements or where they already have granted tenements. In my view, that objection played no real part in the submissions and evidence presented prior to the hearing by either party, and given my findings regarding the other public interest objections, any finding on whether

[99] See for example the exchanges between Ms Corker and the warden, T 23.7.21, 3-4.

that was an objection frivolously and vexatiously lodged or pursued would add little weight to, or change, my findings, on the discretion.

149 In their written Submissions prepared for the substantive matter dated 12 April 2022 the applicant suggested at [33(b)] that the warden should not hear the objectors on their environmental objections. As the objectors pointed out in their written submissions regarding costs dated 8 July 2022, the applicant did not make an application for the warden to determine whether the objectors would be heard. While the applicant is not to blame, and bears no responsibility for, the vexatious or frivolous pursuit of objections, not challenging the objections at an earlier stage, but now claiming they are frivolous or vexatious so as to substantiate a claim for costs when the proceedings lasted until the day before the hearing is a factor that may be given some weight in my discretion under reg 165(4) against ordering costs.

150 Given that all but objection 626720 contained a mixture of private and public interest factors, and my findings on the public interest objections, I am not satisfied that I should exercise my discretion to award costs for the lodgement and defence of the private interest parts of the objections prior to the end of December 2021.

151 However, given nothing changed after December 2021 on the private interest objections, my findings are that all objections from December 2021 were pursued frivolously and vexatiously. While it would be enough to enliven my discretion to award costs with a finding that the objectors acted frivolously, I am of the view that the finding that they also behaved vexatiously, and the way in which they did, waiting until the day before the hearing to withdraw, and my rejection of the reasons given by Ms Corker for that decision, weigh in favour of the discretion being invoked, and that factor outweighs the factors in favour of not exercising my discretion.

ORDER

152 I therefore order that the objectors pay the reasonable costs of the applicant as incurred on all objections by the objectors named in this application for costs after 31 December 2021.

153 As the schedule of costs provided for the hearing of this costs application did not differentiate as to dates, I am unable to fix an amount. Therefore, I order that the costs be taxed, if not agreed.

Warden