

Objecting to mining exploration licence applications

By Ricardo Agostino

Local governments are increasingly involved with mining tenements in their pursuit of preservation of economic, social and environmental sustainability of their district. This involvement may require local governments to object to mining tenement applications. Objections are generally heard by the Mining Warden's Court (**Warden's Court**) and it is necessary for local governments to understand the jurisdiction of the court to avoid the risk of being disallowed from being heard by the warden.

Legislative framework for grant of mining tenements

Mining exploration licences are generally the starting point for any prospective mining expedition. The success of the exploration will determine the viability of mining activity within the district and the continuation of mining activity empowered by section 75(7)(b) of the *Mining Act 1978* (WA) (**Mining Act**) which provides for a 'virtual automatic conversion' of an exploration licence into a mining lease.^[1]

Therefore, the preservation of economic, social and environmental sustainability of a district may rest on the grant or refusal of a mining exploration licence. Fortunately, local governments can object to an application for exploration licence pursuant to section 59(1) of the Mining Act by having the matter heard in the Warden's Court. The warden's function is then to analyse the grounds of objection and make its recommendation to the Minister for Mines and Petroleum, Energy, Hydrogen Industry and Industrial Relations (**Minister**) whether to approve or refuse the application for the exploration licence (Section 59(5) of the Mining Act).

The Mining Act is silent on the types of objections which the warden may take into consideration. While it may seem open for the warden to consider all objections, local governments should exercise caution as to the grounds of objections the warden is prepared to consider and the case of **Telupac Holdings Pty Ltd v Hoyer** [2022] WAMW 26 highlights the importance of getting it right.

Telupac Holdings Pty Ltd v Hayer

In this case, the applicant applied for an exploration licence within the Jarrahdale area. The two objectors each filed an objection to the application largely on environmental grounds. However, in the interlocutory application brought by the applicant, Warden Cleary exercised her discretion under section 59(4) of the Mining Act to not afford the objectors the opportunity to be heard on any of their objections. Warden Cleary's substantial reason for the determination was that the warden is not capable to make determinations on high level public policy considerations and particularly, policy considerations that do not fall under the mining regime.

Primary Objections

Warden Cleary substantiated her reasoning by examining each objection put before the court. The following are a summary of the major objections relied upon by the objectors –

1. Effect on water quality and the use or obstruction of other water and water courses, or the general effect on water, catchment areas, wetlands and water courses.
2. Noise, dust, radioactive dust pollution, sand and soil erosion and blowing off pollution, impact on quiet amenity and damage to soil structure and chemistry.
3. Ecological impacts, particularly to specific flora and fauna in the area, including the black cockatoo and the resilience of the ecosystem of the forest and surrounding areas in general.
4. Social, visual, lifestyle, economic, local hobby farm, honey production and tourism impacts and general opposition to mining in a metropolitan area.
5. Long-standing community opposition from the Serpentine Jarrahdale Ratepayers and Residents Association.
6. Adverse impact on National Parks and Reserves.

Mining Warden's Reasons

Warden Cleary in refusing to give the objectors an opportunity to be heard on any of the objections above made the following important observations in relation to the scope of objections allowable in relation to an exploration licence under the Mining Act –

1. *As a whole, while they [objections] may be of broad 'public interest' they are mostly in truth matters of broad and competing public policy over which the warden cannot make any recommendation or determination; and*
2. *The question of the issues raised in the objections are removed from the warden and do not form part of the filtering role because:*
 - many of the concerns relate to activities that are expressly prohibited, or are limited at law by the need for approvals and permits from other expert authorities for whom the warden does not have a filtering role, or any role;
 - some of the objections relate to activities which the proposed endorsements and conditions limit until either authorities or consents are sought, or for which management plans and other agreements must be provided and adhered to, or which simply become conditions of the licence;
 - there is the opportunity for different parties, including the Minister, to refer the proposal to the Environmental Assessment Authority, which would remove the relevant questions from the warden, while imposing its wider public policy considerations and expertise in gathering and assessing the evidence in that process; and
 - there is legislation governing protected flora and fauna, national parks and reserves, pollution and water which the warden neither has the power or expertise to gather evidence on or make determinations of fact under, or make determinations or recommendations on the broad public principles and policies required, and therefore has no role.

Mining Warden's Role

In refusing to hear the objections, Warden Cleary underlines the warden's role within the decision-making process in exploration licence applications to that of a strictly filtering role for the Minister. The warden is unable to make a final

determination because that function is reserved for the Minister in accordance with section 59(1) of the Mining Act.

The warden can only make a recommendation to the Minister whether to grant or refuse the application for an exploration licence. All environmental objections presented before Warden Cleary are only for the Minister to take into consideration when making its final determination on whether to approve or refuse the application for an exploration licence.

The warden when making a recommendation, is confined to the policies and principles of the Mining Act. In other words, the warden examines the issue of whether the application for an exploration licence complies with the Mining Act not only in form, but that it also complies with the context, purpose and principles of the Mining Act.

Key takeaways

The **Telupac** decision emphasises that care must be taken when drafting objections to the warden, as the warden will only afford objectors the opportunity to be heard on matters that are within the scope of the Mining Act. It is also vital to understand the warden's filtering role in the decision-making process. Environmental objections that demand wide public policy considerations or are already governed by other agencies are outside the scope of the warden and are only for the Minister to consider.

Local governments, however, should not be discouraged when objecting to applications for exploration licences. The Mining Warden's Court has in previous cases been a successful forum for preventing the grant of exploration licences in environmentally sensitive areas, notwithstanding the limited scope of objections that may validly be raised under the Mining Act.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Ricardo Agostino by email to ragostino@mcleods.com.au.

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[1] *Boadicea Resources Ltd v Sharp, Russell & Wheatley Village Pty Ltd* [2016] WAMW 6 [66].