WESTERN AUSTRALIAN WARDEN'S COURT CHANGES – 2007

Tim Kavenagh*

1. Reasons for Reform

As long ago as 1989 Warden GN Calder SM was of the view that a warden hearing a plaint for forfeiture was acting in an administrative capacity and did not have the power to award costs.[1] This was criticised by one commentator as 'sitting uncomfortable with the preponderance of authority'[2] and 'wrong' by one author.[3] In *Re Warden Calder; Ex parte Gardner*[4] the Full Court of the Supreme Court of Western Australia reviewed the nature of the warden's role under the *Mining Act 1978* (WA). Ipp J considered:[5]

> … generally, the provisions of the Act that deal with the warden sitting in "open court" are consistent with the warden acting as the warden of mines, in an administrative capacity, discharging administrative functions, albeit that the warden is usually required to act judicially

such that a warden was not sitting in a Warden's Court and therefore had no power to order further discovery of documents pursuant to the provisions of the Rules under the *Local Courts Act 1904* (WA).[6]

The absence of express procedures and procedural powers when the warden was acting otherwise than in the Warden's Court meant that there was uncertainty as to the warden's powers and procedures with the attendant likelihood of varying and inconsistent views being adopted by individual wardens.

2. Government Response

A first draft of the proposed *Mining Act Amendment Bill 2003* was produced by July 2003 and a final draft became the *Mining Act Amendment Bill 2004*. This later bill also sought to incorporate other amendments to the *Mining Act 1978* (WA) arising from the technical taskforce on native title.[7] The *Mining Amendment Bill 2004* was introduced into the legislative assembly and read a second time on 26 August 2004. The bill was passed and sent to the Legislative Council on 22 September 2004. The Legislative Council passed the Bill on 26 October 2004 and hence became the *Mining Amendment Act 2004* (WA) on that date. That Act received royal assent on 3 November 2004 and, other than Pt 9, was proclaimed to come into effect on 30 March 2005.[8]

---

* BJuris, LLB, Special Counsel, Mallesons Stephen Jaques.

1 *Strange v Pietsch* (1990) 9 AMPLA Bulletin 59 and later in *Denbridge Holdings Pty Ltd v Salokin Nominees Pty Ltd* (1991) 10 AMPLA Bulletin 63.

2 See note 7 to report of 'Denbridge Holdings Pty Ltd v Salokin Nominees Pty Ltd' in (1991) 10 AMPLA Bulletin 63 at 64.

3 Hunt and Lewis, *Mining Law in Western Australia* (2nd ed, Federation Press), pp 227 and 228

4 [1999] WASCA 28; (1999) 20 WAR 525.

5 Ibid at 533, Pidgeon J agreeing.

6 The *Local Court Act* has since been repealed and replaced by the *Magistrates Court (Civil Proceedings) Act 2004*.

7 Technical Taskforce on Mineral Tenements and Land Title Applications, November 2001 under the facilitation of Mr Bardy McFarlane.

8 See *Government Gazette* 14 January 2005 at p 164.

Before the Act came into effect some unintended consequences of provisions not contained in Pt 9 were discovered that required amendment.[9] The proclamation was revoked.[10] The required amendments were contained in the *Mining Amendment Bill 2005*. That Bill passed through the legislative assembly on 30 June 2005 and the legislative assembly on 30 November 2005. The *Mining Amendment Act 2005* (WA) received royal assent on 12 December 2005.

Part 9 of the *Mining Amendment Act 2005* (WA) deals with changes relating to practices of the wardens and the Warden's Court. The *Mining Amendment Act 2004* (WA) and the *Mining Amendment Act 2005* (WA), other than Pt 9, were proclaimed to come into effect on 10 February 2006.[11] Part 9 of the *Mining Amendment Act 2004* (WA) was proclaimed to come into effect on 31 March 2007,[12] almost eight years after the Full Court's decision in *Re Warden Calder SM; Ex parte Gardner.*[13]

3. Transitional Provisions

The amendments to the provisions relating to the Warden's Court only apply to applications or objections lodged after 31 March 2007. Applications made before that date are dealt with under the Act as it stood before amendment.[14] When advising on an application or objection the first question will therefore be – Was this application or objection made on or after the commencement date?[15] If before, the old provisions apply, if after, the new provisions apply.

Unfortunately the transitional provisions do not consider how to deal with applications made before the commencement date where an objection is lodged after that date. On a literal reading of the Act, applications should be dealt with under the law applying before the commencement date and the objections dealt with under the law applying after that date. No doubt this will raise a practical problem for litigants in the short term.

It is important to bear in mind that when considering an application for a mining tenement and objection thereto, the warden 'shall hear and determine' the application for the mining tenement.[16] The warden must give an objector 'an opportunity to be heard'. This tends to suggest that the 'proceeding' is the application itself, the objector only has the right to be heard. The Act provides that the warden grants the prospecting licence[17] and the miscellaneous licence[18] and recommends the grant or refusal of the exploration licence,[19] the retention licence[20] and the mining lease.[21]

---

9 It was originally intended that these and other unintended consequences could be rectified by the Minister using the Henry VIII clause. As that clause had been removed from the bill by the Legislative Council and not become law, further legislation was required.

10 See *Government Gazette* 24 March 2005 at p 1002.

11 See *Government Gazette* 3 February 2006 at p 516.

12 See *Government Gazette* 9 March 2007 at p 847.

13 The Full Court's decision was delivered on 21 May 1999.

14 Section 86, *Mining Amendment Act 2004* (WA).

15 31 March 2007 was a Saturday so it is highly unlikely, if not impossible, that any application or objection was made on that day.

16 See *Mining Act 1978* (WA), ss 42, 59, 70D, 75 and 92.

17 *Mining Act 1978* (WA), s 40(1).

18 *Mining Act 1978* (WA), s 91(1).

19 *Mining Act 1978* (WA), s 59(5).

20 *Mining Act 1978* (WA), s 70D(5).

21 *Mining Act 1978* (WA), s 75(5).

Although the Act is silent as to the outcome of the objection, prior to the amendments the objection was generally considered to be a separate proceeding to the application. Regulation 137(1) may be of some assistance although it is unusual to interpret an act by looking at the Regulations made there under. That Regulation defines proceedings as an application for forfeiture and an application for a mining tenement to which an objection has been lodged.

It is suggested that on a proper interpretation of the Act, where an objection is lodged after the commencement date in respect of an application made before the commencement date, the application and objection should be dealt with under the new rules. This is because until the objection was lodged, the warden was not seized of jurisdiction.[22] The contest did not arise until the objection was made. The contest arising after the commencement date, it must have been intended that the contest would be governed by the new regime.

Section 105 does permit transitional Regulations to be made if there is no sufficient provision in the Act for dealing with a transitional matter. This section may allow Regulations to be made to overcome this problem but none have been made to date.

4. Amendments – General Principles

The *Mining Act 1978* (WA) has been amended to distinguish the roles of the warden and Warden's Court. Essentially those matters that were formally within the jurisdiction of the Warden's Court under Pt VIII of that Act will continue to be within the jurisdiction of the Warden's Court. The practice and procedure will continue to be governed by the *Magistrates Court (Civil Proceedings) Act 2004* (WA).[23]

Those matters traditionally heard by the warden acting administratively will now been known as 'Part IV proceedings'. In relation to these proceedings, the Governor may make Regulations in relation to the

(i) the powers, functions and duties of the warden;[24]
(ii) the practice and procedure to be followed;[25]
(iii) the scale of costs to be applied.[26]

It is anticipated that these will generally be made by amendment to the *Mining Regulations 1981* (WA).[27]

Before the amendments came into effect, wardens traditionally sat in the same court and heard matters that were within the jurisdiction of the court and matters heard administratively. They were heard in the same list. It is not anticipated this will change.

5. Who can be a Warden?

The Governor may appoint any person holding office as a magistrate under the *Magistrates Court Act 2004* (WA) as a warden.[28] Prior to the amendments, the Governor could have appointed any

---

22 Where there is no objection made to an application, the application is dealt with by the Mining Registrar.
23 Section 136 was not amended.
24 Section 162(2)(ra).
25 Section 162(2)(rb).
26 Section 162(2)(rc).
27 See for example the amendments made to those regulations on 9 March 2007.

other fit and proper person as a warden. The Director General of Mines of Mines was traditionally appointed as a warden. The Governor is no longer permitted to appoint a warden who is not a magistrate.[29]

6. Warden's Court Proceedings

Part VIII of the *Mining Act 1978* (WA) deals with the administration of justice. It enables the Governor in council to establish Warden's Courts throughout the state,[30] provides that the Warden's Court shall be a court of record[31] and provides for the jurisdiction[32] and powers[33] of the court.

The Governor may make rules for the Warden's Court but until that occurs 'or insufficient provision is made,' the practice and procedure of the Warden's Court, 'the rules of court of the Magistrates Court' apply.[34] Those rules are currently the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).[35]

The *Mining Regulations 1991* (WA) do make some provisions relating to the Warden's Court. Those provisions are contained in Pt VII of the Regulations. They provide that proceedings shall be commenced by plaint,[36] lodged with the office of the mining registrar[37] and served not less than 30 days before the date fixed for hearing of the plaint.[38] A Notice of Defence is to be filed[39] and a witness summons may be issued.[40] Costs in the Warden's Court are to be in accordance with the determination in force under the *Legal Practice Act 2003* (WA) that applies to the civil jurisdiction of the Magistrates Court.[41]

The practice and procedure not dealt with in the Regulations is dealt with in the *Magistrates Court (Civil Proceedings) Rules 2005* (WA) to the extent that insufficient provision is made. These provide that a party lodging a claim, namely a plaint, must also lodge a statement of claim.[42] The Respondent must lodge a response[43] and a statement of defence.[44] The statement of claim and statement of defence must be accompanied by a statutory declaration certifying that any

---

28 Section 13(1).
29 Subsections (2) and (3) of s 13 have been deleted.
30 Section 127.
31 Section 128.
32 Section 132.
33 Section 134.
34 Section 136.
35 These rules were gazetted on 28 April 2005 and commenced on 1 May 2005.
36 Regulation 121.
37 Regulation 122.
38 Regulation 125.
39 Regulation 126.
40 Regulation 127.
41 Regulation 128.
42 Rule 8.
43 Rule 9.
44 Rule 10.

allegations of fact are true.[45] Default judgment may be entered in default of a response.[46] The parties can be required to disclose documents[47] and answer interrogatories.[48]

These rules also provide that the claimant must request the matter be listed for a pre-trial conference[49] to give the parties an opportunity to settle the case.[50] Presumably such an application is made to the relevant mining registrar and heard by the mining registrar. If the matter does not settle, the mining registrar should list the matter for a further pre-trial conference or a listing conference.[51] At least 7 working days before the listing conference, each party must lodge a listing conference memorandum in the approved form which must include a concise statement of the issues of fact and law, how each allegation of fact will be proved, the name address and occupation of each witness to be called and annex a statement of evidence of each witness who is not an expert witness.[52] At the listing conference the matter is listed for trial. Part 13 deals with the procedure at trial such as the right to begin,[53] witnesses[54] and exhibits.[55]

7. Part IV Proceedings

Part IV of the *Mining Act 1978* (WA) deals with mining tenements, that is, how they are applied for, their terms and conditions, the requirements to lodge reports and comply with expenditure conditions and how they may be surrendered or forfeited.

Part VIII of the *Mining Regulations 1981* (WA) deals with proceedings before the warden under Pt IV of the Act. Part VIII is conveniently divided into 9 Divisions.

8. Division 1 – General

This division includes an interpretation section[56] and introduces the concept of different types of hearings:

(i) the mention hearing
(ii) the interlocutory hearing; and
(iii) the substantive hearing.

There is also provision that proceedings are taken to have been commenced when an application for forfeiture has been lodged or an objection to an application for a mining tenement has been. Applications for mining tenements where no objection is lodge are dealt with by the mining registrar.[57] Proceedings are therefore either an application for forfeiture or an application for a mining tenement and the objection thereto.

---

45 Rules 8(5) and 10(5).
46 Rule 21.
47 Rule 30.
48 Rule 35.
49 Rule 39.
50 Rule 39.
51 Rule 42.
52 Rule 44.
53 Part 13, Div 1.
54 Part 13, Div 2.
55 Part 13, Div 3.
56 Regulation 137.
57 *Mining Act 1978* (WA), ss 42(2), 59(2), 70D(2), 75(2), 90(3) and 92.

When proceedings are commenced, the mining registrar fixes a date for the hearing of the first mention date and advises the parties of that date.[58] The mining registrar also returns to the applicant a copy of the application for service upon the respondent, namely the tenement holder or the objector, and any mortgagee. The obligation to serve the mortgagee of any tenement holder is a new concept that will be of concern to a tenement holder. Practically it will require the tenement holder to explain to the mortgagee what has occurred. The mortgagee will no doubt be alarmed to learn his security is at risk. This obligation only applies to mortgages and not to other encumbrances such as those protected by caveat.

At the first mention date and at other mention dates, the warden may:[59]

(i) issue directions; or

(ii) set a date for the substantive hearing; or

(iii) adjourn the proceedings to another mention date.

This is not unlike the existing practice in matters before the warden acting administratively.

The warden is now empowered to determine a proceeding without a substantive hearing.[60] The warden may order a non-complying party to pay the costs occasioned by the non-compliance or determine the proceedings without a substantive proceeding. In an application for forfeiture this must mean forfeit, or recommend the forfeiture of the tenement, impose a penalty, impose no penalty or dismiss the application.[61] The warden may make such a determination if there has been a failure to comply with a requirement of 'this Division', namely Div 1 of Pt VIII. There is nothing in that division that requires a party to do anything. Perhaps the Regulation was meant to refer to a requirement of 'this Part VIII'. The warden may also make such a determination if a party fails to comply with a summons. A summons is the originating process in matters before the Warden's Court. As that appears in Pt VII, no order could be made under reg 139. The only reference to a 'summons' in Pt VIII is to a witness summons. As a witness is not usually a party it is difficult to see how reg 139 could apply to a failure to comply with a summons.

9. Division 2 – Applications for Forfeiture

Applications for forfeiture are initiated by application in form 35A, and not by plaint as in the Warden's Court, and must be signed by the applicant or a lawyer or other person authorised by the applicant.[62] The signing requirements are more liberal than the existing regime and will bring an end to the line of cases dealing with execution by companies.[63] A director or other person authorised by an applicant may sign an application on behalf of a company. After the application is lodged, the first mention date is added by the mining registrar, signed by the mining registrar, the seal of the mining registrar affixed and a service copy returned to the applicant. Unlike with the procedure under in the Warden's Court, a separate summons is not issued; the actual application is served.

---

58 Regulation 138.
59 Regulation 138(2).
60 Regulation 139.
61 Sections 96(3) and 98(4)(a).
62 Regulation 140.
63 For example, *Exmin Pty Ltd v Australian Gold Resources Ltd* [2002] WAMW 29 and noted in (2003) 22 ARELJ 137.

As will be seen below, the applicant is also required to lodge a written statement of particulars 'at the same time' as the application. The issue of an application for forfeiture will involve a lot more than the issue of the old plaint for forfeiture.

An application for forfeiture may not be withdrawn or proceedings stayed after the application has been served without the consent of the respondent or the leave of the warden.[64] An applicant that wishes to withdraw must lodge and serve on each respondent and any mortgagee a written notice of withdrawal.[65]

If the respondent tenement holder intends to dispute the application he must within 14 days of service file a response in the form number 36. Although this form is essentially a one page form like a memorandum of appearance prescribed by the *Rules of the Supreme Court of Western Australia*, it does require the respondent to set out his grounds of defence. It is suggested that these will probably only amount to a short narrative such as:

> The respondent has complied with the expenditure conditions applicable to the tenement the subject of the application. If, which is not admitted, the respondent has not complied with the applicable expenditure condition, the matter is not of sufficient gravity to justify forfeiture of the tenement.

The Response is forwarded by the mining registrar to the applicant.[66] This is an unusual requirement. As will be seen below, the respondent is required to lodge and serve particulars at the same time as lodging the response. The Respondent will therefore lodge the response and particulars but only have to serve the particulars.

The parties may consent to orders being made by the warden by filing a written memorandum to that effect.[67] This will allow the parties to agree to an extension of time for complying with any regulation, order or direction.

A party may invite another party to admit a particular alleged fact. The failure of the other party to admit that fact may lead to an adverse costs order if that fact is later found to be proved.[68] In the superior courts the notice admitting the fact may be tendered in evidence. Although applications for forfeiture do not involve pleadings, as such, it is suggested that any admissions made pursuant to reg 142 would be proved by tendering the admission during the conduct of the proceedings. It would be a sensible approach to tender such admissions at the commencement of the hearing so that the warden becomes aware of what is not in dispute.

Any person may be joined as a party if the warden is satisfied the person has a sufficient interest in the outcome of the proceedings.[69] This Regulation confirmed the decision of the warden in *Smith v Sita & Blake*[70] where a liquidator of a tenement holder was joined as a party to a plaint for forfeiture.

---

64 Regulation 140(4).
65 Regulation 142(6).
66 Regulation 141(3).
67 Regulation 142.
68 Regulation 142(4) and (5).
69 Regulation 143.
70 (1991) 10 AMPLA Bulletin 121.

The most significant change to procedure is the requirement to provide particulars.[71] An applicant for forfeiture must provide particulars of the application at the same time as the applicant files and serves the application. The practical problem with this Regulation is that an application will rarely be lodged and served at the same time. It is suggested that the Regulation will be construed as meaning that the particulars should be lodged at the same time as the application is lodged and then served at the same time as the application is served.

The respondent must provide particulars of the respondent's defence at the same time as the respondent lodges and serves the respondent's response. The practical problem is that as the response is 'served' by the mining registrar,[72] the respondent will not know when the response has been served. It is suggested that a respondent should lodge the response and particulars and then serve both the response and particulars.

The Regulation sets out what the particulars must contain, namely:

(i) a summary of the facts;

(ii) the legal basis of the application or response;

(iii) the basic contentions of each party; and

(iv) a list of documents that might be tendered.

It will immediately be seen that particulars used in these Regulations are different to particulars that one might see in the superior courts or indeed before the warden in the former regime. This type of requirement has been in place in the civil jurisdiction of the Magistrates Court in Western Australia for approximately two years. The 'usual' particulars in that court will be approximately three to four pages in length.

It will be important that an applicant gets his case in order before commencing the application for forfeiture and the respondent does likewise before lodging his response. This will avoid a claim of 'recent invention' if further material is sought to be introduced at a later time.

There is no requirement that a party must give discovery. Rather the warden may order an applicant to disclose documents relevant to the proceedings.[73] Such an order cannot be made against a respondent tenement holder.[74]

The Regulations adopt Pt 7 of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).[75] Those rules require a person subject to an order to disclose documents to do so by lodging and serving an affidavit containing a list of documents.[76] The affidavit must depose to the fact that every document required to be disclosed by the order has been disclosed or is subject to objection.[77] There is an ongoing obligation to disclose documents that come into the party's possession.[78] This disclosure regime is more restrictive than in the superior courts where a party is required to disclose documents in the party's possession, custody or control.

---

71 Regulation 144.
72 See reg 141(3).
73 Regulation 145(1).
74 Regulation 145(3).
75 Regulation 145(2).
76 *Magistrates Court (Civil Proceedings) Rules 2005* (WA), r 30(1).
77 *Magistrates Court (Civil Proceedings) Rules 2005* (WA), r 31.
78 *Magistrates Court (Civil Proceedings) Rules 2005* (WA), r 30(2).

A party may object to disclose a document if it is privileged from production or inadmissible in evidence.[79]

A party may make a written request to inspect documents that have been disclosed.[80] The documents must be made available for inspection within 14 days. If asked to by the party making inspection, the other party must provide copies of the documents at a reasonable cost to the party requesting inspection or permit the documents to be copied at another place by the party requesting inspection.

A party which discloses a document, must have the document available at trial.[81]

10. Division 3 – Objections

Objections under Pt IV are to be made in the Form 16 of the First Schedule.[82] The objector must serve a copy of the objection on the applicant. When an objection to an application for an exemption is made, regs 144 and 145 apply so that the objector must file particulars and, if ordered to do so by the warden, make disclosure of documents.[83]

11. Division 4 – Service

Service of documents under Pt VIII of the Regulations is dealt with in Div 4. Service of other documents is dealt with under reg 111. Although the heading to reg 148 suggests that that Regulation provides a meaning of 'serve', the Regulation does not define that word or provide for the manner in which documents should be served. It is suggested that the manner in which documents should be served is that set out in reg 111 because, in the terms of that Regulation, the Regulations do not otherwise provide a method of service.

If a party is required to serve a document, the document is to be served within 14 days of lodgment[84] and the party must lodge an affidavit of service in Form 35 in the First Schedule.[85]

The warden has power to make an order for substituted service if for any reason it is impractical to serve a document 'in the manner set out in this Division'. No such manner appears in the division. On a literal interpretation substituted service is not available.

12. Division 5 – Interlocutory Orders

One of the many problems existing under the former regime was the doubt whether a warden had power to make interlocutory orders or directions. That doubt has been specifically overcome by this division. The warden is given wide powers for the purpose of controlling and managing the proceedings,[86] namely transferring proceedings to be heard at another place, extending or shortening time for compliance with any regulation in Pt VIII or any order, adjourning proceedings, staying or consolidating proceedings, hearing matters by audio or video link,

---

79 *Magistrates Court (Civil Proceedings) Rules 2005* (WA), r 32.
80 *Magistrates Court (Civil Proceedings) Rules 2005* (WA), r 33.
81 *Magistrates Court (Civil Proceedings) Rules 2005* (WA), r 34.
82 Regulation 146(1).
83 Regulation 147.
84 Regulation 148.
85 Regulation 150.
86 Regulation 152.

allowing amendments, directing parties to confer and expediting the listing of proceedings for a substantive hearing.

There is a wide 'catch all' provision that vests the warden with power to 'do anything else that in the warden's opinion will or may facilitate proceedings being conducted and concluded efficiently, efficiently and expeditiously'. It should be noted that this provision requires each of the elements to be satisfied before the warden may be so satisfied.

An application for an interlocutory order is to be made in Form 36A in the First Schedule at least seven days before the substantive hearing. This period could be shortened pursuant to reg 152(1)(b). The application must be supported by an affidavit.[87]

13. Division 6 – Conduct of Hearings

The Regulations specifically provide that in any hearing the warden is to act with as little formality as possible and is not bound by the rules of evidence.[88] The general rule is that hearings are to be held in public but if the warden is satisfied that it is desirable to do so because of the confidential nature of any evidence or any other reason, the warden may order the whole or part of a hearing to be held in private.[89]

A party must attend a mention hearing or the hearing of an interlocutory application through a lawyer or, if the warden so orders, in person.[90] It is unusual that a litigant in person does not have an automatic right to appear in person, particularly when the proceedings are to be held with as little formality as possible. It is suggested that a warden would rarely prevent a litigant in person from appearing.

Under the former regime parties rarely appeared at mention hearings outside Perth. Written submissions were usually made in advance by the parties and the proceedings dealt with by the warden in chambers. Although the Regulations require an appearance at a mention hearing, a party can be excused on application accompanied with written submissions.[91] The difficulty the parties face at a first mention date is that if they make an application for the hearing to be conducted in that party's absence, the party will not know until the mention date whether the application has been successful. It is possible for such an application to be refused and therefore the party to be in breach of the Regulation for failing to attend.

A party is required to attend the substantive hearing in person.[92] This is to overcome the suggestion in the past that there have been plaintiffs in plaints for forfeiture that did not exist. A body corporate is to be represented by an 'officer duly authorised to attend'.[93] The word 'officer' is not defined in Pt VIII, the Regulations generally, the *Mining Act 1978* (WA) or the *Interpretation Act 1984* (WA). The word is defined in s 9 of the *Corporations Act 2001* (Cth) to mean a director, secretary or senior manager. This interpretation may be adopted by some wardens.

---

87 Regulation 153.
88 Regulation 154(1).
89 Regulation 155.
90 Regulation 155(1).
91 Regulation 155(3) and (4).
92 Regulation 156(1).
93 Regulation 156(2).

14. Division 7 – Evidence

A party may procure the attendance of a witness by means of a witness statement.[94] The witness summons must be served not less than 30 days fixed for the hearing.[95] A party is not entitled to adduce expert evidence except in accordance with directions given by the warden.[96] A party may adduce evidence by tendering an affidavit of the witness if the affidavit is lodged and served 14 days before the first hearing date and there is no objection made within 7 days after that service.[97]

15. Costs

The warden acting under the former regime was acting in an administrative capacity and not as a court and accordingly had no power to order costs against an unsuccessful party.[98] The *Mining Act 1978* (WA) specifically permits the Governor to make regulations prescribing the power to order costs.[99]

In relation to applications for forfeiture under Div 2, the warden may make an order for a party's costs to be paid by another party.[100] The warden appears to have the usual discretion that applies in the superior courts.

In relation to applications for mining tenements and objections thereto, the warden may make an order for costs against a party if the party frivolously or vexatiously commenced, defended or conducted the proceedings or has caused undue delay.[101] The costs are payable in accordance with the scale of costs set out in the Fourth Schedule to the Regulations.[102]

The taxation process is the same as in the civil jurisdiction of the Magistrates Court. The process is called an assessment rather than a taxation. The Regulations adopt Pt 15 of the *Magistrates Court (Civil Proceedings) Rules 2005* (WA).[103] The successful party is required to lodge a bill of costs.[104] If the unsuccessful party does not, within 21 days of service of the bill of costs, lodge and serve and objection, the unsuccessful party is taken to have admitted the Bill.[105] If there is no objection, the mining registrar assess the costs in the absence of the parties and produces an assessment.[106] It is only when there is an objection that the mining registrar lists the matter for an assessment. A person dissatisfied with an assessment may apply to the warden for a review of the assessment within 21 days of the assessment.[107]

---

94 Regulation 157(1).
95 Regulation 158.
96 Regulation 161.
97 Regulation 162.
98 *Strange v Pietsch* (1990) 9 AMPLA Bulletin 59 and *Denbridge Holdings Pty Ltd v Salokin Nominees Pty Ltd* (1991) 10 AMPLA Bulletin 121.
99 Regulation 162(2)(ra).
100 Regulation 165(2).
101 Regulation 165(4).
102 Regulation 165(6).
103 Regulation 165(7).
104 *Magistrates Court (Civil Proceedings) Rules 2005*, r 81.
105 *Magistrates Court (Civil Proceedings) Rules 2005*, r 82.
106 *Magistrates Court (Civil Proceedings) Rules 2005*, r 84.
107 Regulation 166.

16. Security for Costs

The *Mining Act 1978* (WA) specifically permits the Governor to make regulations prescribing the power to order security for costs.[108] A warden may order an applicant to give security for costs.[109] The application may be made to any warden and may only be made by a respondent. This means a respondent tenement holder or an objector to an application for a mining tenement holder. It is odd that a person can object to an application for a mining tenement and then apply for security for costs. It is suggested that it is the objector that should be required to provide security for costs. Nevertheless, in relation to applications for mining tenements, as an order for costs can only be made in limited circumstances, it is suggested that it will only be in rare cases that security for costs will be ordered.

In the superior courts the method of providing security is adjusted to the circumstances of the particular plaintiff. The Regulations provide that the monies comprising the security are to be paid to the Director General of Mines.[110]

Regulation 169 is silent as to the consequences of failing to comply with an order for security for costs. In the Supreme Court the action is stayed and the court has an inherent jurisdiction to dismiss the action if there is no prospect of the security being lodged.[111] The warden probably has no inherent jurisdiction in this regard but would appear to have the ability to dismiss the application on the basis of the applicant's failure to comply with an order of the warden.[112]

17. Representation

A party is entitled to be represented by a lawyer and in exceptional circumstances a warden may give leave for a party to be represented by a person other than a lawyer.[113]

18. Practice Directions

The Chief Magistrate may issue, amend or cancel practice directions.[114] No practice directions have yet been issued.

19. Conclusion

The Regulations are well structured and cover most matters that can be anticipated. There are some difficulties and anomalies which can, and should, be rectified by amendment.

---

108 Regulation 162(2)(ra).
109 Regulation 167.
110 Regulation 167(2).
111 *Dallas Development Corp Pty Ltd v Western Australian Land Authority* [2000] WASCA 49 at [23].
112 See reg 139.
113 Regulation 169.
114 Regulation 171.