THE FUNCTIONS AND POWERS OF THE WARDEN OF MINES IN OPEN COURT AND THE REFORM OF WARDEN'S COURT PROCEDURE UNDER THE *MINING ACT* 1978 (WA)

Mark Gerus*

This article examines the functions of the warden of mines, convened in "open court" and the "warden's court" and analyses the terminology used in the Mining Act 1978 (WA). It considers the key court decisions that have delineated the powers and procedures currently available before the warden of mines in open court. The analysis shows that far from being a "toothless tiger" the warden does have some powers in administrative proceedings to ensure that procedural fairness is afforded to tenement applicants, tenement holders and plaintiff-objectors[1]. It is suggested that the current situation in the warden's administrative jurisdiction in Western Australia is unsatisfactory. This paper advocates urgent reform of both substantive and procedural mining laws[2] relating to the administrative and judicial functions of the warden. It outlines core procedural rules that should be available to the warden of mines to ensure that efficiency, certainty and transparency are characteristics of warden's court proceedings.

1. INTRODUCTION

1.1 The warden of mines has administrative and judicial functions under the *Mining Act* 1978 (WA)[3]. These functions have caused confusion on the part of prospectors, experienced mining lawyers and wardens[4]. The inconsistent use of terms such as "warden", "warden of mines", "warden's court" and "warden in open court" has caused this confusion and has blurred the distinction between these separate functions.[5] The simple question of what is meant by the term "a warden" under the Act is, even to the Supreme Court, a matter "not without complexity"[6].

1.2 A recent decision of the Full Court in *Re Calder; Ex parte Gardner*[7] has highlighted the careful distinction in the Act between the administrative and judicial functions of the warden. One of the consequences of this decision is that the Act, in its current form, does not provide a set of procedural rules for regulating practice and procedure before the warden of mines. As a result, much of the wardens' limited sitting time in this busy jurisdiction is spent determining the powers

---

* Special Counsel, Blakiston & Crabb.

1 Often a plaint for forfeiture of a tenement for non-compliance with expenditure conditions by the tenement holder is accompanied by an objection by the plaintiff to an application from exemption from those same expenditure conditions. If a certificate of exemption is granted, it usually means a tenement holder will have a complete defence to a plaint. Therefore reference will be made below to a plaintiff/objector and defendant/applicant.

2 As to the distinction between procedural and substantive laws see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176.

3 Referred to in this paper as "the Act".

4 Warden Valerie French SM (now a Judge of the District Court) "The Role of the Warden" paper presented at AMPLA (WA) State Conference 1993 at 4.

5 The problem of terminology has been highlighted before – almost 20 years ago – see the Report of The Hunt Committee of Inquiry into Aspects of the Mining Act published in 1983. In spite of the *Mining Amendment Act* 1985 many deficiencies remain and merit detailed review.

6 *Re His Worship Calder SM; Ex parte Gardner* (1999) 20 WAR 525 at 533 per Ipp J - *Gardner No 1.*

7 Ibid.

available to the warden to conduct the proceedings, instead of resolving the merits of a particular applications or objections.

2. THE FUNCTIONS OF THE WARDEN OF MINES

2.1 The office of warden is created solely by statute. The Act establishes in s 13, the position of the "warden of mines". It provides that a person holding the office of a stipendiary magistrate may be appointed by the Governor to the office of "warden of mines" who may then preside in a "warden's court"[8]. Other suitably qualified persons can be appointed warden of mines, but they are not authorised or empowered to sit in the warden's court.[9]

2.2 The Act still provides that the warden, when sitting as the warden of mines, may exercise some purely administrative functions, which do not involve court processes at all. The warden of mines:

(a) may issue a miner's right[10]; and
(b) grant a permit to enter private land for the purposes of prospecting or marking out a mining tenement[11].

2.3 Part IV of the Act, dealing with mining tenements, contains the most significant and commonly exercised functions of the warden of mines "in open court".[12] The designation that the warden of mines is convened in "open court" is no more than a reference that the warden is to perform the function publicly. It is not an indication that the warden convenes, in a legal sense (as opposed to a temporal one) as the warden's court.

2.4 The warden is required to hear in open court and determine:

(a) applications for the grant of prospecting licences[13] and miscellaneous licences when subject to an objection[14]; and
(b) applications for forfeiture of prosecting licences and miscellaneous licences for non-payment of rent or non-compliance with expenditure conditions.[15]

Notably, the Act contemplates a hearing before the warden in which evidence is to be received.

2.5 The Minister retains a significant deal of control over the warden's power to grant prospecting licences and miscellaneous licences. Any applicant has a right of appeal to the Minister[16]. It has been held that the Minister's power is broad enough for the original decision of the warden to be reviewed *de novo* as if the appeal were a rehearing and for the Minister to consider other materials as he sees fit, subject to the dictates of natural justice.[17]

---

8 Section 13(1).
9 Section 13(2).
10 Under s 20(1).
11 Section 30.
12 Warden Calder SM, *Linda Latham v Greater Australian Gold NL*, (Before the Warden in Open Court, unreported, delivered 26 June 1998) at 28.
13 Sections 40, 41 and 42 of the Act.
14 Section 91 and 92 of the Act, although the warden has a discretion whether or not to hear an objector, see Steyler J in *Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd.*
15 Section 96(1) of the Act.
16 An appeal lies to the Minister upon refusal of the grant of a prospecting licence or miscellaneous licence or the imposition of conditions which the applicant considers unreasonable under sections 56 and 94 of the Act.
17 See *Re Minister for Mines; Ex parte Trythall* (1992) 7 WAR 375 at 383.

2.6 The warden is also required to hear certain applications in open court, receive evidence and to transmit to the Minister for consideration a report and recommendation as to grant or refusal together with notes of evidence, maps and documents. This arises in respect of applications for:

(a) the grant of exploration licences or mining leases;[18]
(b) the forfeiture of exploration licences and mining leases for non-compliance with conditions including minimum annual expenditure obligations;[19] and
(c) the grant of certificates of exemption from expenditure conditions prescribed under a lease or licence.[20]

2 7 In *Re Warden French; Ex parte Serpentine Jarrahdale Ratepayers Association* and *Gardner No 1*, Justice Ipp noted that in hearing such applications, "the warden is performing an investigatory function that assists the Minister in determining whether the tenement should be granted."[21] Only the minister has power to grant mining leases and exploration licences and certificates of exemption from expenditure requirements.[22] The minister is not bound to follow recommendations of the warden and is vested with a high level discretion under the Act to decide applications on policy grounds.[23] The Minister may even receive submissions directly from parties concerning applications for exemption and forfeiture.[24] Of course, in practice the Minister relies on the recommendations of officers in the Department of Industry and Resources such as the Director-General of Mines.[25]

3. THE JUDICIAL FUNCTIONS AND POWERS OF THE WARDEN'S COURT

3.1 The warden's court is a creature of statute and its powers are to be ascertained by reference to the Act. It is not a court of inherent jurisdiction. Part VIII of the Act, entitled "Administration of Justice", contains the provisions regarding wardens' courts, their establishment, powers and functions.

3.2 Wardens' courts are established under section 127 of the Act for various mineral fields or districts throughout the state as determined by the Governor in Council. The Act establishes that every warden's court has "jurisdiction" throughout the state.[26] Proceedings relating to a mining tenement must be commenced in the warden's court responsible for the mineral field in which the tenement is located[27]. The warden may transmit a proceeding to another warden's court where "it could more conveniently be dealt with".[28] The warden's court is also a "court of record".[29]

3.3 The Act states in section 132 that the warden's court has jurisdiction "to hear and determine all such actions, suits, and other proceedings cognisable by any Court of civil jurisdiction…".

---

[18] Sections 59(4) and 75(4) of the Act.
[19] Section 98 of the Act.
[20] Section 102 of the Act.
[21] (1994) 11 WAR 315 at 328; op cit at 531.
[22] Sections 59(6), 97 and 99 of the Act.
[23] *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.
[24] *Re Warden Boothman SM and Anor; Ex parte Peko Exploration Ltd,* (Full Court, unreported, delivered 14 November 1997) Ipp J at 10-11.
[25] See for example *Re Plutonic Operations; Ex parte Roberts,* (Full Court, unreported, delivered 20 August)*; Re Minister for Mines; Ex parte Roberts* (1997) 18 WAR 408.
[26] Section 132(2).
[27] Ibid.
[28] Section 132(3).
[29] Section 128.

According to section 132, this jurisdiction may be exercised in relation to a range of matters including:

(a) the area, dimensions, or boundaries of mining tenements;
(b) title to mining tenements or mining products;
(c) disputes relating water to be used for mining;
(d) trespass or encroachment upon mining tenements;
(e) specific performance of contracts relating to mining tenements or mining;
(f) contribution by or between persons holding joint or several interests in mining tenements towards rent and other expenses;
(g) transfers and other dispositions of and charges upon, mining tenements;
(h) trusts and partnerships relating to mining tenements and mining; and
(i) contribution by or between persons holding joint or several interests in mining tenements towards rent or other expenses.

4. CONFUSION AND INCONSISTENCIES OF TERMINOLOGY

4.1 The demarcation between the "warden of mines in open court" and the warden presiding over the warden's court is not rigorously maintained in the Act.

4.2 Section 132 purports to confer on a warden's court jurisdiction to hear and determine:

> "…generally all rights claimed in, under or in relation to any mining tenement, or relating to any matter in respect of which jurisdiction is under any provision of this Act conferred upon *the warden's court or the warden*" (emphasis added).

4.3 Section 134(1) of the Act provides that the warden's court has power to make orders on all matters within its jurisdiction for such matters as the enforcement of contracts, the award of damages, declaration of trust relating to mining tenements or operations and other enumerated matters. However, sub-section 134(1)(d) purports to include "the determination of objections to applications" to be within the jurisdiction of the warden's court. Objections to mining tenement applications in Part IV of the Act are by specific sections in the Act referred to above, required be determined before the warden of mines in open court.

4.4 Section 134(5) states that "without affecting the jurisdiction of a warden's court, a warden's court or the warden as the case may be may exercise in relation to all matters relating to any civil proceeding under this Act the like powers and authorities as are conferred upon the Supreme Court or a judge thereof." A careful demarcation between the functions of the warden in different capacities is not maintained.

4.5 There exist several other inconsistencies in Act that refer to the warden of mines exercising what are judicial functions within the jurisdiction of the warden's court:

(a) By section 20(6) the warden of mines has power to authorise mining operations that occur within statutory distances of certain improvements provided that he or she is satisfied that compensation has been agreed upon or assessed and settled by the warden under this Act.
(b) By section 122(1)(a) the warden may order the removal of a caveat lodged against a mining tenement which operates to forbids the registration of any transfer.
(c) By section 143 it is contemplated that a warden may grant an injunction or appoint a receiver.

(d) By section 146 the warden may reserve at any stage of proceedings any question of law for the Supreme Court (whereas no appeals to the Supreme Court may be made from decisions of the warden of mines in relation to the grant or forfeiture of mining tenements).[30]

4.6 The forms used in the administrative proceedings before the warden of mines also blur the distinction between the two functions. Forms are prescribed in the *Mining Regulations* 1981 for the making of applications for mining tenements (form 21), applications for exemption from expenditure conditions (form 18), objections to the grant of tenements or certificates of exemption from expenditure (form 16), and plaints for forfeiture of tenements (form 33).[31] The form for an objection is misleading in that it describes that objections will be heard in the warden's court (instead of before the warden in open court). The form 33 for a plaint is the same form as is required for commencing civil proceedings in the warden's court. This form erroneously suggests that plaints for forfeiture of mining tenements are before the warden's court.

5. RULES OF PRACTICE AND PROCEDURE BEFORE THE WARDEN'S COURT

5.1 The Act provides in Part VIII for the conduct of matters in the warden's court, although it is yet to be authoritatively determined by the Supreme Court as to whether the provisions in this part are devoted only to warden's court proceedings. By section 134(6), "the practice and procedure of a warden's court as a court of civil jurisdiction shall be the same as the practice and procedure of a local court established under the *Local Courts Act* 1904, in like matters". Section 136 also provides that the practice and procedure of a warden's court shall be governed by the rules of court made by the Governor. No such rules have been promulgated. In the event that no or insufficient provision is made, section 136 enables, the *Rules of the Local Court* apply to the warden's court.

5.2 Section 162(2)(r) permits regulations to be made to regulate the practice and procedure in wardens' courts. Part VII of the Regulations deals with civil proceedings in the warden's court and matters such as the issue and service of a summons, the filing of defences, issuing of subpoenae, award of costs and issuing of warrants for execution and recovery of possession.

5.3 No express provision is made for rules of practice and procedure before the warden in open court to assist in the conduct of administrative matters.[32] It has often been argued in a variety of proceedings that as the warden in open court exercises functions in and of a warden's court the above procedures apply. This argument as to legal characterisation and the availability of such rules is considered below. However for present purposes it is worth noting the "convention" of practice before the warden in open court.

5.4 By convention the provisions of Part VIII of the Act, which generally provide for the conduct of civil proceedings in the wardens' courts, have been relied upon by practitioners and wardens in the conduct of administrative proceedings. Accordingly, the day to day practice and procedure before the warden in open court generally follows the practice in the Local Court. At times this is uncontroversial and all concerned get on with the business of resolving substantive issues. Particulars, expert reports and documents to be relied upon at hearing are provided prior to hearing and the parties agree by consent to a process that ensures they are not taken by surprise. Mining Registrars issue subpoenae to compel production of documents. Interlocutory disputes

[30] These inconsistencies were catalogued by D R Williams QC, in "Judicial Review of Warden's Decisions" [1984] AMPLA Yearbook 78.
[31] Referred to below as the Regulations – r 48.
[32] Regulation 162(2) enables regulations to prescribe and regulate the powers, functions and duties of the Warden in the administration of the Act.

which may arise in the course of proceedings before the warden are raised by way of chamber summons or notice of motion supported by affidavit. The ability to apply by such a document does not appear to have been challenged, not least because it is a convenient way to bring substantive matters to the attention of the Court and the other parties.

5.5 These are only "conventions" as no statutory provision is made for them. But they generally serve to make the informal procedure before the warden a fair one in a procedural sense. In this regard it is to be kept in mind that courts have regarded the rules and forms of procedure as not ends in themselves, but means to an end, which is the attainment of justice.[33]

5.6 The reliance on the provisions of Part VIII of the Act has been successfully challenged in several recent decisions of mining wardens and of the Supreme Court. In order to determine the scope of the warden's power to control and regulate proceedings in open court the Court has sought to characterise the functions of the warden.

6. LEGAL CHARACTERISATION OF THE FUNCTION OF THE WARDEN OF MINES

6.1 The exercise of functions by wardens in private and not in open court under other mining legislation have been characterised by the courts as "ministerial" functions and not in any sense the exercise of a "jurisdiction".[34]

6.2 The technical question of the legal characterisation of the warden's function in open court has produced differing views amongst judges of the Supreme Court.[35] However, in these cases the Court was not asked to determine whether the warden had power to order discovery, costs or regulate the mode of trial. The issue of characterisation has arisen where a party has been aggrieved by an administrative decision under the Act and has sought judicial review by way of the prerogative writs of *certiorari*, *mandamus* or prohibition.[36]

6.3 The availability of a writ of *certiorari* against a decision of the warden will depend upon whether the Court considers that the warden in exercising his functions constitutes an inferior court or is acting purely as an administrative tribunal.[37] In *Optimum Resources Pty Ltd v Kalgoorlie Consolidated Goldmines Pty Ltd* [38] the applicant sought a writ of *certiorari* in relation to a warden's decision not to grant a prospecting licence on grounds that the warden erred in law and acted in excess of jurisdiction under section 42 of the Act. Justice White considered that, in acting under section 42, the warden constituted an inferior court and was not acting purely as an administrative tribunal. His Honour concluded that *certiorari* would lie in respect of an act of the

---

[33] *Union Bank of Australia v Harrison, Jones & Devlin Ltd* (1910) 11 CLR 492 at 504.

[34] Barwick CJ in *Wade v Burns* (1966) 115 CLR 537 at 551 concerning the grant of an authority to enter private land.

[35] For example, Justice Kennedy in *Richmond v Panda Holdings Pty Ltd* (unreported, Full Court, delivered 27 October 1998) held forfeiture proceedings were held in the warden's court.

[36] By ss 147 and 151 the Act only permits appeals to the Supreme Court from decisions of the warden's court. Appeals to the Minister are otherwise limited. The only redress available to an aggrieved party is by judicial review. By section 16(1)(a) of the *Supreme Court Act* 1935, the Supreme Court of Western Australia has inherited the powers of the Court of Queen's Bench to issue prerogative writs. The procedure for applications for the writs of mandamus, certiorari and prohibition are prescribed in O56 and O57 of the *Rules of the Supreme Court of WA* 1971.

[37] *Craig v South Australia* (1995) 184 CLR 163.

[38] Unreported, Full Court of the Supreme Court of Western Australia, Kennedy, Franklyn and White JJ, delivered 11 July 1997.

warden, where jurisdictional error is shown, but not where only an error within jurisdiction can be established.

6.4 In *Re Calder; Ex parte St Barbara Mines Limited*[39] the Full Court considered an application for a writ of *certiorari* in relation to a decision of a warden in an application for exemption under section 102(2)(h) of the Act. The Court considered that in doing so, the warden had made an error of law. Chief Justice Malcolm preferred the view (but without deciding) that the warden constituted an administrative tribunal so that as the circumstances set out in section 102(2)(h) of the Act constituted a pre-condition of the authority to grant an exemption, the warden's error of law was a jurisdictional error.

6.5 The prevailing view of the Supreme Court as to the characterisation of the function of the warden of mines under the Act is that first described by Justice Murray in *Re Minister for Mines; Ex parte Trythall*[40]. In a decision relating to the power on appeal of the minister, his Honour considered it necessary to determine what sort of function the warden exercises in dealing with an application for a prospecting licence and contrasted it to the function when sitting as the warden's court. Justice Murray emphasised that even though the warden convenes in open court, that court was not a court of law, but a body set up to carry out certain statutory functions.[41] Justice Murray held that when the warden exercises the above functions "the Warden acts, albeit judicially, in a purely administrative capacity". Although not noted by Justice Murray in his decision, under the *Evidence Act* 1906 (WA) a reference to a person "acting judicially" means that person has authority to hear, receive and examine evidence.[42]

6.6 If in carrying out these administrative functions the warden of mines must "act judicially" then there is also usually an obligation to act in accordance with the rules of natural justice: ie to provide procedural fairness. There is no definition of the requirements of procedural fairness and what is required in a particular case will depend on the statutory context and the nature of the power being exercised in all the circumstances.[43]

6.7 In *Gardner No 1* and *Gardner No 2* a total of eight judges have followed *Trythall* in agreeing that the warden in open court exercises an administrative and not a judicial function. As a result a warden in open court does not constitute the warden's court and hence the statutory procedures and powers conferred on the warden's court are generally not available. A

---

39 [1999] WASCA 25, Full Court, unreported, delivered 22 April 1999.

40 (1992) 7 WAR 375. This is consistent with previous decisions of the Supreme Court in relation to the *Mining Act* 1904 (repealed) *Hazlett and Soklich v Rasmussen, May and Piper* (1973) WAR 141, Wickham J.

41 See observations of Starke J regarding the misconception as to the functions of the administrative tribunal in *R v War Pensions Entitlement Appeal Tribunal; Ex Parte Bott* (1933) 50 CLR 228 at 248.

42 Section 3.

43 Mason J in *R v Minister for Immigration and Ethnic Affairs; Ex parte Ratu* (1977) 14 ALR 317 at 329, Kitto J in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475. In *Merman Pty Ltd v Parker* [1987] WAR 159 the Full Court, quashed the decision of the Minister refusing to grant a mining lease under s 71 of the Act. In that case the Director of General Mines requested an environmental impact report from the applicant as the matter had been formally referred to the Environmental Protection Authority. Although the applicant had commenced preparation of the report, it was later advised that the lease had been refused. The Court held that in exercising his discretion under s 74 of the Act, the Minister was obliged to accord natural justice to the applicant. The applicant had a legitimate expectation that its application would not be refused until it had had a reasonable opportunity of preparing the report.

consideration of these and other decisions applying this analysis reveals the full limitations of the Act and the proper statutory and implied powers of the warden to direct and control the procedures of matters heard in open court.

7. RULES OF THE SUPREME COURT AND LOCAL COURT NOT AVAILABLE BEFORE THE WARDEN IN OPEN COURT

7.1 In *Trythall's* case only Justice Murray commented on a submission made that the warden in open court, exercised powers of the warden's court[44]. The tenement applicant had contended that the warden could have availed herself of a power to extend time in which to lodge a security for the purposes of a prospecting licence application. It was submitted that in the absence of an express statutory power to extend time under the Act, the power was available to the warden, by virtue of section 134(5) or (6) of the Act, under the *Rules of the Supreme Court* 1971 or the *Local Court Rules*.

7.2 Justice Murray considered that as the warden was not exercising civil jurisdiction, no procedures or powers set out in these Rules were available to her. Wardens and the Supreme Court as highlighted below have followed these comments in the decision.

8. NO POWER TO AWARD COSTS

8.1 The decision of the Perth Mining Warden, Warden Calder SM, in *Linda Latham v Greater Australian Gold NL*,[45] was a landmark decision in highlighting again the deficiencies of the Act. The warden carefully considered the vexed issue of legal characterisation of the warden's function in open court and the consequences in relation to the power to award costs. This decision has been cited with approval by Justice Wallwork in *Gardner No 1*.

8.2 In the *Linda Latham* decision, the tenement holder, having succeeded in its application for a certificate for exemption and defending a plaint for forfeiture, sought an order for costs against the plaintiff-objector. It was contended before the Warden that costs could be awarded under section 134(2) in circumstances where the objection to the application was frivolous and vexatious.

8.3 Warden Calder catalogued the previous conflicting decisions of the wardens in relation to the ability to order costs against an unsuccessful plaintiff-objector. The warden referred to about 14 previous wardens' decisions and indicated that he had considered others. These variously concluded that either the warden was presiding in the warden's court and, in a judicial capacity, could order costs under Part VIII of the Act or the warden had no power when convened as the warden of mines in open court to order costs except in some decisions, when an objection was frivolous or vexatious. Warden Calder also analysed the decisions of the Supreme Court referred to above that had considered the administrative/judicial distinction, albeit none had considered the issue of costs directly.

8.4 The warden followed his earlier decisions on the issue which accorded with the characterisation by Justice Murray in *Trythall's* case. Warden Calder held that he was not sitting as the warden's court when hearing a plaint for forfeiture and an objection to an exemption application as his functions were purely administrative. He added:

> "Accordingly, it follows that the provisions of Part VIII of the Act *which relate to the jurisdiction and powers and functions of the Warden's Court* do not have application and

---

[44] *Trythall* op cit at 390-391, Murray J.

[45] Op cit n 12.

> that, therefore, I have no power to make any order as to costs (or security for costs) as arising out of any application for the grant of a tenement or for the forfeiture of a tenement or for the granting of a certificate of exemption or any objection to such applications." (emphasis added)

8.5 The warden also considered that some of the powers referred to in Part VIII of the Act were not available to the warden of mines. In summary Warden Calder considered that:

(a) The warden could not exercise the jurisdiction and powers referred to in sections 132 and 134, including the power to transfer to another warden's court or add substitute or strike out any party to, for or from proceedings.
(b) The practice and procedure of the Local Court was not available under section 136.
(c) The warden cannot call of his own motion an expert witness to give evidence in relation to any technical matters arising in the course of proceedings under section 138.
(d) The power to fine or imprison those found to be in contempt of the warden was not available under section 139.
(e) The power to enforce orders was not available under section 140.

8.6 Warden Calder indicated that the above conclusion did not leave an empty void where the warden was powerless in respect to matters of procedure. For example, the Act made provision for the warden of mines to request reports or information from the Department or from an applicant for a mining tenement.[46] Importantly, Warden Calder considered that when sitting in an administrative capacity or as an administrative tribunal the warden had power to direct and control the procedures arising out of the matters before the warden. It is suggested that there is, in fact, power to control both the hearing of evidence and some procedural aspects of the proceedings. The source of these powers is not expressly stated, but is, undoubtedly, the rules of procedural fairness. Warden Calder states that his view was consistent with that of the Supreme Court in Re *Warden Boothman; Ex parte Peko Exploration*[47]. In that decision Justice Ipp indicated that it was beyond question that the rules of procedural fairness entitled the warden of mines "to make rulings in regard to the admissibility of evidence by reference to whether due notice of an issue (raised at a hearing) had been given".[48]

8.7 The decision may seem odd or unfair, particularly to lawyers familiar with the concept that costs in judicial proceedings "follow the event". The risk that a plaintiff must pay the costs of a successful defendant is an important consideration (and sometimes-powerful disincentive) to the commencement of proceedings. But whether power to order costs exists at all depends on the statute. The courts of common law did not have inherent power to order costs – the basis to do so is statutory. The apparent statutory scheme of the Act suggests that there are good policy reasons why costs are not available.

8.8 In interpreting section 134 and dealing with costs, Warden Calder was mindful of the careful scheme of the Act in relation to encouraging expenditure. He noted that the aim of the Act has been to encourage self-regulation within the mining industry of compliance with expenditure conditions and other requirements. The Act enables any party to seek forfeiture of a tenement or

---

[46] See below.
[47] Full Court, Supreme Court of Western Australia, unreported, delivered 14 November 1997. Malcom CJ and Kennedy J agreeing.
[48] Ibid at p 11.

object to an exemption application.[49] If a plaint for forfeiture is successful, the plaintiff may be entitled to the proceeds of any fine levied against the holder or, if the tenement is forfeited, the right in priority to any other applicant to apply for a tenement over the area forfeited.

8.9 Notwithstanding that Warden Calder's analysis is undoubtedly correct, there may be compelling practical reasons why the power in section 134 *should* be available in administrative proceedings – as an important power for the warden to control the proceedings. Applying the decision in *Linda Latham*, the power is *not* available even where an objection is vexatious and frivolous. It is suggested that in circumstances where an objection is frivolous or vexatious or an abuse of process the warden has power not to hear an objector. This will have the effect of minimising the costs incurred by the applicant/defendant.

9. NO POWER TO ORDER DISCOVERY IN ADMINISTRATIVE PROCEEDINGS

9.1 In *WMC Resources Ltd v Gardner*[50], the parties were proceeding to a hearing of plaints for forfeiture and objections to exemption applications for various mining tenements. The parties, possibly assuming (incorrectly) that an order for discovery of documents was capable of being made by reason of the Supreme Court decision in *Re Warden Burton; Ex parte Roberts*[51], provided mutual discovery by consent. The plaintiff/objector applied for further and better discovery.

9.2 The warden declined to make such an order and adhered to his view in the *Linda Latham* decision, that he presided as the warden of mines and that none of the powers of the warden's court or the *Rules of the Local Court* were available. The plaintiff-objector sought a writ of *certiorari* to quash the warden's decision.

9.3 The Full Court in *Gardner No 1* agreed with Warden Calder's reasons for decision that upon the hearing of an exemption application the warden is not sitting as the warden's court. Justice Ipp considered that it was "inappropriate to apply the rules of the Local Court (as required by section 136(1)) in matters which are not civil proceedings or to matters which would not ordinarily be justiciable by a court of civil jurisdiction".[52] His Honour also dismissed the submission that there was a rule of natural justice that discovery should be given. It was not procedurally unfair for the objector to proceed without discovery – but it would be unfair for the objector "to obtain from its competitor for mining rights highly confidential information merely by the expedient of objecting to an application for exemption".[53]

10. NO POWER TO ISSUE A SUBPOENA

10.1 The parties in *WMC Resources v Gardner* again found themselves before the Full Court in *Re Malley; Ex parte Gardner*[54]. The plaintiff/objector had caused the issue of a subpoena under regulation 127 to compel an employee of the tenement holder and applicant for exemption to

---

[49] See *Strange v Pietsch*, Warden Calder SM, delivered 25 May 1989, (1989) 8 AMPLA Bull 97.

[50] Decision of Warden Calder SM, delivered 21 August 1998 (Vol 13, No 17).

[51] Warden Calder expressed the view that the *ratio* of the Court's decision was not that discovery could be ordered in proceedings before the warden of mines – but that where an application for an order for discovery was made a corporation could not avoid the making of such an order upon the basis of any privilege against self incrimination or self exposure to a penalty.

[52] Op cit *Gardner No 1* at 535.

[53] Ibid.

[54] [2001] WASCA 29, Full Court, unreported, delivered 14 February 2001 – *Gardner No 2*.

produce documents to the warden.[55] The warden, on the application of WMC, followed the Full Court's decision in *Gardner No 1* and set aside the subpoena. A bench of five judges constituted the Full Court and were asked to reconsider the correctness of *Gardner No 1* as part of the order nisi for a writ of *certiorari* to quash the decision of the warden. The majority dismissed the proceedings on grounds that this was simply an attempt to re-argue the previous decision between the same parties on the same question and, therefore, an abuse of process.[56] The Court affirmed that the procedural rules contemplated by section 136 were not available to the warden of mines when considering an application for exemption.

10.2 Justices Owen and Parker considered the applicant's robust submission that, post *Gardner No 1*, the warden's court was in "disarray" because "there was no framework and no machinery by which an application for forfeiture under s 98 or an exemption under s 102 can be effectively heard."[57] Warden Malley had observed that he effectively sat "as a toothless tiger unsupported by any mechanism of practice and procedure not knowing whether he has the powers of contempt, not knowing whether there were powers of execution…"**.**

10.3 Justice Owen indicated that the consequences of *Gardner No 1* were not as draconian in terms of the proper administration of the Act as the submission suggested. He considered that "much will depend on the powers being exercised and the nature of the proceedings".[58]

10.4 Justice McKechnie agreed in respect of the majority decision as to *certiorari* and with the reasoning of Justice Ipp in *Gardner No. 1.* However, he considered that the proceedings were not an abuse and that the warden had the common law power (unaffected by whether he presided in the warden's court) to issue a subpoena *ad testificandum* (for a witness to attend and give evidence) and a subpoena *duces tecum* (for the production of documents) by operation of the *Evidence Act*. He observed that Parliament's use of the word "evidence" in the Act (whereby the warden is to hear evidence in open court) was significant. Section 97 of the *Evidence Act* requires that witnesses give evidence on oath before any person acting judicially in any inquiry or examination. Further Justice McKechnie held that by reason of the *Interpretation Act* (WA) the grant of the power under the Act to the warden to receive evidence in open court carried with it such incidental powers as may be necessary to fulfil the duty imposed by statute and the power given. This would include the power to compel a witness to give evidence.

10.5 It is respectfully suggested that this reasoning – that as a statutory administrative tribunal the warden exercises an inherent common law power to compel production of documents and witnesses – is inconsistent with other provisions of the Act relating to tenement applications. The mining registrar or warden may request an applicant to furnish "further information in relation to the application, or such evidence in support thereof". However, each relevant section expressly excludes information and evidence of assays or other results of any testing carried out on the land the subject of the application.[59] The confidentiality and commercial value of such information are good reasons why the warden has no power to compel a witness to do so or to provide them to a competitor for minerals or water resources or an objector.[60]

---

[55] Presumably the subpoena was issued, as the form suggests, from the warden's court by an officer of the Department.

[56] Chief Justice Malcolm at [29], with whom Owen, Parker, Wheeler JJ agreed.

[57] Ibid at [34] to [42] and [49] to [50].

[58] Ibid at [42].

[59] Sections 42(3), 59(3), 74(2).

[60] See *Quartz Water Leonora Pty Ltd v WMC Resources Ltd* [2001] WAMW 14.

10.6 In the absence of a power in the warden to order discovery or order an applicant-defendant to provide notice of documents which a party intends to rely on at hearing, the only avenue for obtaining documents held by the Department of Industry and Resources on a tenement file is under the provisions of the *Freedom of Information Act*. However, statutory exceptions exist by which a party can object to various categories of documents being produced.

11. PROCEDURAL FAIRNESS AND THE POWER TO DIRECT THE ANSWER OF REQUESTS FOR PARTICULARS

11.1 One of the concerns of parties in administrative proceedings before the warden is, in the absence of rules, the ever-present danger of being taken by surprise at a hearing. The strict application of the *Gardner* decisions suggested by some commentators is that the warden has no express power to order that particulars to be provided of a plaint for forfeiture, an application for exemption or objection.[61]

11.2 Prior to *Gardner No 1*, it was held that a defendant to a plaint for forfeiture is entitled to know with some degree of certainty what grounds are alleged and in absence of particulars the warden may dismiss a plaint.[62] This right to know is not based on an express right, but is a result of the rules of procedural fairness. *Gardner No 1*, could, therefore, be viewed as a case where a right to general discovery was plainly over and above what is required to accord procedural fairness in administrative proceedings. It is clear that notwithstanding the absence of rules a warden must in certain circumstances act judicially and accord the parties procedural fairness based on the circumstances.

11.3 Therefore, it follows that in exercising a particular function or power the warden may have power to do those things necessary in order to provide the parties with procedural fairness. *Re Warden Nicholls SM; Ex parte Plutonic Operations Ltd*[63] provides a good illustration of this proposition.

11.4 In *Re Warden Nicholls*, Plutonic sought a writ of *certiorari* to quash the warden's orders that it provide further and better particulars of the reasons for its application for exemption from expenditure conditions relating to a mining lease. The application simply listed the reasons for exemption by describing the relevant sections of the Act. Plutonic submitted that the warden was not exercising judicial power by reason of the *Gardner* decisions and had no capacity to direct the form which the proceedings should take or to ensure that the particulars are made available to an objector.

11.5 Justice Wheeler (with whom Justices Miller and Murray agreed) considered the nature of an administrative proceeding under section 102. She noted that a statutory declaration in support of an exemption application is not a document that is available to an objector. She held that an objector is entitled to know the factual basis upon which an application for exemption is to be made so that the objector can properly put forward materials in opposition to the application at the hearing. Justice Wheeler considered that it is the duty of a warden to ensure the objector is afforded natural

---

[61] M Hunt, Mining Law in Western Australia, Third Ed at 10.2.11.3, pp 154-155.

[62] See Malcolm CJ in *Savage v Teck Explorations Ltd*, (unreported, Full Court delivered 16 September 1988) and Justice Rowland in *Re Warden Heaney; Ex parte Flint* (unreported, Full Court delivered 27 October 1995) held that the warden had power to dismiss a plaint for failure to give sufficient particulars. However, his Honour assumed that section 136 and the procedures under the *Local Court Act* and Rules applied.

[63] [2002] WASCA 232 (Full Court, Supreme Court of Western Australia, delivered 28 August 2002).

justice. This could be done by granting an adjournment of a hearing if an objector had been taken by surprise and had to undertake further investigation.

11.6 Justice Wheeler favoured an approach whereby a warden would program the application for exemption by directing the applicant to furnish the objector with a statement of the material facts and circumstances upon which it proposes to rely at the hearing well in advance of the hearing date. In circumstances where material is of a "sensitive" nature she considered that the warden could make special directions. In this regard it is notable that in an application for exemption there is no statutory power vested in the warden to request information and evidence in support of the application.

11.7 Nevertheless, the approach suggested by Justice Wheeler may avoid the inconvenience and expense of adjournments and ensure that exemption/forfeiture proceedings are conducted expeditiously so that the tenement holder does not unduly rely on the benefits of a pending forfeiture application[64].

11.8 Justice Wheeler noted that there is no power under the Act to enforce directions. Nevertheless, failure to comply with directions may entitle the warden (in the exercise of his or her discretion) to direct the grant an adjournment of the hearing or to refuse to permit the applicant to adduce evidence or to rely upon material which had not been made available to an objector in accordance with the direction.

12. POWER TO AMEND AND THE RULE IN *WELDON V NEAL*[65]

12.1 In a series of decisions, Warden Heaney[66] and Warden Calder have held that section 142 of the Act permits the warden in open court to amend applications for exemption and objections. Section 142(4) relevantly provides that "all such amendments as may be necessary for determining in existing proceedings the real question in issue between the parties shall be allowed".

12.2 In *WMC Resources Limited v Gardner*[67] the warden considered that the power to amend an objection to an exemption application under section 142 was part of the Warden's broader power to control the conduct of proceedings. The Warden considered that section 142(4) should be interpreted broadly and applied in relatively robust manner. Therefore, amendments permitted under section 142 were not limited to informalities or errors but could allow, in certain circumstances, new issues to be introduced. Warden Calder also noted that no party ought be unfairly prejudiced by any amendment and the power to amend should not be applied in the manner which, in broad terms, overcomes the rule in *Weldon v Neal*. This aspect of the decision was not subject to the prerogative writ in *Re Gardner No 1*.

12.3 In *Great Boulder Mines Ltd v Bailey*[68] a tenement holder sought to raise a further ground of exemption under section 102(2)(h) following the decision of the Full Court in *Re Calder; Ex parte St Barbara Mines Limited*. The warden granted the amendment and expressly considered that the hearing of an application for exemption and objection thereto is a "*proceeding*" for the purposes of

[64] Where a forfeiture application is lodged, the tenement holder is entitled under regulation 52 of the Mining Regulations to a pro rata reduction in the annual amount to be expended on the tenement.
[65] (1887) 19 QBD 394.
[66] *Griffith v Dominion Metals Pty Ltd and Whim Creek Consolidated NL* (unreported, delivered 20 December 1996).
[67] At pp 11 and 13.
[68] Delivered 24 March 2000.

section 142 of the Act.[69] This was supported by regulation 56, which requires the warden in hearing an objection to an application for exemption "to receive evidence in open court".

12.4 This expansive interpretation of section 142 by the warden was in the face of an argument that the whole of the provisions of Part VIII of the Act should only apply to proceedings before the warden's court.[70] Warden Calder's view was that some of the sections in Part VIII, including section 142, do not expressly refer to the warden's court. These include:

(a) Section 135 – power of warden to resolve matters in dispute without formal proceedings.
(b) Section 137 – power to keep records of evidence.
(c) Section 144 – relating to the swearing of affidavits.
(d) Section 146 – power to reserve questions of law to the Supreme Court.

Warden Calder also considered that section 142(4) must be interpreted broadly in light of the warden's filtering role under section 102 in recommending to the Minister.

12.5 In *Quartz Water Leonora Pty Ltd v WMC Resources Ltd* showed the above decision relating to section 142, the Warden has exercised this power to amend in relation to competing objections to miscellaneous licence applications in circumstances where the documents exchanged by the parties disclosed the real issues in dispute.[71]

12.6 In *Alcoa of Australia Ltd v Simunovich and Dillon*[72] an objection went beyond the grounds claimed for the exemption and raised additional issues. An amendment was permitted to raise an unusual issue where it was alleged that one of the joint objectors was the cause of the failure to expend monies. It was unsuccessfully argued by the objectors that the application of section 142 enabling the warden to order amendments in administrative proceedings had the effect of defeating the strict time limits prescribed by the Act and the Regulations.

12.7 The power to amend is yet to be considered by the Supreme Court, as is the issue of the application of the rule in *Weldon v Neal*.[73] The strict rule in *Weldon v Neale*, briefly stated, is that a court will not permit an amendment to a pleading where that would defeat a defence under a limitation statute such as the *Limitations Act* 1935. The Rule is tempered by the ability of the Supreme Court to allow amendments to add new causes of action under O 21 r 5 of the *Rules of the Supreme Court* notwithstanding the expiry of the limitation period if the cause of action arises out of the same or substantially similar facts.

12.8 It is respectfully suggested that the rule in *Weldon v Neal* has no application in administrative proceedings before the warden in open court. However, subject to the operation of the *Local Courts (WA) Act* it would apply to proceedings in the warden's court because the *Limitations Act* 1935 (WA) applies to "actions". By section 3 of the *Limitations Act* (WA):

> "Action means a civil proceeding commenced, in the Supreme Court by writ or in such other manner as may be prescribed by Rules of Court, or in a Local Court or other inferior Court in the manner prescribed by or under the Act conferring jurisdiction on such Court."

---

69 Page 16.
70 See *Great Boulder Mines Ltd v Bailey*.
71 *Quartz Water Leonora Pty Ltd v WMC Resources Ltd* [2001] WAMW 14.
72 [2002] WAMW 9 – Warden Calder.
73 Op cit n 63.

12.9 In *Andela v Normandy Bow River Diamond Mine Ltd*[74] Warden Calder applied the rule in *Weldon v Neal* to an application to amend plaints for forfeiture, but also considered that proposed amendments were not permitted under section 142. The warden considered that the applications before him sought to raise new issues and facts going to the nature of the claim which were not present when the plaints were lodged. In effect, the amendment, if allowed would have been to abandon the basis of the existing plaint and introduce a new claim on a new basis. Accordingly, the warden struck out the plaints.

12.10 It is respectfully suggested that section 142, if applied in a “robust manner”, should be applied in a way which may achieve the same effect as the rule in *Weldon v Neal*. The power to amend proceedings is critical for the functioning of the warden in open court.

12.11 Often the forms required in administrative application, such as applications for exemption, are filled out by lay persons. Such applications are processed by the Department. If an objection is lodged, only then will the matter proceed to the warden to be heard in open court. New grounds may arise in an objection which raises facts that go beyond the grounds raised in an application and may go to matters which the Minister may consider in his or her decision to grant the certificate of exemption.[75]

12.12 However, "limitation periods", (or perhaps more correctly described as the statutory time limits under the Act,) are substantive rather than procedural laws. Plainly, there is a danger that the use of section 142 may have the effect of relaxing the strictness of some of the requirements of the Act that are understood as a precondition to the exercise of statutory power. However, *Andela* indicates that the wardens are vigilant in this respect and section 142 does not enable amendment in every case.

13. EXPERT EVIDENCE

13.1 A significant feature of applications before the warden of mines is that detailed reports of experts are often tendered and received into evidence. For example, in applications for exemption any arguments relating to the claim of whether a resource is for the relevant tenement year “uneconomic” or a tenement is part of a "project" may require detailed geological, geophysical, metallurgical or engineering evidence. Alternatively, mineral exploration reports are filed[76] and may be available for the warden to request or review on the tenement file. Given the specialist nature of the warden’s functions an issue is how the warden is to balance the need for parties to be accorded procedural fairness with sensitive and valuable information in absence of any right to discovery or production of documents by subpoena.

13.2 In *Quartz Water Leonora Pty Ltd v WMC Resources Ltd,*[77] an objector and competing tenement applicant sought to obtain annexures referred to in an expert hydrogeolgists’ report which had been exchanged by the parties. These annexures contained results of drilling, hydraulic testing and water analysis. There was a dispute between the parties as to whether access to these documents was required prior to the hearing in order to properly evaluate the report. The warden considered that there was no power under the Act to compel the production of the documents prior

---

[74] [2002] WAMW 6, delivered 8 February 2002.
[75] See *Alcoa v Simunovich & Dillon* at n 72 above.
[76] Section 115.
[77] [2001] WAMW 14, Warden Calder delivered 9 August 2001.

to the hearing. Warden Calder acknowledged that issues may well arise at trial as to admissibility of a report or weight to be accorded to its contents.[78]

13.3 It is respectfully suggested that procedures should be adopted (either by way of express rules or practice directions) to address the issue of expert evidence in the warden's court for the same reasons referred to by Justice Wheeler in *Re Warden Nicholls*. The proper role of expert witnesses has been set out by Cresswell J in the "*Ikarian Reefer*"[79]. His Lordship outlined the duties and responsibilities of expert witnesses in civil cases. There is no reason why such duties should not apply before the warden. One of the obligations is described as follows:

> "Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports."

13.4 The failure to provide such supporting documents prior to the hearing may have the effect that the evidence of expert witnesses can not be properly scrutinised prior to hearing so that it is necessary for the parties to request an adjournment so that they (or their independent expert) can consider the material tendered at the hearing.

13.5 Another requirement for the efficient conduct of matters before the warden that are of an inquisitorial nature is the power for the warden, if necessary to call experts, particularly from government departments with special technical knowledge, such as the Water & Rivers Commission, to assist in the Court resolution of applications.[80]

14. SUMMARY OF PROCEDURAL POWERS OF WARDEN OF MINES

14.1 In summary, by reason of the above authorities it is suggested that in administrative proceedings currently before the warden of mines, the warden:

(a) cannot rely on the procedural rules of the Supreme Court or Local Court (particularly those provisions which facilitate the identification of issues prior to a hearing);
(b) has no power to order discovery of documents;
(c) has no power to compel production of documents prior to the hearing where those documents are part of an expert's report to be adduced as evidence at a hearing (or relied upon in that expert's report);
(d) cannot, at the request of a party, issue a subpoena to compel a witness to attend a hearing give evidence or to produce documents;
(e) cannot make an order for costs or security for costs;
(f) has no power to compel obedience with interlocutory directions; and
(g) cannot punish those in contempt of the warden.

---

[78] For example, in *Pownall & Ors v Conlan Management Pty Ltd & Anor* (1995) 12 WAR 370 the Full Court of the Supreme Court of Western Australia held evidence of an expert witness concerning the value of certain mining tenements to be inadmissible as the factual matters upon which the opinion was based were not formally proven at trial.

[79] (1993) 20 FSR 562 at 565/6. This principle in the *Ikarian Reefer* has been adopted by the RT Hon Lord Woolf in "*Access to Justice*", the *Draft Civil Proceedings Rules* and by a Federal Court Practice Direction for expert witnesses in proceedings in the Federal Court of Australia.

[80] See for example disputes relating to access to limited ground water supplies and the role of the Water and Rivers Commission in allocating water to the holders of miscellaneous licence under the Act. S 22 n 78. Gerus, M [2001] AMPLA Yearbook "Transferable Water Entitlements in WA: Water Markets and Property Rights for the Mining Industry".

14.2 Conversely, the warden of mines in open court may:

(a) give leave to amend an application, plaint, objection or defence in order to ventilate the real issues in dispute, subject to certain conditions;
(b) direct the applicant for exemption or a tenement applicant and an objector (as the case may be) exchange a statement of the material facts and circumstances upon which it proposes to rely at the hearing;
(c) direct that restrictions based on confidentiality apply to the parties as to use of information or of documents;
(d) make rulings in regard to the admissibility of evidence at the hearing;
(e) grant adjournment of a hearing where a party is taken by surprise;
(f) reserve questions of law to the Supreme Court; and
(g) direct and control the evidence (and possibly other procedures) arising out of the matters before the warden to ensure that parties receive procedural fairness.

14.3 The above summary indicates that the situation is less than satisfactory. The absence of express rules and procedures means that the wardens have an ongoing task of analysing on a case by case basis whether they may have power in certain circumstances. The procedural rules that are to be followed before the warden of mines are collected in a miscellany of decisions of various courts. The procedures in open court are not readily accessible or transparent. In the past they have not been applied uniformly by wardens or the department administering the Act, now known as the Department of Industry and Resources.[81]

14.4 It appears that even after the Supreme Court has determined in *Gardner No 2* that a party is not able to issue a subpoena the practice still prevails whereby officers within the Department of Industry and Resources are issuing subpoenae in administrative proceedings. Often at the commencement of a hearing before the warden of mines, the Department makes available Departmental files to the warden, in answer to a subpoena purportedly issued by the warden's court at the request of an objector's solicitor. There are good reasons why this is necessary, but the practice of simply issuing a subpoena should be either ceased or give express statutory authorisation.

14.5 The Forms for the administrative proceedings need to be reviewed and supplemented. An objection is, in effect, the document which initiates the proceedings before the warden in open court. In the absence of an objection, applications are dealt with administratively by a mining registrar. There is no form by which an applicant for a mining tenement or an exemption can formally respond to an objection. A form 36 defence is prescribed by the *Mining Regulations* 1981, albeit that it appears to be intended for defences to civil proceedings.[82]

14.6 Justice Ipp in *Peko Exploration Ltd v GHK Mining Pty Ltd*[83] has indicated that these forms are designed to ensure issues are properly defined and that the parties are given reasonable notice of the case each has to meet. Therefore, according to Justice Ipp, forms under the Act fulfil the same purpose as pleadings: parties have notice of the real issues in dispute, can properly prepare for the hearing and they assist the determination of admissible evidence at the hearing.

---

[81] Referred to below as the Department.
[82] Rule 126.
[83] Full Court, unreported, delivered 14 November 1997.

15. PREVIOUS RECOMMENDATIONS FOR REFORM OF THE *MINING ACT*

15.1 In 1983 a submission by the Australian Mining Petroleum Law Association (WA)[84] to the Committee of Inquiry into Aspects of the Mining Act[85], highlighted the confusion between the warden's court and the warden acting administratively. AMPLA noted that the inconsistent terminology used throughout the Act required amendment. The Committee agreed with AMPLA's suggestion that the Act should be amended to clarify the distinction that reference to the warden means the warden acting administratively and the references to the warden's court mean the warden sitting judicially.[86] Accordingly, the Committee also recommended that section 134(1)(d) be deleted.[87]

15.2 The Committee also considered that the issue of costs needed to be clarified so that costs could be awarded in circumstances where the warden considers a competing tenement application or objection to be vexatious or frivolous.[88.]

15.3 As to procedures before the warden in open court the Committee recommended that "practice rules" be issued and published from time to time by the chief mining warden to create some uniformity "amongst wardens regarding the administration of the Act".[89] The Committee noted that the lack of consistency in matters such as evidence supporting applications for exemption tended to create confusion and delay. The Committee considered but rejected a submission that the "procedures of the warden's court should follow the form of an inquiry rather than the present system of each party presenting its case either personally or through legal counsel". It is unclear whether this submission related to the warden's administrative jurisdiction.

15.4 Daryl Williams QC in a paper presented in 1984[90] also catalogued the inconsistencies in the Act and apparent drafting errors.[91] He considered that the reference to "jurisdiction" in section 132 referred to above was misleading and that it could not have been intended to confer on the warden's court jurisdiction (or more correctly-confer statutory power) which elsewhere under the Act is to be exercised by the warden acting as the warden of mines. Williams considered that the intention of the Act is to give the warden's court jurisdiction to hear proceedings relating to claims as of right arising from matters that the warden deals with under the Act. Conversely, it is well established that in the administrative jurisdiction an applicant for a tenement does not have "rights" – the Act only confers rights to minerals upon grant. He concluded that these provisions dealing with the functions of the warden of mines, on the one hand, and the jurisdiction and powers of the warden's court on the other should be delineated.[92]

---

84 AMPLA.

85 See Section 4 – referred to below as the Committee.

86 Recommendation 4.7(1).

87 Another key recommendation of the Chair of the Committee, Michael Hunt, was the appointment of a Chief Mining Warden with sole responsibility to the jurisdiction. Wardens still attend to other responsibilities in their capacity as stipendiary magistrates in the Local Court and the Court of Petty Sessions. The legal and factual complexity and value of matters before wardens together with the significant increase in the workload of the warden's court arising from large scale mining activity and closer public scrutiny of resource allocation issues merits reconsideration of this recommendation.

88 Recommendation 4.2D.

89 Recommendation 4.6.

90 "Judicial Review of Warden's Decisions" [1984] AMPLA Yearbook 78.

91 Williams, op cit at 82-85.

92 Ibid at 83-84.

15.5 Williams did not focus on the issue of costs or other aspects of practice and procedure. His analysis has important consequences in relation to each issue, but has been ignored, with some notable exceptions, until relatively recently. The consequences of this analysis can no longer be neglected.

16. AMPLA (WA) REPORT AND RECOMMENDATIONS ON THE JURISDICTION AND POWERS OF THE WARDEN AND WARDEN'S COURT

16.1 In 2000, an AMPLA (WA) subcommittee[93] provided a submission to the Mining Industry Liaison Committee to deal with the consequences of the *Gardner* decision. The AMPLA sub-committee considered that it wasn't in the interests of justice or the mining industry to retain the existing dichotomy of the "jurisdictions" and powers of the warden and the warden's court under the Act should be abolished.

16.2 Generally, it was suggested that where administrative applications before the warden of mines were opposed, then the administrative proceeding should be heard by a warden in the warden's court, being the warden's court constituted under section 127 of the Act and exercising powers conferred by section 134. All unopposed applications including plaints for forfeiture be dealt with by a Mining Registrar.

16.3 Accordingly, AMPLA recommended that section 132 of the Act would need to be amended to provide the warden's court with the jurisdiction to determine:

(a) applications for mining tenements to which objections have been lodged;
(b) applications for forfeiture to which a defence had been filed;
(c) applications for exemption from expenditure to which an objection is made;
(d) applications for cancellation of forfeiture to which an objection is made;
(e) survey disputes;
(f) actions for determination of compensation between private land owner, pastoralist and mining tenement holder;
(g) conduct of ballots to determine priority of tenement applications;
(h) applications for extension of time; and
(i) applications for removal of caveats.

16.4 Further, amendment would also be required so that in each case where the warden is required to convene and hear evidence in "open court" that it be amended to refer to the warden's court.

16.5 A further controversial aspect of AMPLA's recommendation was that the recommendatory functions of the warden to the Minister be removed. In practice, the Minister relies on recommendations of the Department or delegates (pursuant to section 12) his power under the Act to a senior officer of the Department. Generally, the recommendations of the warden are followed by the Minister. The practice of parties making further submissions to the Minister after the hearing before the warden has in the past been less than transparent and has been the subject of much litigation. Under AMPLA's proposal the Minister would still retain a general supervisory role through his or her ability under section 111A of the Act to terminate an application or refuse an application on reasonable grounds in the public interest.

---

[93] Australian Mineral and Petroleum Law Association (WA Branch). The author was a member of this sub-committee.

16.6 A further key component of this proposal is to remove the restrictions on appeals under section 151 of the Act. AMPLA have proposed that the Act should provide for appeals to a single judge of the Supreme Court. The restriction on appeals in practical terms has been largely illusory given the availability and frequency of prerogative writs. The 10 year saga of the Bronzewing South tenements, which recently concluded with the High Court's decision in *Hot Holdings v Creasy*[94] provides a notorious example.

The Powers of the Warden's Court

16.7 Key requirements of the AMPLA submission were that the warden be given express power to deal with interlocutory matters in Chambers and for the warden to have power to issue practice directions. It is suggested that it is not appropriate for the Minister or the Department to have power to issue practice directions or determine the Rules of Court. Matters relating to the administration by the Department of mining titles is frequently the subject of proceedings before the warden in open court. The practice directions (and rules) should be the responsibility of mining wardens in the same manner that procedure in the Supreme Court are the responsibility of judges of the Supreme Court.

16.8 The other key recommendation of the AMPLA submission was the necessity for rules of the warden's court to be promulgated under section 162(2)(r) of the Act. In the event of the abolition of the warden of mines in open court, it would not be necessary to amend the Act to introduce a specific provision to permit other rules. AMPLA considered that the Rules of the Local Court as well as the Supreme Court were not particularly appropriate for the specialised practice of a mining court.

16.9 AMPLA recommended that the Rules should provide the new Warden's Court with power to:

(a) make interlocutory orders including orders for discovery, further and better particulars and interrogatories although no order for discovery or interrogatories should be made against a defendant tenement holder in an application for forfeiture;
(b) issue a subpoena;
(c) order costs including security for costs.

16.10 Specific instructions in relation to drafting amendments of the Act were issued in late 2002 but they have yet to produce any formal draft legislation.

17. OTHER OPTIONS FOR REFORM

17.1 The alternative resolution of the problem of administrative/judicial distinction is to abandon the warden's court jurisdiction altogether. The "civil jurisdiction" of the warden's court is concurrent in some respects with the jurisdiction of the Local Court (subject matter to the value of $25,000)[95], District Court (subject matter to the value of $250,000)[96] and the Supreme Court.[97] It is suggested that because of the costs scale and complexity of litigation that may be brought in the warden's court, the Supreme Court will be the preferred forum, not least of which because the scale of costs may result in greater costs recovery.

---

[94] (2002) 73 ALJR 70.
[95] *Local Courts Act* 1904, ss 30-31, 99-103.
[96] *District Court Act* 1969, s 50.
[97] *Supreme Court Act* 1935, s 16.

17.2 For example, recent significant Court actions relating to mining tenements and mining agreements that have been commenced in the Supreme Court:

(a) in relation to trespass on a mining lease and conversion of minerals[98];
(b) declarations relating to agreement for payment of monies upon nickel production from certain tenements[99];
(c) seeking enforcement of a heads of agreement relating to mining tenements[100].

17.3 The above actions were plainly within the jurisdiction of the warden's court under s 134. The complexity and value of matters that may come within the jurisdiction the warden's court usually means that the local court scale remains manifestly inadequate when compared with the other court scales to recover costs.

17.4 Anecdotal evidence suggests that there are very few actions commenced in the warden's court in comparison to the administrative matters before the warden. Recent decisions of the warden's court indicate that actions have been commenced by individuals or small companies:

(a) actions for specific performance of mining agreements[101];
(b) applications for declarations that mining tenements held on trust[102];
(c) applications for declarations to amend the register to delete records of expenditure noted by reason of late filing of expenditure reports[103].

18. CONCLUSION

18.1 Since the late nineteenth century Western Australia has had mining wardens who have exercised administrative jurisdiction amongst the prospectors to whom "vociferous quarrels and violent disputes were not unknown"[104]. Wardens were expected to know of the customs and

---

98 F*inesky Holdings Pty Ltd v Minister for Transport* [2002] WASCA 206 – Full Court.

99 *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94, see (2002) 21 AMPLJ 179.

100 *Anaconda Nickel Limited v Tarmoola Ltd* [2000] WASCA 27; see (1999) 18 AMPLJ 115 and (2000) 19 AMPLJ 113.

101 *Amethyst Gold Pty Ltd v McDowell and Others* (2000) 19 AMPLJ 9.

102 S*orna Pty Ltd v Flint & Anor* [2000] WASCA 22.

103 *Hodgkinson v Global Doctor and Minister for State Development* [2002] WAMW 11, see (2002) 21 AMPLJ at 142.

104 Since the *Goldfields Act* 1885; Wells J in *Pacminex (Operations) Pty Ltd v Australia (Nephrite) Jade Mines Pty Limited* (1974) SASR 415.

expectations of miners. The hallmark of this “jurisdiction” was that wardens dealt promptly, decisively and authoritatively with disputes that arose on the mineral fields.[105] Disputes between prospectors were resolved "without the frills and fancies of litigation in the normal sense"[106]

18.2 Today the mining and exploration industry in Western Australia is worth approximately $17 billion and contributes approximately $690 million in royalties. The mining warden has a central role in the administrative titles system by which the Crown grants rights to explore and mine for minerals in Western Australia. Committees and commentators have long urged for substantive and procedural reform. In the absence of express rules, the courts have begun to imply rules to assist parties in the conduct of proceedings before the warden. The failure to embrace legislative changes may not threaten the integrity of the administration of justice but it fails to meet the needs of a modern large-scale mining industry and the broader community.

[105] Ibid Wells J.
[106] Franklyn E M, QC, “Judicial Review of Warden’s Decisions” a paper in “The Practice of Mining Law in the Warden’s Courts” 1984 Law Society of Western Australia.