RECENT CASES – THEIR PRACTICAL SIGNIFICANCE

Tortola Pty. Ltd. v. Saladar Pty. Ltd. and Holloway[1]

By J. B. Snelling*

The title of this paper refers to only the first of a line of cases arising from three overlapping applications for mining tenements, all made in January 1984, under the Mining Act 1978–1983 of Western Australia ('the Act').[2] The issues raised by the cases revolve around the role of wardens of mines appointed under the Act[3] and the means by which their decisions concerning the grant, and objections to grant, of prospecting licences under the Act may be appealed and reviewed.

Disputes relating to applications for mining tenements are an occupational hazard for mining companies in Australia. Recent issues of the *AMPLA Bulletin* testify to the current popularity of that form of dispute. In Western Australia, the warden is in the frontline with respect to every contested application for a mining tenement, the Act charging him with the responsibility to hear each application and the objections thereto. In the case of prospecting and miscellaneous licences, the warden has the further responsibility of granting the licence, whereas in the case of exploration licences, and mining and general purpose leases he is asked only to transmit to the Minister notes of evidence, maps and documents and a report recommending the granting or refusal of the mining tenement.

It is difficult to apply with complete authority and confidence the decisions of superior courts on the jurisdiction and role of the warden in one jurisdiction to that in another. Hence the detailed content of this note may not be susceptible to application outside Western Australia. Nevertheless, the story told through the cases is an interesting one and repays some attention.

THE FACTS

The reported facts can be shortly stated. Since 1973 Westside Mines Pty. Ltd. ('Westside') had worked eight mineral claims at Mount Seabrook, 140 kms north of Meekatharra, for talc. Operations comprised an open cut mine, crushing and screening facilities at the mine site and a talc mill at

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1 [1985] WAR 195.

2 The Mining Act 1978–1983 has been substantially amended, subsequent to January 1984, by the Mining Amendment Act 1985, Mining (Validation and Amendment) Act 1986 and the Mining Amendment Act 1986. Unless the context otherwise requires, references to 'the Act' mean both the Act as it was in Jan. 1984 and in its current form.

3 S.13. Hereafter the word 'warden' shall be used for 'warden of mines' in accordance with s.8(1). The Act distinguishes between the warden, and the warden's court constituted for a mineral field or district under s.127.

Leighton. At the time of the dispute, talc ore was being shipped overseas and to the eastern states in both lump and milled form. Twenty two people were employed by Westside at the mine site and eight at Leighton, together with a number of people employed by Westside's parent company, Bellway Pty. Ltd., as truck drivers engaged in transporting the talc ore by road from Mt. Seabrook to Leighton.

Westside was the registered holder of the eight mineral claims, which it had obtained under the Mining Act 1904 (W.A.) ('1904 Act') and in particular the regulations made under that Act.[4] Digressing briefly into the legislation, it will be recalled that the 1904 Act was repealed by the Mining Act 1978. The Act was proclaimed[5] to commence operation on 1 January 1982. The Interpretation Act had the effect of making the commencement of the operation of the Act to be 'the beginning of that day'.

The Second Schedule to the Act contains transitional provisions which deal with, *inter alia*, the conversion of tenements under the 1904 Act to tenements under the Act. The effect of these provisions is that mineral claims granted under the 1904 Act and in force immediately before the commencement date continued in force after the commencement date for a period of two years (the precise period was a matter in dispute in the actions and will be discussed below). While such a claim continued in force, the holder of the claim was entitled to apply for and, subject to the Act, be granted a prospecting licence, exploration licence or mining lease under the Act.[6]

As at the last moment of time within the day 31 December 1983, Westside had made no application for a tenement under the Act. On 1 January 1984 Tortola Pty. Ltd. ('Tortola') marked out as prospecting licences the land the subject of the expired (?) mineral claims. On 4 January 1984, Saladar Pty. Ltd. ('Saladar') and John Nelson Holloway ('Holloway') jointly marked out as prospecting licences the land which had been the subject of two of the expired mineral claims and on 10 January they marked out the land which had been the subject of the remaining six expired mineral claims. Applications for prospecting licences were subsequently lodged by Tortola and by Saladar and Holloway.

On 9 January 1984 Westside marked out and applied for a mining lease of the land which had been the subject of its expired mineral claims. Subsequently, it objected to the earlier applications. Saladar and Holloway also lodged at the warden's office notices of objection to the granting of the applications by Tortola.

The proper procedure for dealing with competing applications was one of the issues in the cases, and is discussed below. Assuming for present purposes that section 105A of the Act required the applications to be dealt with in an order based on time of marking out, it will be apparent from the above that Tortola's applications were the first in time and, assuming they were validly made were, prima facie, the first in line to be granted or refused by the warden. In the event that the application could be shown to

4 Reg. 55 *et seq.*
5 Gazette dated 11-12-81, 5085.
6 Cls. 3(1) & 3(2).

be defective in some way or should otherwise be refused, Saladar's applications were next in time and in line for grant or refusal. Westside, the operator and owner of the mine prior to the expiry of its mineral claims, could only regain ownership of the mineral and mining rights if it could be established that both Tortola's and Saladar's applications were invalid and should not be granted on that basis or, based on considerations other than mere technical compliance with the Act, Westside's application should be preferred and granted in front of, or at least after refusal of, the earlier competing applications.

THE LITIGATION

From the facts described, a total of nine separate court actions have evolved. Some of the actions have been heard jointly. Apart from the hearings before the warden which resulted in the grant of prospecting licences to Tortola, four lines of cases can be identified. At present only two of the court actions have been reported and it appears likely that the balance will remain unreported. A summary of the cases is therefore appropriate.

Proceedings before the Warden

Tortola's applications for prospecting licences came on for hearing before the warden. In July 1984 the warden reserved five questions of law for the opinion of the Supreme Court pursuant to section 146 of the Act. The warden stated the case, the writer is given to understand, on his own initiative.[7]

The hearing before the warden resumed upon the conclusion of the appeals from the opinion of a single judge of the Supreme Court. On 29

7 S.146 provides as follows:

(1) The warden may reserve, at any stage of any proceedings under this Act, any question of law for the opinion of the Supreme Court thereon.
(2) The question of law shall be submitted to the Supreme Court in the form of a special case stated by the warden and transmitted by him to the Registrar of the Supreme Court.
(3) The Registrar of the Supreme Court shall set down the case for consideration by a Judge, and shall forthwith notify the warden of the time and place appointed therefor.
(4) The warden shall give notice of the time when, and the place where the Judge shall consider the case to each of the parties concerned who is entitled to be heard by the Judge.
(5) The Judge, at any stage of the matter, may:
(a) remit the case to the warden for amendment;
(b) direct that the case be set down for argument before the Full Court of the Supreme Court; or
(c) proceed to hear and determine the question so submitted;
and the Full Court or Judge, as the case may be, may give such direction or opinion as to the question so submitted, as the Full Court or the Judge thinks proper.
(6) Every such direction or opinion of the Full Court or the Judge, shall be transmitted by the registrar of the Supreme Court to the warden who shall act in accordance therewith.
(7) When reserving any question of law pursuant to this section or at any time before acting in accordance with the direction or opinion of the Full Court or the Judge as provided in this section, the warden, on the application of any party to the proceedings in relation to which the question of law is to be or was so submitted, may make such order for:
(a) an injunction;
(b) the appointment of a receiver;
(c) the payment of money into court; or
(d) giving security for damages and costs or otherwise,
as he thinks fit and on such terms or conditions as he thinks fit.

November 1985 the warden held that Tortola had marked out the land the subject of its applications in accordance with regulation 61 made under the Act and, (in accordance with the opinion received from the Supreme Court), the mineral claims held by Westside had expired prior to the marking out by Tortola. The warden made orders dismissing the objections of Saladar, Holloway and Westside and granting Tortola's applications for prospecting licences.

Category 1

Opinion of a judge of the Supreme Court on a case stated from the warden and appeals therefrom.

The opinion sought by the warden referred to above was given by Brinsden J.[8] The terms of the opinion will be discussed in detail below. It is sufficient to say here that the answers to the questions stated favoured Tortola. Westside and Saladar then appealed Brinsden J.'s opinion to the Full Court of the Supreme Court of Western Australia.[9]

Two preliminary issues were raised by the Full Court appeals. The first was whether the warden had authority under the Act to seek the opinion of the Supreme Court on the questions asked of it. The Court concluded, unanimously, that the warden was authorised by section 146 to state a case in the circumstances in issue.

The second issue, which assumed an affirmative answer to the first, was whether any appeal to the Full Court was available from the answers returned by a judge to questions stated for opinion. On this issue the Full Court concluded, also unanimously, that the opinion of the Court, whether given by a single judge or by the Full Court exercising original jurisdiction is an advisory opinion which cannot be expressed in the terms of an order and cannot be set aside.

Westside subsequently sought leave to appeal to the Privy Council against the Full Court's decision. The application was heard by Brinsden, Olney and Pidgeon JJ. Leave was denied, Pidgeon J. dissenting.[10]

Category 2

Appeals from decision of warden to grant the licences to Tortola and the dismissal of objections.

Following the grant of the prospecting licences to Tortola in November 1985, Westside appealed to the Supreme Court by filing a notice in the prescribed form in the warden's court pursuant to section 147 of the Act.[11] The 'final judgement, determination or decision' identified in the notice was 'the dismissal of the appellant's objection Nos. 5/84 to 9/84

8 *Tortola Pty. Ltd. v. Saladar Pty. Ltd. and Holloway.* [1985] WAR 195.

9 *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd. and Others*; *Saladar Pty. Ltd. & Another v. Tortola Pty. Ltd. and Another.* [1985] WAR 343.

10 *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd. and Others.* Appeal No. 495 of 1985. Before the Full Court of the Supreme Court of W.A. comprising Brinsden, Pidgeon, and Olney JJ. Unreported.

11 S.147(1) provides as follows:

> Except as provided in section 151, any party aggrieved by any final judgment, determination or decision of a warden's court may appeal therefrom to the Supreme Court.

and the subsequent grant of prospecting licences 52/117 to 52/121 to the respondent'.

Tortola moved to have the appeal struck out as being incompetent, based upon section 151 of the Act. At the hearing Westside amended its grounds of appeal so as to challenge only the warden's order dismissing its objection. It was conceded that the appeal against the order granting the prospecting licence was within section 151 and was incompetent. Rowland J. held that the appeal, as amended, was incompetent and ordered that the appeal be struck out.[12] An appeal to the Full Court on that order was dismissed unanimously, on the ground that the appeal was barred by section 151(b).[13]

Category 3

Application by Saladar and Westside for issue of prerogative writs.

In conjunction with the proceedings described as Category 2, orders nisi requiring the warden to show cause why writs of *certiorari* and *mandamus* should not issue to quash his orders were sought by Saladar. In an unreported decision, orders nisi for writs of *certiorari* and *mandamus* were granted by Rowland J. upon the ground that the warden had erred in law (such error appearing on the face of the record).[14]

Orders nisi requiring the warden to show cause why writs of *certiorari*, *mandamus* and prohibition should not issue were also sought by Westside. In an unreported decision,[15] the orders nisi were granted by Rowland J. upon two grounds. The first ground was similar to that supporting Saladar's orders nisi concerning the construction to be placed upon clause 3(1) of the transitional provisions contained in the Second Schedule to the Act. The second ground was that the warden erred in law and misconceived his functions and acted *ultra vires* his powers, duties and functions in holding that he had no jurisdiction or power or discretion to refuse to grant the prospecting licences applied for by Tortola, once he was satisfied that there had been compliance with the machinery provisions of

S.151 provides as follows:

There shall be no right of appeal under this Part:

(a) where at or before the hearing of any proceedings in the warden's court the parties thereto have agreed by a memorandum in writing lodged in the warden's office, that the decision of the warden's court therein shall be final;

(b) in respect of any decision, order or recommendation of the warden or of the Minister upon any application for a mining tenement, the forfeiture thereof, or exemption from expenditure or other conditions;

(c) in respect of any matter in which it is provided by this Act that the determination of a warden or mining registrar is final and conclusive and not subject to appeal.

12 *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd.* Appeal No. 422 of 1985. Before Rowland J. of the Supreme Court of W.A. Unreported.

13 *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd.* Appeal No. 12 of 1986. Before the Full Court of the Supreme Court of W.A., comprising Burt C.J., Wallace and Olney JJ. Unreported. An appeal in like terms was lodged by Saladar (Appeal No 426 of 1985). It was agreed that the fate of that appeal would follow the fate of Westside's appeal and hence it was also struck out.

14 *Re Stapp; Ex parte Saladar Pty. Ltd. and Others.* No. 2238 of 1985.

15 *Re Stapp; Ex parte Westside Mines Pty. Ltd. and Others.* No. 2311 of 1985.

the Act as to marking out. Westside had argued an additional two grounds based on further errors of law on the face of the record, lack of jurisdiction and lack of natural justice. These two grounds were rejected by Rowland J. on the basis that they related to matters of fact and once findings of fact were made by the warden, albeit that other findings may have been open, then no mistake of law could be established.

Upon the return of the orders nisi granted on Saladar's[16] and Westside's[17] applications, the Full Court determined, unanimously, that the orders nisi be discharged.

Application for Special Leave to Appeal to the High Court of Australia.

Saladar then sought, and obtained, special leave to appeal to the High Court of Australia from the Full Court's decision.

The transcript of the special leave application[18] discloses that counsel for Saladar identified five questions of law raised by the application. They included whether a decision of an inferior court, based on the opinion of a superior court on a case stated, which opinion is wrong in law, can ever be reviewed; did a provision in a statute which requires a tribunal to act in accordance with the opinion of a superior court on a case stated have the effect of removing the remedies by way of the prerogative writs; and at what moment in time did a mineral claim under the 1904 Mining Act expire by virtue of Clause 3(1) of the transitional provisions of the Mining Act 1978?

The application for special leave was heard and granted on 16 May 1986. The appeal was withdrawn by consent of all parties in August 1986.

Category 4

Appeal from decision of Rowland J. on the grant of the order nisi sought by Westside.

Westside sought leave to appeal from Rowland's decision in declining to include two of the four grounds contained in its application for orders nisi. The Full Court unanimously dismissed the application.[19] The essence of the reasoning of the four judges of the Supreme Court who considered this matter was that the grounds raised questions of fact, which once decided by the warden, could not then be reviewed. The result is that a number of important questions regarding the manner of pegging, including the ability of an applicant to move forms attached to his pegs and the

16 *Re Stapp; Ex parte Saladar Pty. Ltd. and Others.* No. 2238 of 1985. Before the Full Court of the Supreme Court of W.A., comprising Burt C.J., Wallace and Olney JJ. Unreported.

17 *Re Stapp; Ex parte Westside Mines Pty. Ltd. and Others.* No. 2311 of 1985. Before the Full Court of the Supreme Court of W.A., comprising Burt C.J., Wallace and Olney JJ. Unreported.

18 *Saladar Pty. Ltd. v. Stapp and Others* Appeal No P3 of 1986 (Before the H.C. of A., comprising Gibbs C.J., Mason and Dawson JJ).

19 *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd. and Others.* Appeal No. 429 of 1985. Before the Full Court of the Supreme Court of W.A., comprising Burt C.J., Wallace and Olney JJ. Unreported.

degree to which components of the operation of pegging could be carried out prior to the time at which ground became open for pegging, did not have the benefit of judicial attention in this case.

ISSUES

The *Tortola* series of cases touch on a number of questions of ongoing fundamental importance under the Act and a question of decreasing interest, relating to the transitional provisions incorporated in the Act. The principal issues raised by the actions are:

- The role of the warden in dealing with applications for prospecting licences, including treatment of competing applications, the scope of the warden's discretion and the matters relevant to his consideration of such applications.
- The construction of section 146 of the Act, including the 'proceedings' to which it applies, the nature of an opinion under section 146 and the scope for appeal from the opinion of a single judge.
- The right to appeal pursuant to sections 147 and 151 of the Act against a decision of the warden in relation to an application for a prospecting licence and objections thereto.
- The scope for judicial review (as distinct from appeal) of a decision of a warden upon an application for a prospecting licence and objections thereto where the warden's decision incorporates or takes account of the opinion of a judge given pursuant to section 146 of the Act and which may arguably contain an error of law.
- The scope for judicial review of a decision of the warden upon an application for a prospecting licence and objections thereto, upon the ground that the decision was mistaken in fact.
- The interpretation of clause 3(1) of the Second Schedule to the Act.

Issue I — Grant of Prospecting Licences

Scope of the warden's discretion and matters for his consideration

Five of the eight questions stated for the opinion of the Supreme Court touched on the above topics. The questions asked and the answers given by Brinsden J. are set out in the report of the case.[20] The role of the

20 *Op. cit*, n.8, 197, 198, 208. It may be useful for practitioners to set out the grounds of objection which Brinsden J. found to be relevant to the warden's function in hearing applications for prospecting licences. Quoting from Westside's objection, the paragraphs referred to are as follows:

12. The ground applied for has not been marked off and applied for in accordance with the Mining Act 1978 and the regulations thereunder.
13. There was no or insufficient advertising of the application.
14. The applicant's marking off papers do not reflect the true position in that times, dates, angles and distances stated are incorrect or are otherwise false.
15. The applicant has failed to mark out the land the subject of his application in accordance with the Regulations nor has it complied with Regulations 11, 90 and 61 in respect of surveyed land in that:
    (a) It has not fixed a datum post at a corner of the boundaries as required.

warden in dealing with applications for prospecting tenements was, in Brinsden J.'s view a 'narrow' one. In arriving at this conclusion his Honour examined at some length a number of arguments put by Westside and the terms of the Act. His reasoning will now be examined.

Section 40 of the Act provided (at that time) that: 'Subject to this Act, the warden may on the application of any person grant that person a licence to be known as a prospecting licence'. Westside's counsel argued 'may' is usually permissive whereas 'shall' is mandatory. Section 56 of the Interpretation Act established a presumption in favour of that interpretation.[21] He further argued that the warden has a discretion to grant or refuse on criteria more extensive than those involved in mere compliance with the method contained in the Act and regulations by which a prospecting licence may be marked out and applied for, though the discretion must be exercised judicially and within the objects and policy of the Act. In other words, the warden had a 'wide' discretion in determining whether to grant prospecting licences. He could take into account matters such as prejudice to an objector's existing mining operation.

There has been much judicial ink spilt on the vexed issue of mandatory and directory words. The list of cases referred to by Brinsden J. and in argument before him is but a sample of what Pearce describes as a 'multiplicity of irreconcilable decisions making it impossible to assert with any certainty that a provision will be held either mandatory or directory in a particular context'.[22] The common thread in the authorities is that in each case the particular statute concerned must be examined. Earlier cases relating to other statutes are of little assistance.[23] It is suggested however that in ascertaining the intention of the legislature 'you begin with the prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning'.[24]

Brinsden J. did not specifically recognise the presumption in favour of a permissive meaning for 'may'. He simply examined the Act at some length and concluded:

> (b) Further and in the alternative, it has not affixed to a datum post at the corner of the boundaries the notice of marking out in Form No. 20 of the First Schedule to the Regulations.
> (c) Further and in the alternative, in so far as it has affixed any notice to any datum post it is not a notice in the Form No. 20 of the First Schedule in that:
> (i) it does not describe the boundaries of the land;
> (ii) it does not correctly state the time and or date of the purported marking out.
>
> 16. In so far as the Regulations purport to dispense with the need to mark out the land the subject of an application for a prospecting licence, they are ultra vires and of no effect.
> 17. The application lodged is invalid and defective and cannot lead to the grant of a prospecting licence by reason of the matters specified in Grounds 15 and 16 hereof and Regulations 11, 90 and 64...
> 19. The application is invalid or in the alternative should in the Warden's discretion be refused in that it does not comply with Section 105 and Regulation 92.

21 The statutory presumption is often ignored or read down: Pearce *Statutory Interpretation*, 178.

22 Authorities referred to on this point included *Finance Facilities Pty. Ltd. v. FCT* (1971) 127 CLR 106; *Ex parte NSW Rutile Mining Co. Pty. Ltd; Re Burns* [1967] 1 NSWR 545; *Craies on Statute Law* (7th Ed); *Re M* (1924) 26 WSLR 115; *Julius v. Lord Bishop of Oxford* (1880) 5 AC 214; *Macdougal v. Paterson* (1951) 11 CB 455; *Ex parte McGavin; Re Berns* (1945) 46 SR (NSW) 58.

23 *B v. B* [1961] 2 All ER 396, *per* Scammell J. 397, cited in Pearce. *op cit.* n.21 228.

24 *Ward v. Williams* (1955) 92 CLR 496, 508.

> Even without reference to the provisions of Section 105A I would have thought that the object of the Act is not to entrust questions of policy and principle governing the exploration of mineral deposits in this State to the discretion of a warden upon an application for a prospecting licence: *Ex parte New South Wales Rutile Mining Co. Pty. Ltd.; Re Burns* (supra) at 556. Those questions, I think, are reserved for consideration of the Minister at the stage where the application involves a more significant mining tenement than a prospecting licence. I believe the warden's functions upon an application for a prospecting licence are confined to the limited range of questions necessarily involved in discovering whether the application complies with the requirements of the Act.[25]

The decision of Brinsden J. is no doubt one of some convenience for wardens. It entitles a warden to restrict his concerns in determining whether to exercise his discretion to grant a prospecting licence to what may be called 'machinery matters' only. He identifies those matters to be:[26]

- provision of an opportunity to be heard to the applicant and objectors;
- determining whether the land is 'open for mining' within the meaning of Part III of the Act;
- determining that the formalities relating to marking out (if required) have been complied with;
- whether the Minister has acted pursuant to section 111A in relation to the application;
- the relevant provisions of any town planning scheme, which are to be taken into account in accordance with section 120;
- the Environmental Protection Act 1986 (if applicable), which is to be taken into account in accordance with section 6 of the Act;
- the application of section 105A (which Brinsden J. interpreted to require the grant of a prospecting licence to the applicant having priority in accordance with that section);
- 'any other express or by necessary implication, requirements of the Act, concerning the grant of a prospective [*sic*] licence.'

In a number of respects the reasoning of his Honour is, with respect, open to question. His Honour found section 105A to put the matter beyond doubt. Exactly how this provision puts the matter beyond doubt was not explained. In his view the discretion of the Minister to grant a mining tenement upon which he receives a recommendation from the warden is wider than that of the warden in dealing with a prospecting licence, but despite that, it was difficult, he found, to see how the Minister could refuse an application which obtained priority under section 105A by first compliance with the 'initial requirement' and then grant a subsequent application over the same, or part of the same, land.[27] This view was expressed by way of *obiter dicta*. He further suggested (without deciding) that so far as the Minister was concerned the section should be read as providing that if all other things are equal the right in priority should be afforded to the earlier application. He declined to apply this interpretation to the case at hand, implying that section 105A applied to the warden in a different way. The unstated conclusion is that the applicant first complying

25 *Op. cit.* n.8, 204.
26 *Ibid*, 206.
27 *Ibid.* 205.

with the initial requirement is given an absolute right to a licence which lies in the grant of the warden.[28] Following on from this, the warden's discretion under section 40 was necessarily limited.[29]

It is difficult to see how the section can, of itself, have a different application to the warden and the Minister, given that it is expressed to apply to all mining tenements. With respect, a better view of section 105A is that it 'entitles' the first person to comply with the initial requirement to have his application proceed, through the steps required by the Act, to be either granted or refused by the warden or the Minister, as appropriate and with such discretions as each possesses. The key words of the section are 'subject to this Act'. If the applicant fails to comply with a subsequent requirement then the right in priority is lost and the next applicant with priority may have its application progressed to grant or refused. Another problem with the opinion is that section 105A only applies where there are two or more applications. It has no operation where there is only one application. Hence it is difficult to see how it supports a limited discretion argument for the warden where there is only one application.

Brinsden J. also relied upon section 111A to support a contention that the absence of jurisdiction in the warden to consider public interest arguments did not remove the possibility for public interest concerns to be respected. He suggested, quite mistakenly in the writer's opinion, that this was a case in which the Minister could intervene through section 111A.

Section 111A of the Act did not at that time provide the Minister with the ability to implement public interest concerns in the wide manner postulated by Brinsden J. The section did not say that where a particular application is not in the public interest (as determined by the Minister), he may refuse the application. Further, it could only have been applied where the Minister concluded that the *area* (to which an application related) should not in the public interest, be *disturbed.*

Apart from his discussion of sections 105A and 111A Brinsden J.'s tour through the Act is largely descriptive, and therefore not persuasive. Further analysis of key sections of the Act does provide support for his decision. Sections 40, 59(4) and 75(4) contain the essence of the differing role of the warden and the Minister in granting tenements. Section 40 simply provided (at that time) that the warden *may* grant a prospecting licence. Section 59(4) provides, in relation to an application for an exploration licence, that the Minister may 'grant or refuse the exploration licence *as he determines*, whether or not the warden recommends the granting of the licence or the refusal thereof'. Section 75(4) is the corresponding provision for mining leases. It provides that the Minister may 'grant or refuse the mining lease as *he thinks fit* and whether or not — (a) the warden recommends the granting of the mining lease or the refusal thereof'. The italicised words grant a discretion to the Minister, which in the case of mining leases is expanded by section 75(4)(b). The absence of those words in section 40 suggests that a similar discretion was not

28 The Full Court expressed a similar view in Appeal No. 2311 of 1985, n.17.

29 S.40 was amended by the Mining Amendment Act 1985. The effect of that amendment on the scope of the warden's discretion is discussed below.

available to the warden at the time the opinion was given. The subsequent amendment, identified below, reinforces that conclusion. The absence of those words in section 40 may also constitute the type of evidence necessary to rebut the statutory and common law presumption in favour of a permissive meaning for 'may' in that section.

Section 56 of the Act provides conflicting clues on the nature of the warden's discretion. It can be argued that it illustrates the contention (put by Westside) that the warden is 'standing in' for the Minister in granting prospecting licences, with all of the Minister's discretions regarding grant of tenements in his armoury. However, the Minister is not granted a discretion of the type contained in sections 59(4) and 75(4). It is arguable that the Minister has no greater discretion 'on appeal' than the warden had at first instance. It is noteworthy that only the aggrieved applicant may appeal. An aggrieved objector has no recourse under this section — a result which is consistent with a presumption in favour of grant of prospecting licences if they comply with the provisions of the Act.

There are several arguments against the narrow view of the warden's role determined by Brinsden J. It can be argued that in the 1984 form of the Act it was sufficiently clear that the presumption in favour of the permissive use of 'may' had not been displaced. For example, unlike the circumstances in one of the authorities cited by counsel and referred to by the Court,[30] there are no express conditions precedent upon which the warden must be satisfied before exercising his power under section 40. Further, grounds of objection are not stated to be restricted to showing that the requirements of the Act have not been met by the applicant; the warden may impose conditions on a licence (but is not limited as to the conditions which may be imposed);[31] the warden's power to require further information relating to the application is almost unrestricted;[32] and section 75(5) deprives the Minister of an opportunity to exercise discretion where a prospecting licence holder wishes to progress to a mining lease. The last mentioned section ensures that questions of policy and principle may never be considered if the warden has a narrow discretion, a matter not addressed by Brinsden J.[33]

It was contended by Westside that the concept of the warden 'standing in' for the Minister is supported by the provisions of the 1904 Act, under which the warden had only a power to recommend in respect of an application for any sort of mining tenement, the grant of them all lying in the Minister. Brinsden J. analysed briefly the nature of the 1978 Act as a consolidating and amending Act and concluded that the Act was clear enough to make it unnecessary to resort to a consideration of the 1904 Act.

30 *Finance Facilities v. FCT* (1971) 127 CLR 106.
31 S.46
32 See s.41(3).
33 His Honour picked up the reasoning of Sugerman J. in *Ex parte New South Wales Rutile Mining Co. Pty. Ltd; Re Burns* (1967) 1 NSWR 545. There was, however, no equivalent to s.75(5) in the N.S.W. Mining Act. The amendment to s.111A in 1986 has given the Minister a more substantial discretion to intervene on public policy grounds.

Analogies with the 1904 Act and the mining statutes of other states can be difficult to sustain. Nevertheless the decisions of the Supreme Court of Western Australia in *Hazlett & Soklich v. Rasmussen*,[34] the High Court in *Stow & Others v. Mineral Holdings (Australia) Ltd.*,[35] and the Supreme Court of New South Wales in *Ex parte NSW Rutile Mining Co. Pty. Ltd. Re Burns*[36] support the contention that the warden's role, whether granting or merely recommending the grant of a title, is confined to a consideration of 'the machinery provisions' *e.g.* validity of pegging, validity of application, impact of other statutes, satisfactory compensation provisions and so on. The decision in *Sinclair v. Mining Warden at Maryborough and Other*[37] is an exception which may be explained by the existence of a particular provision in the Mining Act of Queensland requiring the warden to consider the 'public interest'.

The amendments to the Act implemented by the Mining Amendment Act 1985 support the view that the warden has a limited discretion in granting prospecting licences, and if that arguably was not the case previously, then the amendment provides a substantial hurdle for those now arguing for a wide discretion. Section 40 now provides that in circumstances specified (including an absence of objections), then the approval of the warden may be deemed to have been given and the mining registrar may issue the licence. It is difficult to argue that the mining registrar should be given, without clear words, a wide 'ministerial' form of discretion. Indeed the provisions operate to the contrary, establishing a set of conditions precedent to the issue of a licence.[38] Such conditions reflect back on the warden's scope of discretion because it cannot be said that the mere absence of an objection removes the need to consider, assuming they were part of the warden's duties, the wider 'ministerial' issues. The amendment to section 111A is also relevant. The Minister now retains a more substantial supervisory power over the grant of prospecting licences by wardens.

It is appropriate to consider briefly the types of matters which the warden may take into account. It will be apparent from a reading of the list of matters provided by Brinsden J. that on the narrow view, the warden has almost no discretion with respect to the granting of prospecting licences and is in effect little more than a compliance officer. The alternative view requires the warden to have power to consider any matters within the scope and object of the Act.[39] There is no scope for a compromise between the two approaches; either the warden can take into account public interest matters such as the quality of an applicant or he cannot. This view is based on the notion that it would be difficult to distinguish between public interest concerns that should fall within his discretion and those which

34 [1973] WAR 141.
35 (1977) 51 ALJR 672.
36 *Op. cit.* n.33.
37 (1975) 132 CLR 473.
38 In a manner analogous with that in issue in *Finance Facilities Pty. Ltd. v. FCT*, *op. cit.* n.30.
39 *Water Conservation & Irrigation Commission (NSW) v. Browning* (1947) 74 CLR 492.

shouldn't. If this view is right, it lends further support to a narrow scope of inquiry for the warden in granting prospecting licences. There is no substantial difference between the terms of section 42 and the terms of sections 59 and 75 with regard to the obligations to hear applications and objections.[40] However, in the latter case, in dealing with exploration licences and mining leases the warden's inquiry is limited to establishing compliance with the 'machinery' provisions, with one specific exception in the case of exploration licences.[41] Arguing by analogy, the warden's hearing of a prospecting licence application is similarly constrained.

A postscript: section 42 provides that any person is entitled to object 'to the granting of the application'. Does that entitlement include a right to suggest conditions on which the tenement may be granted? This question was not directly addressed by Brinsden J. unless it can be said to fall within his 'catch-all' category of matters to be dealt with by the warden. That is an unlikely interpretation. Strictly construed, the Act only allows objections to be made to the granting of the application, not the conditions of grant. It could be argued that the former includes, by necessary implication the latter. Owners and occupiers of private land are given a specific right to be heard by the warden, regardless of whether they object to the granting of the application[42] and presumably could make submissions on the conditions which should be imposed. Whether third parties, who are not owners or occupiers, have a right of audience with respect to the conditions of a licence remains unresolved.

Order of dealing with applications

In most jurisdictions there is a provision in the Mining Act giving priority of processing and/or consideration to the application which is 'first in time', as determined by the statutory formula. In the *Tortola* cases an opinion on the correct method, procedurally, for dealing with competing applications was sought by the warden. The question asked was:

> where there is more than one application for a mining tenement of the same land, are they to be dealt with as conflicting applications, requiring the warden to engage, as part of his inquiry, in an examination of the relative merits of the applications?

To this question Brinsden J. answered 'No'. In his view:[43]

> the warden consistent with the provisions of section 105A ought to deal with each application separately commencing to deal with the application which, on the face of it, appears to be that of the applicant who has first complied with the 'initial requirement' within the meaning of that section. The difficulty of attempting to hear all the applications together would be compounded where some of the applications before him lie in his grant but others lie only in the grant of the Minister. Support for my view is, I think, contained in *Ex parte Murphy; Re Mineral Deposits Pty. Ltd.*.[44]

The opinion of Brinsden J. confirms the legal efficacy of the usual practice of the warden to deal with applications in their prima facie

40 Indeed, the 1985 amendments to section 42(2) put that section in almost identical form to sections 59(2) and 75(2).
41 S.57(2) and see *Hazlett & Soklich v. Rasmussen op. cit.* n.34.
42 S.33(2).
43 *Op. cit.* n.8, 205.
44 [1963] NSWR 1199.

chronological sequence. This has important ramifications for second and later applicants who may only contest the granting of the prospecting licence (or recommendation regarding mining leases and exploration licences) by objecting to the first application. It also confirms that the historically derived priority principle[45] has a modern voice despite the development of forms of tenement which are granted at the discretion of the Minister rather than by the mere pegging of ground.

It is relevant to note that even with a statutory command interpreted to require sequential dealing, problems can arise with a sequence of applications for tenements which consist of prospecting licences (lying in the grant of the warden) and tenements lying in the grant of the Minister: See *Dixon v. Hannans Gold Ltd.*[46]

Issue II — Section 146

Stating a case in the course of hearing a prospecting licence application

Section 146 of the Act provides that 'the warden' may reserve, at any stage of 'any proceedings under this Act', any question of law for the opinion of the Supreme Court thereon.

The *Tortola* cases raised the issue of whether section 146 could be called upon by the warden in the course of hearing an application for a prospecting licence and objections thereto. Is such a hearing a 'proceeding' under the Act?[47] A review of the Act shows that the word 'proceedings' is used in a number of contexts.[48] It is a word of wide application whose meaning in any particular case must be determined by its context.[49] It is generally used in relation to matters with a judicial or adversary element.

It can be argued that section 146 should apply only to proceedings in the warden's court and not to hearings before the warden, the latter category including the granting of prospecting licences. The distinction between decisions of wardens, on the one hand, and decisions of warden's courts, on the other hand, is a vexed one. It has received attention in previous AMPLA papers and elsewhere.[50] The argument relies on the

45 *The Warrior Gold — Mining Co. v. Cotter* [1866] 3 W.W. — A.B. (M) 81, 90.

46 Full Court of the Supreme Court of W.A., 12 June 1986. Unreported. Noted in the (1986) 5 *AMPLA Bulletin* 49, 50, 70.

47 This issue was raised by a question from the bench in the course of *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd. and Others; Saladar Pty. Ltd. & Another v. Tortola Pty. Ltd. & Another op. cit.* n.9.

48 *E.g.* S.132(1): . . .. 'all such actions, suits and other proceedings cognizable by any court of civil jurisdiction . . .'; s.127: '. . . all proceedings pending in that (warden's) court . . .'; 132(2) 'every warden's court has jurisdiction throughout the State but all proceedings under this Act . . .'; 132(3): '. . . any action, suit or other proceeding. . ..'; s.135: '. . .without requiring any formal proceedings to be taken'; 142(2) 'No proceedings in a warden's court . . .'; s.141(1): '. . . in any proceedings in a warden's court under this Act . . .'

49 The variety of applications and meanings is illustrated in Stroud's Judicial Dictionary, 4th ed., 2124–2128.

50 D. R. Williams 'Judicial Review of Warden's Decisions' [1984] *AMPLA Yearbook* 78; E. M. Franklyn QC. 'Judicial Review of Warden's Decisions' a paper delivered at a Seminar 'The Practice of Mining Law in Warden's Courts', sponsored by the W.A. Law Society, 26 March 1984. See also Report of the Inquiry into Aspects of the Mining Act (1983) M.W. Hunt (Chairman) at para. 4.7.

location of section 146 within Part VIII of the Act, which deals primarily with the administration of justice in the warden's court. The word 'primarily' is used advisedly, for some sections within Part VIII refer to actions of the warden, rather than the warden's court. Section 146 is an example. It has been suggested that the reference to the warden in section 146, rather than the warden's court, is a drafting error.[51] The 1904 Act spoke of 'civil proceedings' in the equivalent provision and the second reading speech of the Minister for the introduction of the 1978 Bill stated simply, in relation to Part VIII, that 'the existing provisions which have operated satisfactorily under the present Act have not been departed from in the Bill'.[52]

The 1904 provision was examined in *Smith v. Liebig*[53] where it was held that the hearing by a warden of an application for a lease was an entirely ministerial act on the part of the warden and not a judicial act, and that it could not fall within the words 'civil proceedings'. The result was that a case could not be stated from the hearing of a lease application which then, as now, only resulted in a recommendation to the Minister.

In the course of the *Tortola* proceedings, the Full Court unanimously distinguished *Smith v. Liebig*. Burt C.J., with whom Wallace J. agreed, reasoned that because section 42(1) required the warden to hear an application and any objections to it in 'open court', and the Act gave the warden the authority to make a grant and because the word 'civil' no longer appeared in the section, then section 146 authorised the warden to state a case. The reasoning is confined to applications for prospecting licences which have been objected to. Rowland J. delivered a judgment which is, with respect, a little difficult to follow. His conclusion that 'proceedings under the Act' were present is derived from the assumption that judicial functions exercised by the warden would necessarily give rise to proceedings. The 'judicial functions' included the hearing of objections to the grant of a prospecting licence. His Honour's reasoning was not confined to prospecting licences. He suggested, without deciding, that an objection to the grant of a tenement which lies within the grant of the Minister (such as a mining lease) would still be a 'proceeding' and therefore could also be the subject of a case stated.

From the reasoning and conclusions of Burt C.J. and Rowland J. it can be inferred that if no objections had been filed, no 'proceedings' would have arisen within the meaning of section 146. A recent judgment challenges that inference. In *Re Reynolds; Ex parte Melville and Hunter Resources Limited*[54] Brinsden J. interpreted the words 'proceedings under this Act' as they appear in section 142(2) to encompass 'proceedings in warden's courts which would require to be dealt with judicially and proceedings of a nature requiring only administrative action on the part of

51 Williams, *op cit.* 92.

52 S.256 of the 1904 Act. Parliamentary Debates 29th Parliament, 2nd Session, 24 August 1978, 2625. In the draftman's defence, the Minister's speech described the Bill in general terms.

53 (1923) 26 WALR 10.

54 No. 2052 of 1986, Full Court of the Supreme Court of W.A. before Brinsden, Olney and Rowland JJ. Judgment delivered 25 March 1987. Noted in (1986) 5 *AMPLA Bulletin* 70.

a mining registrar or warden as the case may be'. It is significant perhaps that the words 'under this Act' were inserted by the Mining Amendment Act 1985 replacing the words 'in a warden's court', but that other sections in Part VIII which promote the confusion identified by the Hunt Committee and Williams[55] remained unamended.[56] Suggestions of previous commentators that Part VIII is and should be restricted to the regulation of the warden's court have been overrun by the decisions of the Supreme Court and the deliberate way in which the Act has been amended in recent times. It would seem now that wherever the label 'warden' is used in Part VIII, the presumption is that it means the warden acting as warden as well as the warden sitting as the warden's court.

The practical effect of the judgment of Brinsden J. in *Re Reynolds; Ex parte Melville and Hunter Resources Limited* is that a warden could state a case for the opinion of the Supreme Court in the course of hearing an application even where no objections to that application had been filed. It may be, however, that Brinsden J has gone too far. Certainly, his extension of 'proceedings' to include the marking out of a tenement is difficult to accept and even its extension to include the application for a prospecting licence (as distinct from the hearing of that application) by the warden is open to doubt.[57]

Re Reynolds and the *Tortola* cases dealt with an application for a prospecting licence. Can a case be stated from the hearing of an application for a mining lease or exploration licence? *Dicta* of Rowland J. in *Tortola* suggest it would be possible but Burt C.J. confined his decision to contested applications for prospecting licences. It could be argued that the hearing of a contested application for a mining lease or exploration licence is, following the elements of Burt's reasoning, heard in open court and requires the warden to act 'judicially'.[58] *Smith v. Liebig* could be distinguished by reference to the absence of the phrase 'civil proceedings' in the Act.

Appeals from an opinion under Section 146

The second issue raised in relation to section 146 was the scope for appeals from opinions arising out of its operation. The Court determined[59] that the opinion under section 146 was advisory and consultative because it did not determine rights, notwithstanding the provision requiring the warden to act in accordance with the opinion which he receives, and therefore that an appeal did not lie. In this case the opinion was obtained while the application for a prospecting licence was undecided and still

55 *Op. cit.* n.50.

56 *E.g.* ss.132(1), 134(1)(d), 143(1), 145, 146(1), 146(7). See also s.141.

57 See s.116(2) which draws a distinction between 'application' and 'proceeding'.

58 Burt C.J.'s description of the hearings as judicial in nature derived from their contested nature rather than the power to grant: *op. cit.* n.9, 346. See also *Ex parte Keough; Re Heffernan & Driscoll* [1961] NSWR — 585, 587, 588; *R. v. Brooks; Ex parte Hayes* [1965] Qd. R. 441, 447–448 *per* Hanger J.

59 *Per* Burt C.J., with whom Wallace and Rowland JJ. agreed, *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd. op. cit.* n.9, 346–347.

before the warden, a matter specifically referred to by the Court, but arguably irrelevant to its decision.

Reliance was placed upon the perceived policy of the section:[60]

> [The section] authorises the warden to state a case for the opinion of the Supreme Court on a question of law . . . The judge may determine the questions submitted for his opinion himself, or he may 'direct that the case be set down for argument before the Full Court . . . and the Full Court or the judge, as the case may be, may give such direction or opinion as to the questions so submitted, as the Full Court or the judge thinks proper.' And when that is done, and whoever does it, the warden has obtained all that the section can give him. It would, I think, cut across the policy of the section to hold that it was the intention of Parliament that the opinion of the Supreme Court expressed by a single judge was to be, or that it could be expressed again and perhaps in a different way by the same court sitting in banc in the exercise of an appellate jurisdiction.

The Court was also referred to authorities relating to cases stated under section 21 of the Arbitration Act 1895 (W.A.) and its equivalents in other jurisdictions.[61] The analogy with arbitration is, in one respect, misconceived in that opinions in the arbitration setting are not binding on the arbitrator and he may decline to follow the opinion though to do so might enable the award to be set aside.[62] Section 146(6) requires the warden to act in accordance with the opinion given; he has no discretion. The Court also referred to the Supreme Court Act 1935[63] and concluded that the general language therein did not control 'as a primary consideration' the existence or otherwise of an appeal.

The absence of any findings of fact by the warden prior to a reference to the Supreme Court clearly facilitates the description of the subsequent opinion as 'advisory' and not determining rights. However, it can be inferred from Burt C.J.'s reasoning that no appeal will lie from an opinion given pursuant to section 146, regardless of the facts found. This approach is consistent with the statement of the High Court in *Saffron v. The Queen.*[64]

> when a court is authorised by legislation to give an advisory opinion, no matter what language is used, its opinion is not a judgment, decree, order or sentence from which an appeal lies.

The crucial issue is whether an opinion given under the Act is advisory bearing in mind section 146(6). In *Oteri and Oteri v. R*[65] it was held, in the context of an application for leave to appeal to the Privy Council, that opinions given by the Full Court of the Supreme Court of Western Australia pursuant to an application from the District Court were not merely advisory in their nature because by express provision they were binding upon the District Court. This case was referred to by Brinsden J. in

60 *Ibid.* 347.
61 *Knight v. Tabernacle Permanent Building Society* [1892] 2 QB 613; *Minister for Works (WA) v. Civil & Civic Pty. Ltd.* (1967) 116 CLR 273.
62 Dorter & Widmer *Arbitration (Commercial) in Australia — Law and Practice*, 168; Barwick C.J. in *Minister for Works (WA) v. Civil & Civic Pty. Ltd.* 276.
63 Ss.58(1)(a), 58(1)(b), & 41. Comparisons can be made with the Supreme Court Acts in other jurisdictions. See s.101(1)(b) of the Supreme Court Act 1976 (NSW) which specifically provides for appeals in these circumstances.
64 (1953) 88 CLR 523.
65 [1975] WAR 126.

the hearing of the application by Westside for leave to appeal to the Privy Council. It is arguable that it is good authority for the existence of appeals from opinions obtained under section 146.

Issue III — Sections 147 and 151

The possibility of ordinary appeals under section 147 of the Act in relation to applications for prospecting licences and objections thereto was considered by the Supreme Court in the *Tortola* cases.[66] The intention of the section is to provide appeals from decisions of the 'warden's court' involving civil jurisdiction but not the warden acting as 'warden of mines'. It has been judicially noted in the *Tortola* cases that the exclusion from appeal in section 151(b) is, in fact, only confirmatory of the inapplicability of section 147 to hearings which result in a recommendation from the warden, such as in the case of applications for exploration licences and mining leases.[67] With respect to prospecting licences, it can be argued, taking a literal approach, that section 147 is in any event referring to matters arising out of the warden's court and not the warden as warden of mines.

The *Tortola* cases address the difficult question of the impact of section 134(1)(d), which empowers the warden's *court* to make orders determining objections to applications, on the interpretation of section 151(b). It is assumed that the applications referred to in section 134(1)(d) include applications for mining tenements. It has been suggested elsewhere that the section is anomalous in that it suggests the warden's court determines objections while it is the warden of mines who hears objections.[68] In *Westside Mines Pty. Ltd. v. Tortola Pty. Ltd.*[69] Rowland J. appeared to suggest a distinction can be drawn, at least in the case of applications for prospecting licences, between the hearing of an application for a mining tenement and the hearing of objections to that application, the latter hearing constituting separate proceedings, capable of being appealed under section 147. In the attempted appeal from the warden's decision to grant, he addressed the point directly;

> If I have said something when delivering reasons in another application relating to these parties which had led the appellant to believe that a right of appeal in the circumstances exists, then I believe I have misled the appellant. There is more than a hint throughout the Act that the hearing of an application and the hearing of an objection to an application could be regarded as separate proceedings (sections 42 and 134(1)(d)). Although it may be suggested that the determination of the objection is a final determination within the meaning of section 147(1) it would be, in my view, an extraordinary situation that the Act should be constructed so as to allow an appeal against that determination but exclude the right of appeal against the final determination of the application, which in this case depends for its force on the objections being rejected.[70]

66 *Op. cit.* nn.9, 11, 12. See also Williams, *op. cit.* n.50, 86; Franklyn op. cit. n.50.
67 *Per* Rowland J, *op. cit.* n.9, 350. A recommendation cannot be considered a 'final judgement, determination or decision'.
68 Submission to the Hunt Committee by AMPLA, noted in the Committee's Report. *op. cit.* n.50, 64.
69 *Op. cit.* n.9, 349-351.
70 *Op. cit.* n.12.

Rowland J.'s characterisation of the hearing of the application for a prospecting licence and objection thereto as being separate proceedings was contradicted by Burt C.J. on appeal:[71]

> If an objection is made it is made within the application for the grant. It is not a proceeding which can stand on its own.

It may be said, as a consequence of the *Tortola* cases, that the non-applicability of section 147 appeals to prospecting licence applications and objections is now settled law. Although the applications and objection in question in the *Tortola* cases related to prospecting licences the same reasoning and result applies to applications and objections involving mining leases and exploration licences.

It is relevant to note that in respect of the mining law of Tasmania, as it was in 1975, the High Court decided that determinations of objections to the grant of a special prospecting licence were capable of appeal (in the usual sense) to superior courts, under the Mines Act. See *Stow & Others v. Mineral Holdings (Australia) Pty. Ltd.*[72] This decision may be distinguished by reference to the legislation the subject of the appeal. The warden was not called upon by the Tasmanian legislation to recommend the grant of a special prospecting licence or to grant the licence; he merely 'determined objections'. The High Court inferred that a favourable determination was a condition precedent to grant and therefore such a determination was a 'final judgment' under the provision allowing appeals from the wardens court. Significantly, the Mines Act 1929 (Tas.) did not contain a provision equivalent to the current section 151(b) of the Act in Western Australia, and this is where the decision founders as a precedent from the Western Australian perspective.

Issue IV — Judicial Review

The scope for judicial review of warden's decisions and recommendations has been investigated by numerous plaintiffs. Saladar and Westside sought relief in this manner, without success. The *Tortola* cases examine the scope for judicial review of a decision of the warden upon an application for a prospecting licence and objections thereto, taken in accordance with the opinion of a judge given pursuant to section 146 of the Act.

It will be recalled that both Westside and Saladar sought relief in the nature of *certiorari* to quash the decisions of the warden on the ground of error of law on the face of the record. The members of the Full Court rejected the arguments of Westside and Saladar in a variety of ways. However the effect of the decision is that while the prerogative writs may lie for error of law or jurisdictional error if the warden erroneously determines a question of law himself, such remedies will be denied where the warden acts in accordance with the opinion of the Supreme Court which is also erroneous.

71 *Op. cit.* n.13.
72 *Op. cit.* n.35. The case does not appear to have been cited to the Full Court.

Burt C.J. reasoned as follows:[73]

> If it (the opinion) was wrong it was the judges' error. It is not an error made by the warden and the warden does not err in law or otherwise by acting in accordance with the judges' opinion . . . Indeed, if this Court were now to quash the order which the warden has made and return the matter to him to be dealt with by him according to law, the law would again command him to act in accordance with the judges opinion and upon that basis the warden could not do otherwise than to remake the orders which are now sought to be quashed.

Wallace J. noted the reference by counsel for the applicant to *British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Company of London Limited.*[74] In that case an arbitrator acted on the opinion given by a superior court under the provisions of the Arbitration Act, which opinion was not at that time directly susceptible to appeal. The opinion was obtained on a case stated in the course of an arbitration. The House of Lords held that the court had jurisdiction to set aside the arbitrator's award disclosing an error on its face notwithstanding that it arose from the opinion of a superior court. Wallace J distinguished the case by reference to the differences in the Arbitration Acts of Western Australia in 1985 and England in 1912, disregarding the strength of the analogy with the *Tortola* facts. He went on:[75]

> The case can easily be tested by asking as to what was to happen if the relief claimed was granted and the matter was returned to the warden who was ultimately bound by the provisions of section 146(6) of the Act. Could his decision be any different?

Olney J. interpreted the Act to be stating a clear policy against appeals from an opinion obtained under section 146.[76]

> . . . it is entirely appropriate and consistent with the policy of the Mining Act that the law declared by the Supreme Court in answer to a special case stated should, for the purposes of the proceeding in which it is stated, be the law applicable to that case.

It is suggested that the reasoning of the Full Court is quite wrong in two areas. With respect to Burt C.J.'s argument that it was an error of the judge, it is submitted that obtaining an opinion, which must be followed when delivered, does not equate with an abdication on the part of the warden of his responsibilities to determine the issues before him. There is no provision for the removal of the final decision to the Court; rather, the Act speaks of the warden acting in accordance with the opinion. The decision, is ultimately made by the warden, and any error in it is an error made by him. If the error derives from the opinion, then both the warden and the Supreme Court are in error.

The reasoning of Olney J. denies the distinction between review and appeal.

> The law makes a vital distinction between review and appeal. The common law courts have always had an inherent power to 'review' or control all inferior jurisdictions. This is inherent in the nature of the jurisdiction of both the common law courts (it is 'unlimited') and the inferior tribunals (which have a limited jurisdiction). As this reviewing or

73 *Op. cit.* n.16.
74 [1912] AC 673.
75 *Op. cit.* n.16.
76 *Ibid.*

> controlling power is inherent, it does not owe its existence to statute. On the other hand, an appeal is entirely a creature of statute . . . It follows that an Act which 'takes away' appeals has no effect on the reviewing or controlling powers of the superior courts'.[77]

However, the arguments of Burt C.J. and Wallace J. on the compelling nature of section 146(6) require close attention. They imply that the warden has a statutory duty, regardless of the contents of an opinion, to act in accordance with that opinion. If this is so, any error, of whatever magnitude, by the Supreme Court must be slavishly adopted by the warden but would be beyond review by the Court. Such a result runs foul of a fundamental jurisdiction of the superior courts, identified above, but may, nonetheless, be incurable, unless a remedy can be found in the law of administrative review.

The transcript to the special leave application before the High Court of Australia discloses that no authorities could be found by counsel for the applicants which directly touched upon the dilemma for an inferior tribunal created by an alleged erroneous opinion of a superior court on a case stated, where there was a statutory duty to apply the opinion. The applicants cited *British Westinghouse Electric Manufacturing Company v. Underground Electric Railways Company of London Ltd.*,[78] in support of their application. That case has never been questioned in any relevant respect and was cited with approval and followed by the High Court of Australia in *Tuta Products Pty. Ltd. v. Hutcherson Bros. Pty. Ltd.*[79] *Tuta Products* was not cited to the Supreme Court in the *Tortola* cases and only Wallace J. specifically addressed the guidance offered by the *British Westinghouse* case. He distinguished the case, it is submitted, in an illogical manner.

The precedent value of the *British Westinghouse* case to an application for *certiorari* on the face of the record is supported by the comments of Lord Goddard in *R. v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw.*[80] In that case Lord Goddard stated that review of arbitrators awards for error of law was but an example of the supervision of inferior courts by the superior courts. The rationale of the *British Westinghouse* case was explained by Kitto J. in *Minister for Works (W.A) v. Civil and Civic Pty. Ltd.*[81] to be an example of the common law power to supervise the decisions of tribunals which are under a duty to decide according to law. It can be concluded that the *British Westinghouse* case is authority for the view that an action for error of law on the face of the record of an inferior court may be entertained even where the error derives from the opinion of a superior court.

To establish whether *certiorari* will lie to the warden in the circumstances encountered in the *Tortola* cases, it is necessary to establish a number of criteria. It is sufficient to deal here with two of those criteria.[82]

77 Aronson & Whitmore *Review of Administrative Action* 491.
78 *Op. cit.* n.74.
79 (1972) 127 CLR 253.
80 1951 1 KB 711, 721.
81 *Op. cit.* n.61.
82 For a description of the criteria, see Aronson & Franklin *Review of Administrative Action.*

Whether it can be said that a warden's decision 'affects' rights can cause substantial difficulties. In *Centamin Exploration (W.A.) Pty. Ltd. v. Gething*[83] the Full Court of the Supreme Court of Western Australia declined to issue a writ in the nature of *certiorari* on the ground that a recommendation of a warden under the Mining Act 1904–1971 that applications for coal mining leases be refused did not of its own force prejudicially affect any right of the applicants. It has been suggested that this decision may well have been decided another way by the High Court[84] but for present purposes it is sufficient to say that it can be distinguished where the warden is granting a mining tenement rather than merely recommending grant.

The first ground on which *certiorari* was sought in this case was error of law on the face of the record. The principal difficulty with the ground lies in establishing what is 'the record'. It is well established that the actual record of decision is part of the record for relevant purposes. This issue was not addressed by the judges in the *Tortola* cases. In Australia the question of whether reasons for decision also constitute part of the record has expressly been left open by the High Court for further consideration.[85] In England judges' reasons are now considered to form part of the record. It is submitted that the compulsion on the warden to adopt an opinion given under section 146, coupled with the warden's acknowledgement that he was acting in accordance with that opinion, made the opinion of Brinsden J part of the record with respect to the warden's decision on the Tortola applications.

It is submitted that, but for the decisions in the *Tortola* cases, an order in the nature of *certiorari* for error of law on the face of the record could issue to a warden who has relied upon an erroneous opinion of the Supreme Court obtained under section 146.

It will be recalled that Westside's application for the prerogative writs contained a second ground. Westside's claim of jurisdictional defect was dismissed by the Court on grounds relating partly to the merits of the grounds stated (see Issue I) and partly to the perceived command of section 146(6), which insulated the warden from any possibility of jurisdictional error. Both of these questions have been dealt with above.

The quashing of an erroneous decision of the warden removes a cancer, but it does not always heal the wound. In the *Tortola* proceedings writs of *mandamus* were sought to compel the warden to hear and determine according to law the applications of Tortola and the objections thereto.

Mandamus is a writ under which the respondent is directed to perform a public duty. It is a discretionary remedy and will readily be refused where an alternative remedy is available. *Mandamus* will not go, however to correct an error of law made by a warden acting in the course of an undisputed jurisdiction. There must be an error of law that results in the conclusion that there has been an abdication of duty.

83 No. 1178 of 1982. Unreported.
84 Williams *op. cit.* n.50, 89.
85 *Ibid.* 89. See also Aronson & Franklin, *op. cit.* n.82, 558.

The quashing of the warden's decision by the issue of a writ of *certiorari* is arguably not effective to quash an erroneous opinion of the Supreme Court on which it is based. Can *mandamus* compel the warden to re-perform his duty without regard to the source of his error? This is a difficult question. The answer hinges on the existence or otherwise of a failure or 'constructive refusal' to exercise a 'public duty'. It frequently happens that an official purports to perform a duty, but is regarded by the law as having refused (some say 'declined') to perform the duty, because his or her action is legally void. In such a case, there is a constructive refusal.[86]

Applying these principles to the circumstances encountered in the *Tortola* cases it could be argued that the warden acted outside his jurisdiction in hearing the Tortola applications (because Westside's mineral claims had not expired at the time of the marking out by Tortola) or that he had declined to exercise jurisdiction (in rejecting arguments by Westside that it should be preferred to Tortola on 'non-machinery' grounds). Upon a re-hearing the opinion of Brinsden J. should have been disregarded on the basis that it was obtained in the course of proceedings which were now void. Such an argument significantly extends the application of the writ of *mandamus*, in that it requires the opinion of a judge of a superior court to be ignored. However, the argument does not, it is submitted, violate the rule that *mandamus* will not go to a superior court, because it is the warden, rather than the court, who is required to re-perform.

However, the Full Court did not take the approach proposed. The law, as interpreted by the Court, did not permit judicial review by prerogative writ in the circumstances encountered.

Issue V — Judicial Review — Facts

A further issue raised by the *Tortola* cases is the scope for judicial review of a decision of a warden upon an application for prospecting licence and objection thereto, upon the ground that the decision was mistaken in fact. Westside's application for the prerogative writs contained two grounds which were rejected by Rowland J. and such rejection was confirmed by the Full Court. The judges described the grounds as raising questions of fact which, once decided by the warden, could not then be reviewed.

The fact/law distinction is, of course, one of the great difficulties encountered where decisions at first instance are being reviewed or appealed. It is clear that where a decision maker is charged with the responsibility of determining matters of fact, those decisions will generally be considered within the decision maker's jurisdiction or function as arbiter of matters of fact and therefore not susceptible to review for jurisdictional error or error of law on the face of the record. However, where the superior court's power to intervene is conditioned simply on the existence of mere error of law (such as *certiorari* for error of law on the face of the record) the courts have found little difficulty in classifying a factual

86 Aronson & Franklin, *op. cit.* 486.

error as one indicating or involving an error of law).[87] The error is simply reclassified so that it becomes 'applying the wrong test, failing to take relevant considerations into account, taking into account irrelevant considerations, drawing a legally wrong inference from the fact, absence of evidence and, more controversially, inferential perversity and improper weight given to a factor'.[88]

The reclassification referred to is, in large measure, at the discretion of the superior court. In the *Tortola* cases the Judges declined to 'reclassify' the warden's findings of fact as errors of law and arguably classified errors of law concerning the interpretation of the regulations governing method of marking out as errors of fact. The decision may be explicable on the basis that the alleged errors were non-jurisdictional or did not appear 'on the face of the record' and hence jurisdictional error or error of law on the face of the record would not lie.

Issue VI — Transitional Provisions

The final issue raised directly by the *Tortola* cases is the proper interpretation of clause 3(1) of the transitional provisions scheduled to the Act.

Clause 3(1) provides as follows:

> A mineral claim or dredging claim granted under the repealed Act and in force immediately before the commencing date shall remain in force, subject to that Act and as though that Act had not been repealed, for a period of 2 years after that date, and shall then expire.

Westside and Saladar argued that the words 'that date' in clause 3(1) referred back to the 'commencing date' because that was the only date mentioned previously in the sub-clause. The word 'after' operated to begin the period of two years from the first moment on 2 January 1982 and therefore the two year period would not expire until, at the very earliest, midnight, 1 January 1984.[89]

Brinsden J. reasoned that the statutory period for mineral claims expired on 31 December 1983, on two grounds. In response to the arguments of Westside and Saladar, he argued:

> ... there is an alternative date referred to and that is the date, or at least the time, immediately before the commencement date.[90]

From this ambiguity, he determined that reference should be made to the 1904 Act. He then concluded:[91]

> If the contention of the two objectors is correct, on 1st January, 1984, the rents for the mineral claims for that year became due and payable even though on the most futuristic

87 *Ibid.* 82.

88 See generally *ibid.* chap. 5.

89 Saladar contended that the minerals claims the subject of the case did not expire until midnight on 3 January 1984 relying upon the public holiday on 2 January 1984, the provisions of the Public and Bank Holidays Act 1972 and s.61(1)(e) to (h) of the Interpretation Act 1984. Brinsden J. dealt with the case by determining whether the mineral claims expired at midnight on 31 December 1983 or at some subsequent time.

90 *Op. cit.* n.8, 207.

91 *Ibid.*

> construction of clause 3(1), the mineral claims must have expired on 4th January, 1984. A construction which leads to this absurd result was surely not that intended by the draftsman.

Issue can be taken with Brinsden J.'s description of the objectors' interpretation as being 'absurd'. The statutory period referred to in Clause 3(1) allowed a mineral claim holder to apply for an exploration licence, prospecting licence or mining lease in respect of the area of the claim at any time during the two year transition period. Assuming that the application was made prior to 1 January 1984 no obligation to pay rent for the 1984 calendar year would arise.

The second ground upon which the Court decided the matter was expressed as follows:[92]

> Alternatively, if the view I have expressed above is not correct, another approach would be to read the word 'after' as including the commencement date and there is some authority for such an approach: *Prowse* v *MacIntyre* (1961) 111 CLR 264 per Dixon CJ at 269.

That case interpreted the word 'after' in the context 'after their coming to full age'. The High Court found that the statutory time period commencing by operation of that phrase did not commence after the day upon which a minor first enjoyed full age; rather it ran from the beginning of that day. However, the usual interpretation of statutory time periods is that where time is to be computed from an event the day of that event is excluded from the computation.[93] There is much authority for this approach[94] and support can be found in the Interpretation Act. The 'event' in this case is, however, the commencement of an Act, which by application of the Interpretation Act commences at the beginning of the day it is proclaimed to commence.

Perhaps the best approach which could be taken is to read Clause 3(1) literally, in the manner attributed to Westside and Saladar by Brinsden J. and referred to above. Such a reading requires the word 'after' to be given its ordinary meaning of 'subsequent to' and the words 'that date' at the conclusion of Clause 3(1) to be taken as referring back to the 'commencing date'. Read in this way Westside's mineral claims expired at midnight on 1 January 1984 and hence the ground would not have been open for mining at the time Tortola marked out its prospecting licences. However, the failure of the various appeal and review proceedings in the *Tortola* cases to examine the merits of Brinsden J.'s opinion leaves us with that opinion as the law on this matter.

CONCLUSION

The result of the various actions in the *Tortola* cases confirms the sentiment in Michael Hunt's comment that 'title is vital'.[95] The cases

92 *Ibid.*

93 *Per* Barwick C.J., *Associated Beauty Aids Pty. Ltd. v. FCT* (1965) 113 CLR 662, 667.

94 *Dodds v. Walker* [1981] 2 All ER 609, 610; *EJ Riley Investments v. Eurostile Holdings Ltd* [1985] 3 All ER 181. The English cases describe the principle in a different way but with a similar result.

95 M. W. Hunt 'Security of Title for Mining Operation', Western Australian School of Mines Annual Conference 1986, 27.

illustrate that the absence of a 'ministerial' or 'wide' discretion to grant or refuse mining tenements removes an element of uncertainty from the tenement application procedures, but also denies the possibility of a favourable decision from the person charged with the power to grant tenements when, through misfortune or inadvertance, a valid production title expires or lapses and a competing application is lodged. It could be said that Westside's problems in this case were of their own making, having operated their mine under the protection of mineral claims only and not having sought to transition those claims to tenements under the new Act within, what was by any test, a long period. Nevertheless, concern has been expressed from time to time on the ephemeral nature of the tenements which support substantial mining operations in all parts of Australia and this case illustrates that concern.

From a purely legal perspective, the cases have confirmed that a warden hearing applications for and objections to the grant of a prospecting licence has, despite the use of permissive words in the granting power, a restricted discretion and function. They are authority for the proposition that actions based on the prerogative writs will not lie to the warden upon the grant of a prospecting licence where the warden has obtained an opinion from the Supreme Court in the course of the hearing of the relevant applications and objections and has relied upon that opinion. Further, opinions of a single judge obtained under section 146 cannot be appealed to the Full Court. On the current law it would be a brave applicant or objector who would seek that the warden state a case for the opinion of the Supreme Court during the course of hearing tenement applications, unless their objective was to deny the possibility of subsequent review by prerogative writ. The cases also establish that appeals to the Supreme Court under section 147 do not lie from a decision of the warden rejecting or accepting objections to applications. Hence, an aggrieved objector is restricted to judicial review by prerogative writ or declaration and injunction. An aggrieved applicant may make an appeal to the Minister, or seek judicial review.

While the *Tortola* cases provide, in general, an unambiguous statement of the law, it is submitted that their application of the judicial review remedies can be questioned. It is relevant to note that the High Court granted special leave to appeal on this issue with little hesitation.