THE PRACTICE OF MINING LAW IN WARDENS' COURTS*

By D. J. Reynolds, SM**

1. **Introduction**

My terms of reference for the paper to be delivered was titled "Practice Directions in the Warden's Court". Given that there are so few Practice Directions, I have taken the liberty to look generally at practice in the Warden's Court. For those of you who appear regularly in the Warden's Court, much of what I say will be appreciated by you. Nevertheless it is a good thing to constantly remind ourselves of the basics. For those of you who have not appeared and hope to practice in this jurisdiction, I hope my comments help to form a sound foundation for you.

2. **General Approach**

The last five years has seen a dramatic resurgence in the gold mining industry in this State. This has meant that the workload of Wardens and the Wardens' Courts has increased substantially. Over this period I think there has been a shift to a more legalistic approach by Wardens. In my opinion this shift is both sound and positive for all those involved in the mining industry. There are a number of factors that have come together at about the same time to produce such a shift.

These factors (no order of priority being intended) include the appointment of legally qualified persons to the position of Warden. There has been some debate about whether it would be better for a Warden to have a geological/engineering background or a legal background. The two together would of course be ideal. I have no doubt that it is far preferable for the Warden to have a legal background. That view was shared by the late Don Elliott who was the first Warden appointed under the new legislation in Victoria. Subsection 138(4) of the Act provides the Warden with the power on his own motion to call an expert witness at any time during the hearing of any proceedings. It is a very worthwhile provision, but the fact that it is so rarely used, supports my point of view.

The value of prospective land the subject of dispute is in most cases very high. The worth in monetary terms of matters before the Wardens' Courts is also in most cases very high. Underground mining using declines or shafts is a very expensive operation. So

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** Mining Warden.

too is an open pit mining operation including a treatment plant designed to treat large amounts of gold bearing ore with relatively small amounts of gold per ton. Companies and individuals expending large amounts of money and incurring substantial liabilities are entitled to expect the Wardens and the Wardens' Courts to apply the law and to be consistent in their application of the law.

It is now usual for Wardens to reserve and give written reasons on matters involving legal issues particularly where it is the first time that the issue is being determined. These decisions are available for perusal in the library of the Supreme Court.

3. **Practice Directions**

There are only two sets of formal Practice Directions. One was issued by Warden Brown S.M. on listing matters for hearing and the other was issued by me on the transfer of proceedings from a country registry to the Perth registry. I am loath to issue practice directions unless they are absolutely necessary. Whilst it is desirable to ensure that proceedings come before the Warden or the Wardens' Courts with the applications or plaints in good order and with the issues well defined, it is undesirable to shackle the proceedings with formality that serves no good purpose and only increases costs and inconvenience. Lack of formality can be a good thing. It can lead to flexibility and enable matters to come on for hearing and determination without delay. The mining industry is a dynamic industry and many factors that affect it may vary on a day to day basis. It is therefore necessary to resolve disputes expeditiously.

4. **Applications for Mining Tenements:**
The Commencement of the Hearing

Where a person has applied for a prospecting licence, for example, and the objector alleges that the applicant has failed to mark out the land in accordance with the Act and Regulations, Wardens insist that the applicant fist adduce evidence on the marking out preliminary to the application. Where an application is objected to on the basis of failure to correctly mark out, there is no presumption in favour of the marking out. The applicant should call a witness or witnesses on the matters in issue. The witness or witnesses are required to give their evidence on oath (s 138(1)). The application and any objection thereto are heard in open court (s 42).

When the applicant has called all of the evidence upon which it seeks to rely the Warden will then call on the objector to call the witness or witnesses it proposes to call to support the ground or grounds of objection.

No Case

It does happen that a witness or witnesses called by an applicant do not come up to proof. If that witness or those witnesses are the

only witnesses then it is open to counsel for the objector to submit that the application should be refused without the need for the objector to call any evidence. Where such submission is based principally on a question of law then the Warden does not put the objector to its election not to call evidence. If however, the applicant called several witnesses on the question of marking out and one or other gave evidence that the land was marked out and another one or other conceeded that there was some deficiency in the marking out then the Warden may decline to rule on the submission unless the objector elects not to call evidence.

Standard of Proof

The standard of proof in proceedings before the Wardens and the Wardens' Courts is the civil standard, on the balance of probabilities. Where there is an application for a prospecting licence and that application is objected to, the Wardens take the view that the applicant is the proponent and it is for the applicant to persuade the Warden on balance.

Administrative and Judicial Functions

The Warden has both an administrative function and a judicial function. The Act refers to the Warden, the Warden in open court and the Warden's Court. It seems to me that the draftsman has confused these functions. For example s 42(2) provides that the Warden hear an objection to a prospecting licence and s 134(1)(d) provides that the Warden's Court has power to determine objections to applications.

It has been held that a hearing of an application for a prospecting licence and an objection thereto is a proceeding for the purposes of the Act. Perhaps it could be further said that such proceeding is comprised of both an administrative function and a judicial function. The Warden would be acting administratively in determining the application and judicially in determining the objection.

The distinction is important. Given that the Warden is acting administratively in determining the application, the Warden may peruse and consider the information on the file kept in the registry relating to that application. If something on the file relates to a matter in issue then it is my practice to bring it to the attention of the objector and give the objector an opportunity to call evidence on the point before I arrived at a decision. It would be wrong to take anything into account that would be adverse to one of the parties without first giving that party some notice and opportunity to be heard on the point.

A further significance in having access to the file is that if matters such as the affixing of the Form 21 to the datum post and doing so within time, the making of the application within time, service on any private land owner or pastoral lease holder and advertising are not in issue, then the applicant need not call any evidence on those matters in the hearing and can simply rely on the information contained on the file.

Affidavits

After I had occupied the position of Warden, resident in Kalgoorlie for some time, I decided to call on applicants for mining tenements to lodge an affidavit setting out that certain provisions of the Act and Regulations had been complied with. There is some variation on the content of the affidavit depending upon the type of mining tenement sought. I had a number of reasons for requiring such a document to be lodged by an applicant.

One of the main reasons was to ensure that I had some evidence of marking out of the land the subject of the application on the file before proceeding to grant or recommend for grant. This was particularly important in those cases where no objection had been lodged alleging non compliance with the marking out provisions. This was one method of improving the quality of marking out. I saw that as important because I wished to avoid the likelihood of boundary disputes at some time in the future when the cycle had shifted from an exploration phase to a production phase. Today's explorer may be tomorrow's producer. I did not want to see huge amounts of capital being put into a mine and mining equipment and for that mining operation when it was up and running to then be jeopardised by a boundary dispute. Even if such a dispute did not result in a mining operation coming to an end it may have resulted in a party sustaining a large loss.

The affidavit also caused an applicant to become aware of the requirements under the Act and Regulations and to thereafter comply with these requirements. This would result in the application being disposed of without delay. That was to the advantage of an applicant. Finally, the document was a single document that could be checked by the Warden to ensure that the several requirements of the Act and Regulations had been complied with. It made it unnecessary for the Warden to sift through a file with the information being scattered throughout the file and in no real order.

The Merits

There are three substantive types of mining tenements, a prospecting licence, an exploration licence and a mining lease. The Warden is empowered to grant a prospecting licence and for both an exploration licence and a mining lease the Warden's function is to hear the application and any objection thereto and to thereafter make a recommendation to the Minister.

When determining a prospecting licence application, whether it is contested or not, the Warden is not concerned with the merits of the applicant and hence the application. By "the merits" I mean the financial capacity of the applicant, the items and value of mining equipment owned or possessed by the applicant, the mining expertise of the applicant and the history of the applicant in bringing a mine to the production stage. Provided the applicant complies with all of the express and implied conditions of the Act and Regulations and the land is open for mining then in most

cases a grant will be made. By declining to give any weight to the merits, all applicants immediately before they commence to mark out the land are on an equal footing. If after the first year and having been given an opportunity to exercise rights pursuant to a grant, the holder fails to satisfy the obligations that go with such grant, then depending upon the nature of the failure the holder may be liable to prosecution, the security may be forfeited (see s 52) or the tenement may be forfeited (see s 96).

It is also the practice of Wardens not to concern themselves with "the merits" when hearing an application for an exploration licence and also an application for a mining lease, whether contested or not. This is so even though in the case of an exploration licence the applicant is required to lodge the details of the programme of work proposed to be carried out on the land (see s 58(1)(b)(ii)). The Warden only concerns himself with the lodging of the programme and not the efficiency or quality of the programme and so not whether a better programme could be planned.

Marking Out

It is common for applicants for a prospecting licence to call an independent surveyor to give evidence on the applicants marking out if that is the subject of an objection. If a party was anxious to achieve a favourable result then it would be prudent to engage a qualified surveyor to give evidence on the marking out. If that party was the applicant, it would also be prudent to instruct the surveyor to carry out an inspection soon after the completion of the marking out and not wait and see whether any objection was lodged before giving such instructions. There is a cost involved in my suggestion and if no objection is lodged then such cost may in retrospect have been unnecessary. To what length a party is prepared to go to prove any particular facts is to a large extent a commercial decision. It is always wise to be prepared for an objection rather than react to it. The closer the inspection to the time of marking out the better, provided of course that the inspection was thorough and the method used were sound.

Miscellaneous Licences

A miscellaneous licence is an ancillary type of mining tenement (see s 91). A miscellaneous licence may be granted in respect of land already the subject of a mining tenement.

It is essential for an applicant for a miscellaneous licence to produce proof of service of a copy of the application on any and every holder of a mining tenement already granted in respect of the land and also on the local municipal council. This is usually achieved by forwarding a copy of the application by certified mail to the last known address. In the case of the holder of a mining tenement the copy should be sent to the address of the holder on the register.

Regulation 40 provides that the applicant should furnish the Warden with details of any works to be constructed, the manner of construction and any operations to be carried out. The

Wardens accept this information in the form of a letter. If however the application is objected to and any such information is in issue, then the applicant should be in a position to call a witness or witnesses at the hearing to give evidence on oath.

Subsection 91(1) of the Act in the case of a water licence is expressed to be subject to the Rights in Water and Irrigation Act 1914 (WA). That Act requires a licence and such licence specifies the amount of water that can be drawn over a particular period of time and the purpose for which such water can be utilised. Wardens do not insist on the production of a licence pursuant to the Rights in Water and Irrigation Act before commencing to hear and determine an application for a miscellaneous licence. Any grant is expressed to be subject to that Act.

Where a miscellaneous licence is sought for water over a large area of land, the Warden may well impose a condition that at the end of the first twelve months the applicant provide a survey of the areas where it proposes to sink the water bores, to be confined in an area ten metres square, and that it surrender the balance of the land. This condition gives the holder the first twelve months to explore a large area for water and to determine where it wishes to locate the bores it requires. The reason for such a condition is that it seems that whilst the Act allows for a miscellaneous licence to be granted over land already the subject of a mining tenement, it does not allow a mining tenement other than a miscellaneous licence to be granted over land the subject of a miscellaneous licence. Thus if such a condition was not imposed it would mean that if a miscellaneous licence was granted for water over an area of 200 hectares, then a large area would be excluded from persons to mark out and apply for a prospecting licence and then a mining lease for example. The grant of the miscellaneous licence would effectively exclude exploration and perhaps a mining operation from areas that may not be utilised for the purpose of the miscellaneous licence.

Following on from the previous point, practitioners should be careful not to disregard applications for miscellaneous licences seeking the same land as their client who may be seeking one of the three substantive type tenements, a prospecting licence, an exploration licence or a mining lease. Section 105A on rights in priority specifically excludes a miscellaneous licence from its application. Therein lies a trap. Say for example your client seeks a prospecting licence over land already the subject of an application for a miscellaneous licence. You should not fail to lodge an objection to the miscellaneous licence. You should also attempt to negotiate with the applicant for the miscellaneous licence to see whether a satisfactory arrangement can be struck for the mutual benefit of the parties. If you fail to do these things the miscellaneous licence may be granted and your clients application for the prospecting licence will be refused there being no ground available.

Even if your client marked out and applied for a prospecting licence before the marking out and application for a miscellaneous licence, you would be wise to lodge an objection to the application for the miscellaneous licence. You should beware of not being ready to proceed on the first hearing date of your clients application for the prospecting licence and allowing it to be adjourned to a date after the hearing date for the miscellaneous licence. Come the second hearing date for the prospecting licence, if you failed to lodge an objection, you may be horrified to learn that the miscellaneous licence has been granted and so there is no ground available for your client to hold as a prospecting licence.

Access

Subsection 57(3) of the Act provides that the Warden should not recommend an application for an exploration licence for approval unless the applicant is able to effectively explore the land. There are a number of exploration techniques that do not require access to the surface of the land eg. aeromagnetics. Wardens have construed the words "effectively explore the land" to mean that the applicant should have some access to the surface of the land to carry out some traditional exploration techniques. In the case of an application for an exploration licence over private land the applicant would need to have the consent of the private landowner and occupier in order to have access to the surface of the land (see s 29). Where there were two parcels of private land and consent was given in respect of one only then the application for the exploration licence could be recommended for approval and to include surface rights in respect of that part where consent had been given and subsurface rights only in respect of that part where no consent had been given.

Subsection 57(3) does not entitle the Warden to examine the financial capacity of the applicant.

It should be noted that there is no similar provision for an application for a prospecting licence. I take the view that an applicant for a prospecting licence does not need to establish access to the surface of the land (when I say surface I mean within 30 metres of the natural surface). If a grant is made then it is open to the holder to carry out exploration by means of modern techniques that do not require access to the surface of the land. It is also open to the holder to pursue the consent of the landowner and occupier during the first year of the licence and if given, to then seek surface rights (see ss 29(5) and 29(6)) and thereafter carry out some more traditional exploration techniques. If at the end of the first year the holder has not complied with the expenditure provisions then the prospecting licence would be liable for forfeiture.

Securities

An applicant for a prospecting licence is required to lodge a security within 28 days of lodging the application, for compliance

with the conditions of the prospecting licence and of Part IV of the Act and the Regulations (s 52). A similar provision exists for an exploration licence (s 60).
Where the security is lodged outside the 28 day period the Wardens require the applicant to file an affidavit setting out the reasons for the delay. There is no provision in the Act to grant any extension. Regulation 104 has no application because the time of 28 days is required by the Act and not the Regulations. If an affidavit is filed explaining the delay I may still grant or recommend for grant and leave the applicant liable to prosecution under s 154(1) of the Act. If I refused the application or recommended it for refusal the applicant would still be liable to prosecution and that may amount to a double penalty.

5. **Objections**

Particulars

An objector should set in the objection full particulars of the objection. It is fair that an applicant knows what the allegations are that will be made at the hearing of the objection and the application. If the objection is based on marking out for example it would not be adequate to simply state in the objection that "the applicant has failed to mark out in accordance with the Act and Regulations". In my opinion the particular location on the boundary should be noted together with further mention of the nature of the non compliance eg. the trench was not the required distance or the post was less than the minimum height or the intermediate post was in excess of 300 metres.

Relief

The extent of the Wardens powers in respect of the application should be ascertained. Often an objector wrongly seeks that the Warden recommend a prospecting licence for refusal or that the Warden refuse a mining lease. You should know what the function of the Warden is in respect of the particular application to which the objection is being made.
Too often an objector seeks refusal of a prospecting licence or a recommendation for refusal of a mining lease or refusal of a miscellaneous licence when really the objector has no objection to a grant but seeks that certain conditions be imposed. If such is the case then set out in the objection the conditions that the objector seeks to have imposed. If a private landowner and occupier has no objection to the grant of a mining tenement in respect of subsurface rights only then say so in the objection.

Service

You should ensure that a copy of the objection lodged with the mining registrar is served on the applicant for the mining tenement. You should also ensure that some proof of service of the copy objection is lodged with the registry. It is not sufficient to simply produce a certified copy mailing slip addressed to the applicant. Such a slip can be obtained by simply posting an

envelope. There should be something in the form of an affidavit proving service. I have attached a standard form affidavit to this paper. Such an affidavit could attach a certified mailing slip and the deponent stating that a copy of the objection was posted to the applicant by such mail and that the slip relates to the service of the objection. If on a return date of a prospecting licence for example, the applicant does not appear and the objector is unable to prove service, an application by the objector to have the application for the prospecting licence refused will be unlikely to succeed.

Applicant pursuant to Regulation 67

Objections are required to be lodged within 30 days of the date of application for the mining tenement or such period as the Warden considers reasonable. When lodging an Objection beyond the 30 day period, the prospective objector should also lodge a letter explaining the delay. The mining registrar will then forward to the applicant a copy of the Objection, a copy of the letter of explanation and a notice requiring the applicant to provide information in letter form whether he takes issue with the application by the Objector and if so that he set out the reasons why and any prejudice. A date would be given, about 14 days hence, for the application to be heard and at such a hearing both parties are excused from attendance. It is always open to a party to attend even where his attendance is excused. The Warden would on the return make a decision and if the parties did not appear, they would be advised of the decision.

6. **Plaints**

All civil proceedings in the Warden's Court shall be commenced by plaint (reg 121). The plaint is required to be in the Form No 33 in the First Schedule to the Regulations. There are no Rules of the Wardens' Courts and the Act brings in the relevant civil practice and procedure of the Local Court (s 136). I will comment further on rules later.

Plaints for Forfeiture

An application for forfeiture pursuant to s 96(1)(b) or section 98 shall be made by way of plaint (reg 48). I think it would be fair to say that Wardens' Courts over the last 2 years or thereabouts have been more prepared to order or to recommend forfeiture. I think I should also add that once nearly all of the land near prospective centres had been taken up, an application for forfeiture became more relevant in order to obtain land in areas of interest.

An important matter to first consider is whether a plaint is within time. The Act provides that plaints for forfeiture may be made during the expenditure year or within 8 months thereafter (ss 96(2A) and 98(2)). In one case decided by me I allowed the plaint to be made "during the expenditure year" even though the expenditure requirement is an annual requirement and reg 52 provides that the obligation to comply ceases after the filing of the plaint. In another case decided by Warden Michelides S.M., he

held that given that the expenditure requirement is expressed as an annual expenditure (not capable of being reduced to a pro rata amount), that together with reg 52 operated to prohibit a plaint for forfeiture being made "during the expenditure year". It was not necessary for me to go that far when deciding the case before me. Perhaps the situation may only be clarified when the validity of reg 52 is determined because that regulation does not sit comfortably with ss 50 and 96(2A) for prospecting licences, ss 63A(b) and 98(2) for exploration licences and ss 82(1)(c) and 98(2) for mining leases.

On some occasions it may be apparent to a plaintiff that a defendant will not appear at the hearing of a plaint for forfeiture. If a defendant does not appear then a number of Wardens, including myself, still insist that the plaintiff calls evidence on the issue of the alleged failure by the defendant to comply with the expenditure requirements. The plaintiff should also ensure that he calls evidence that if accepted would justify forfeiture. It should be remembered that even in the absence of the defendant the Warden needs to be satisfied that in the circumstances of the case there is sufficient gravity to justify forfeiture.

There are still a number of interesting points to settle in this area and I await learned submissions. Regulation 126 requires a notice of defence to be lodged not less than 7 days before the date fixed for hearing or at any subsequent time before the hearing as the Warden may allow. What would be the position where no notice of defence was filed and 6 days before the hearing the plaintiff sought to enter a judgment? Is it open to a plaintiff to so enter judgment and on the hearing date would the plaintiff only need to call evidence on the question of sufficient gravity? Should or need the legislation be amended to provide that if on a return day or upon an adjournment the defendant does not appear, on proof of service of the plaint, forfeiture be ordered and the defendant made to pay costs?

On a number of occasions before me, counsel for a plaintiff has tendered a search of a mining tenement and relied on there being no entry of any expenditure on the register for a finding that the holder has failed to comply with the expenditure provisions. I have held that such a search is not prima facie evidence of a failure to comply with the expenditure provisions. It is equally open to infer from such a search that the holder has simply failed to lodge a Form 5 report. A plaintiff should call evidence from a person who has physically inspected the land the subject of the tenement. If such an inspection revealed that there were no signs of exploration for many years then such evidence would be of use on both the issue of compliance and the issue of sufficient gravity.

The mere failure to lodge a Form 5 report on work done on a prospecting licence (s 51), cannot form the basis of a plaint for forfeiture of the prospecting licence. Section 51 is a statutory requirement and not a condition of the prospecting licence.

Failure to lodge such a report would constitute an offence (s 154) and it is the conviction of such an offence that may form the basis of a plaint for forfeiture (s 96(2)(c)).

When the Warden's Court hears and determines a plaint for forfeiture it is acting judicially. It is my opinion that the Warden when determining the plaint is not entitled to take into account any matter on a file that is not the subject of evidence. If a party desires something on the registry file to be considered by the Warden's Court, then that party should subpoena the file and put the evidence properly before the Court.

Any fines imposed by the Warden's Court on a plaint for forfeiture should be forwarded to the Mining Registrar. Where the Warden directs that part or all of the fine be paid to a plaintiff, then the Mining Registrar will in turn and in due course forward an amount by cheque to the plaintiff. The amount of the fine should not pass directly between the parties because the Warden needs to be satisfied that the fine is paid. A successful applicant for forfeiture has a right in priority to mark out pursuant to the Act. The Warden's Court cannot make any order granting such a right.

Where the register of a tenement sought to be forfeited provides for a caveat or a registered agreement then the party claiming an interest in the tenement and the parties to the agreement should in my opinion be served with a copy of the plaint even though the plaintiff need not provide any of them as a party to the proceedings.

No plaint for forfeiture heard by me has been determined one way or the other because of the capacity of a particular party. Plaints for forfeiture should not be seen as "an entrepreneurial battlefield". In some cases the capacity of a particular party may be significant. In my opinion there is too much emphasis placed on capacity when counsel presents a case. The emphasis should be in the area of the alleged failure to comply with the expenditure provisions.

If your client has sought forfeiture of a mining tenement and the holder has an application for exemption on foot then you would be wise to seek instructions to lodge an objection to the application for the exemption. Your clients position in the forfeiture proceedings would not be advanced by an exemption being granted (without objection) prior to the hearing of the plaint. If requested, the Warden may consolidate the two.

7. **Costs:**

Applications and Objections

Before any costs can be ordered against an applicant or an objector there needs to be a finding that the application or objection so made was frivolous or vexatious (s 134(2)). This provision was the subject of an amendment to the Act. Before the amendment, because the Warden's Court had power to determine objections to applications it was my view that the

Warden had power to order costs not on the application but rather on the objection to the application. In the case of objections I think the amendment reduced the power to award costs. It seems to me that the Warden should have a general discretion to order costs, particularly on an adjournment of an application or an objection.

Where there is an application for a mining tenement over private land, the owner of the land would minimise costs if the objection noted whether the objection was to surface rights only if such was the case. Likewise an applicant could minimise costs by giving notice to an objector at an early stage of the proceedings that it would be satisfied with subsurface rights only. If an objector objected to both surface rights and subsurface rights then the applicant could minimise costs by providing the objector with notice of any consent to surface rights from an adjoining landowner as soon as such consent was obtained. An objector would thereafter be hard pressed to object to subsurface rights given that the applicant had access.

In the past nominal costs of only $50 were awarded to an objector to an application over private land. One rationale may have been that there were often numerous objectors and collectively the applicant was required to pay a large amount in costs. In my opinion one objector is not concerned with the objection of another and each objector is entitled to have the quantum of costs for his objection determined independent of any other. This approach has led to greater amounts of costs being awarded to objectors. The amount of course varies from case to case.

If the amount of costs sought is relatively low it may be more convenient and economic to ask for them to be fixed by the Warden without the need to incur the further costs associated with the preparation of a bill and an attendance to tax the bill.

It is important to realise that the Warden's Court often awards costs in favour of a plaintiff even where forfeiture is not ordered. If a plaintiff succeeds in establishing that the defendant/holder has failed to comply with the expenditure provisions then that finding may be sufficient to justify an order that the defendant pay the plaintiff's costs. Where forfeiture is also ordered or recommended then usually as a matter of course costs are awarded in favour of the plaintiff. Such an approach recognises the self policing policy contained in the Act.

It is common for Wardens' Courts to order that costs be taxed on the highest scale available in the Local Court Rules. There are a number of reasons why the civil jurisdiction of the Wardens' Court has not been fully utilised. One reason I think has been the low scale of costs. Where a matter is complex or important it is open to increase discretionary costs by 100 per cent (O 37 r 6A of the Local Court Rules). It is also open to the Wardens' Courts in such cases to allow a special counsel fee on brief not exceeding $500 and where applicable a refresher fee commensurate with the counsel fee on brief (reg 128).

It should also be remembered that the Wardens' Courts can make an order for costs at any stage of the proceedings. If you act for a plaintiff in proceedings for forfeiture and the defendant/holder surrenders the tenement thus rendering the plaint nugatory, then an application for costs to the time of the surrender may be made and the Warden's Court may order that the defendant/holder pay such costs.

8. **Chamber Applications**

The Rules

Few interlocutory applications are made before the Warden's Court. That does not mean that there is no scope for such applications. A key to success is proper preparation and interlocutory applications can assist greatly in the preparation of a case. Many hearings would have run more smoothly if the parties had availed themselves of interlocutory proceedings.

There are no rules of the Wardens' Courts. The Local Court Rules apply (s 136). The Warden or the Wardens' Court may exercise in relation to all matters relating to civil proceedings like powers and authorities as are conferred upon the Supreme Court or a Judge thereof (s 134(5)). In all aspects except as expressly provided by or under the Act the practice and procedure of the Warden's Court as a Court of civil jurisdiction shall be the same as the practice and procedure of a Local Court (s 135(6)). When exercising like powers of the Supreme Court or a Judge thereof, the Warden's Court adopts the practice and procedure of the Local Court and not that of the Supreme Court. For example where a declaratory judgment is sought (not being of the kind mentioned in s 134(1)(b) and (g)), the source of power to hear and determine the matter would be s 134(5). The practice and procedure applicable to such proceedings would be that of a Local Court.

Summary Judgment

Where the Local Court Rules are silent I have utilised the Supreme Court Rules. I did so when dealing with a plaint for cancellation of licenses to treat failings. The defendant filed a chamber summons seeking orders inter alia that there be a summary judgment in favour of the defendant. It was argued that the plaints could not succeed as a matter of law. I had previously, in other matters, made a finding on the very point of law the subject of the submission. I was of the opinion that no matter what the evidence, the plaints could not succeed. I had power to dismiss the plaints (a final determination) but if cancellation was considered appropriate then I could only recommend cancellation.

There is no provision in the Local Court Rules for summary judgment on the application of a defendant. I therefore utilised the provisions of O 16 r 1 of the Supreme Court Rules and ordered that judgment be entered for the defendant with costs.

Discovery

In *Coumbe v. Sanidine N.L.*, Supreme Court Appeal No. 118 of

1985, Rowland J. gave the opinion that a plaintiff seeking forfeiture was not entitled to an order for discovery of documents against the defendant. As I understand if that opinion may not have been capable of being the subject of an appeal (see *Tortolla's Case*). Whether the opinion is right or wrong it has resulted in there being no such applications for discovery.

What sometimes happens in practice is that a defendant produces volumes of receipts and many and lengthy geological reports at the hearing. Counsel for the plaintiff has not examined these documents before and so the hearing is continually interrupted with adjournments to enable the documents to be perused and instructions taken. Such a situation is very unsatisfactory. Informal discovery by and between the parties should be encouraged. If a defendant succeeds in defending a plaint for forfeiture and has failed to bring documents to the attention of the plaintiff that clearly supported the defendant's case, then such a defendant may not be successful in obtaining costs and in bad example may have costs awarded against him.

9. **Adjournments**

An application for an adjournment should not be left in obeyance until the hearing date. Regretfully this is too common an occurrence and I propose to take a firmer line on adjournments. It is not always acceptable to say the other party can be compensated by way of costs. Where an application or an objection is concerned there may be no power to award costs. In the case of a plaint for forfeiture, any delay in the hearing results in land not being explored which is counter to the policy of the Act. There is a degree of public interest in the processing of applications and the hearing of plaints and they should be listed and heard expeditiously.

An application for an adjournment should be made as soon as the basis for such an application becomes known. The application should be made by way of chamber summons with a supporting affidavit. Copies of the documentation should be served on the respondent at least 2 days before the hearing (O 12 r 3 Local Court Rules). It is possible to apply for an adjournment in Perth in respect of a matter listed for hearing in a country centre. This is discussed towards the end of this paper.

10. **Injunctions**

Proceedings seeking injunctive relief should be commenced by summons. An affidavit or affidavits should be filed to provide a basis for any interim injunctive orders. It is usual for a plaintiff to file the plaint at the same time as the chamber summons and affidavit, however that is not necessary. If the Warden's Court makes any orders then it would be on terms providing for the issue of the plaint.

I am very reluctant to deal with an application for an injunction on an exparte basis. In my opinion there is no reason why modern

technology should not be used to bring notice of the application to the defendant. For example where it is known that a defendant has a facsimile machine, notice of the application and copies of the papers could be brought to the attention of the defendant via that medium. Where it is known that a certain solicitor or firm of solicitors acts for the defendant, there is no reason why they should not be contacted and given notice whether it be by telephone or facsimile. There are also many courier services that could be contracted at short notice to deliver copy documents to a defendant.

No injunctive orders will be made unless the usual undertaking as to damages has been filed. It is desirable that the party seeking the injunctive relief (and not the solicitor) sign such undertaking. In my opinion the execution of the undertaking should be witnessed. If the deponent of the affidavit is the applicant or in the case of a company is authorised to make the undertaking on its behalf then one suggestion is to exhibit the undertaking to the affidavit.

11. **Exemptions**

Where there is no objection to an exemption, the applicant is excused from attendance provided a statutory declaration is lodged providing the evidence in support. Because the exemption application must be filed prior to the end of the expiry of the expenditure year (s 102(1)) and because a holder has within 60 days of such expiry to file the necessary report (reg 16), it is often the case that the holder does not know before the expiry of the expenditure year whether an application should be made or not. Often the application is made before the expiry date to bring it within time and no statutory declaration is filed until the applicant has ascertained its position from the information used to compile the report. I have previously expressed the view that there be some amendment so that these provisions operate in tandem.

As a matter of practice I will not recommend an application for refusal within 60 days of the date of the expiry of the expenditure year for the reason that there has been a failure to lodge the statutory declaration. Thereafter I will not requisition the statutory declaration more than once. If it is not filed then the application will be recommended for refusal. Likewise, if I seek further information I will not do so more than once. If the information is not supplied within the time initially allowed then the application will be recommended for refusal.

Before filing the statutory declaration you should check that each and all of its pages have been signed and witnessed and that all of the supporting documents referred to in it carry the date and place of execution and the signature of the witness.

12. **Evidence**

Evidence of proceedings in the Wardens' Courts is taken on oath.

On a number of occasions now, evidence has been introduced by way of a video. Each occasion involved a video of a mining tenement the subject of a plaint for forfeiture. Also on each occasion the video carried a commentary. It should be noted that given that the commentator was not on oath nothing said in such a commentary will be taken into account. The party relying on the video should call a witness at the hearing to give evidence on the taking of the video and what the video shows.

Often at a hearing counsel puts a written document to a witness, an agreement or plan, and then questions the witness on the document. Don't forget that it is the Warden who makes the decision, so ensure that you have a copy of the written document to hand up to the Warden for him to follow the line of questioning of the witness. You should also have a copy for counsel for the other party.

A search obtained from over the counter of a registry of the Mines Department, providing it carries a Mines Department date stamp is acceptable in proceedings in the Wardens' Courts. The search need not be certified by a mining registrar.

13. **Transfer of Proceedings**

Where a Warden is satisfied that any action, suit or other proceeding pending in his Court could be more conveniently dealt with in another Warden's Court he may transmit the record of proceedings to the other Court (s 132(3)). The subsection is drafted in such a way that suggests the Warden may transmit on his own motion and cause the parties to be given notice after he had decided to transmit.

If both parties advise the mining registrar that they agree to the proceedings being dealt with in another Court (telephone contact will suffice), then the mining registrar would bring this to the attention of the Warden and he may order a transfer without the necessity for any appearance.

If one party seeks a transfer and the other opposes one then the party desirous of a transfer should make an application by way of chamber summons with a supporting affidavit and the copy documents should be served on the other party. Counsel need not appear on the return date provided written submissions are filed. These practices take into account the cost and invoncenience of travelling about this vast State.

In my opinion the words "*any* action, suit or *other proceeding pending*" (my emphasis) appearing in s 132(3), allow the transfer of interlocutory proceedings as well as the substantive proceeding. It is therefore possible to have an application for an adjournment dealt with in Perth say when the tenement is located in the Mount Margaret mineral district (Leonora Registry). The application would have to be initially filed at the registry in Leonora.

If a party sought the agreement of the other party to a transfer of proceedings and such agreement was not forthcoming then depending on the circumstances and the decision of the Warden to

the transfer, such refusal to agree may be relevant on the question of costs.

14. **Amendment of Particulars**

By operation of ss 134(6) and 136(1) of the Act, O 16 r 10 of the Local Court Rules applies. An amendment of particulars may be delivered at any time before the return day without obtaining any order for the purpose. At the hearing, if the Warden is satisfied that the other party has not had a reasonable opportunity of preparing his case to meet any new matter introduced by such amendment or for any sufficient cause, the Warden may disallow the amendment.

15. **Caveats**

Any person claiming any interest in a mining tenement may lodge a caveat. I have held that the lodging of a caveat is separate and distinct from the registration of the written instrument creating the interest. The lodging of a caveat is not registration for the purposes of reg 110. Therefore it is necessary to both lodge the written instrument for registration *and* lodge a caveat. I have raised some doubt about the validity of reg 110 but I do not propose to take that any further in this paper.

Where a party seeks the leave of the Warden to lodge a successive caveat (s 121(4)) or orders that a caveat continues in force (s 122(1)(c)) and/or an instrument be registered while a caveat remains in force (s 112(3)), a letter setting out the application and information in support is acceptable.

16. **The Future**

From and including February 1989, the Warden based in Perth will be able to attend to duties as a Warden every alternate week for the whole week and on Friday of every other week. This will allow improvement of many procedures. I propose to canvas changes with the profession and members of industry before any implementation.

Some of the improvements I have in mind include:

(1) Providing appointments for different times during the day for short matters.

(2) Allocating time to deal with interlocutory applications and staggering appointments for them.

(3) Minimising the appearances on applications over private land by both applications and objectors.

(4) Introducing a callover and hence giving a hearing date greater significance than seems to attach to them at present.

(5) The Warden to control or at least monitor listings.

(6) All correspondence to persons who are applicants or parties to proceedings before the Warden or the Warden's Court and relating to the application or proceedings be under a Wardens or Warden's Court letterhead.