WESTERN AUSTRALIA*

LEGISLATION

AMENDMENTS TO THE MINING ACT 1978 (W.A.)

In the previous edition of the *AMPLA Bulletin*[1] reference was made to proposals to amend the *Mining Act* 1978 (W.A.) by removing private landowners' veto in relation to mining tenement applications over certain categories for land. Reference was also made to additional amendments proposed to be introduced and which were briefly described in that report.

Both sets of amendments reached the second reading stage when debate was adjourned. Parliament was subsequently prorogued, and a State election has since been called in Western Australia. Accordingly, the status of the proposal to amend private landowners' power of veto is unknown, although it is understood that it is still hoped that the other amendments will be proceeded with.

MINING AMENDMENT REGULATIONS (NO. 4) 1992

These regulations were published in the *Government Gazette* of 18 December 1992 and commenced operation on that day. Minor amendments are made to reg. 86 of the *Mining Regulations* 1981 in relation to royalties.

SUPREME COURT DECISIONS

TALBOT PTY LTD v. ARIMCO MINING PTY LTD

(Unreported, Full Court of the Supreme Court of Western Australia, 16 November 1992)

This case dealt with an application for a writ of certiorari against the Warden's decision at first instance reported below. The relevant facts are summarised in that report. Briefly, the issue was which registry an application for a mining tenement was required to be lodged with where it straddled two districts under the jurisdiction of different Warden's courts.

Pidgeon A.C.J. referred to s. 132(2) of the *Mining Act* 1978 (W.A.) (the Act), which provides that proceedings under the Act in respect of or in relation to mining tenements are to be brought in the Warden's Court for the mineral field or district thereof assigned to the court and in which the mining tenements are situated. His Honour held that that section had to be read with s. 58 which deals with exploration licences. Section 58(1)(d) provides that an application for an exploration licence must be lodged with the mining registrar of the mineral field or the district thereof wherein the land to which the application relates is situated.

Here the objection was similar to the objection considered and upheld in *Hunter Resources Ltd v. Melville.*[2] The objector was alleging that there had to be strict compliance with the *Mining Regulations* 1981, and that there had not been strict compliance in that reg. 95 was not complied with. That regulation

* Michael Hunt and Philip Edmands, W.A. Information Service Reporters.

1. (1992) 11 *AMPLA Bulletin* 147.
2. (1988) 164 C.L.R. 234; (1988) 7 *AMPLA Bulletin* 84.

deals with the question of which registry an application should be lodged with where it straddles two mineral fields or districts.

The objector maintained that the regulation is mandatory and requires strict compliance, and that it was not open to the Warden in this case to hold that the application was in the correct court.

Pidgeon A.C.J. noted that neither ss 58(1)(d) nor 132(2) say that the application must be "wholly situated" within the relevant mineral field or district. Thus looking at the sections alone, without reference to the regulation, one would say that the application could be lodged at either Warden's Court.

His Honour held that reg. 95 could not be read to alter the provisions of the Act and that, to the extent that it purported to do so, it would be ultra vires. Accordingly, it would be ultra vires if it required that selection of the correct registry was a mandatory condition to obtaining the mining tenement.

His Honour accordingly held that the regulation was doing no more than governing procedure, and that the Warden was correct in stating that it did not impose a mandatory requirement. Regulation 95(1) requires that an application be lodged with the Warden of the mineral field or district "apparently" containing the largest portion of the ground applied for. His Honour found this significant and noted that reg. 95 recognises that the appearance might not necessarily be the reality because reg. 95(2) provides that if a survey shows that what was initially apparent is incorrect, then the Director-General of Mines determines to which mineral field or district the mining tenement is to be assigned.

His Honour further held that reg. 95 contemplates that a tenement application would be filed in the registry where, on an objective test, it is apparent that the larger portion of the land lies.

The present case was quite different to the case considered in *Hunter Resources v. Melville* where s. 105(1) of the Act required marking out in the prescribed manner and in the prescribed shape. There the regulations that prescribe that manner and shape became critical because of a section of the Act. The case of *Pancontinental Goldmining Areas Pty Ltd v. Minister for Mines*[3] was also distinguishable because there what was being considered was a failure to comply with a section of the Act. In the present case the Act has been complied with.

Pidgeon A.C.J. accordingly held that the application should be dismissed.

Ipp J. approached the matter differently. He assumed (but did not decide) that the phrase in s. 58(1)(d) "the land to which the application relates" means the total area of the land the subject of the application, and also assumed (but did not decide) that reg. 95 is not outside the power for making regulations under the Act.

Crucial to the decision in this case then was the meaning of "apparently" in reg. 95(1) and whether reg. 95(1) is to be construed as imposing a peremptory or permissive obligation upon the applicant for an exploration licence.

Looking at s. 58(1)(d) itself, his Honour found that it allowed an applicant to lodge an application in either of the districts in question. So for reg. 95 to be within power it must be construed in such a way as not to be inconsistent with or repugnant to s. 58(1)(d). This is despite the fact that s. 162(1) of the Act, allowing the Governor to make regulations, is in wide terms.

3. [1989] W.A.R. 169; (1989) 8 *AMPLA Bulletin* 135.

His Honour held that to construe reg. 95(1) as invalidating, automatically, an application simply because it is lodged with the Warden of a mineral field or district which objectively does not contain the largest portion of the ground applied for will result in the regulation being materially inconsistent with, and repugnant to, s. 58(1)(d) of the Act. Accordingly, his Honour held that "apparently" means as is apparent to the applicant.

His Honour further held that reg. 95(2) allowing the Director-General of Mines to assign applications provides a safety net to catch inappropriately lodged applications, and recognises the practical difficulty than an applicant may have in ascertaining which portion of the land is largest. There would be little purpose in having the Director-General of Mines determine this matter if an application lodged otherwise than with the Warden of a mineral field or district containing the largest portion of the ground is invalid.

His Honour noted that s. 58(2)(b) provides that on the application for an exploration licence the land affected is not thereby required to be surveyed. He held that this supported the inference that the largest portion of the ground applied for under reg. 95(1) is not required to be objectively determined. This is because, without a survey, an objective determination may well be difficult. The absence of the obligation to survey also supported the inference that the requirement laid down by reg. 95(1) is permissive.

Here the application was lodged in the mineral district which, apparently to the applicant, contained the largest portion of ground applied for. In the circumstances, his Honour held, the application was correctly lodged in accordance with the requirements of s. 58(1)(d) and reg. 95(1). Even if the word "apparently" is to be construed objectively, reg. 95(1), his Honour held, is permissive.

Accordingly, his Honour held that the application should be dismissed.

Nicholson J. substantially agreed with Pidgeon A.C.J. and Ipp J. that reg. 95(1) does not impose a mandatory requirement and that the consequence of non-compliance with it does not give rise to invalidity in the application. His Honour also held, therefore, that the application should be dismissed.

MINISTER FOR MINES v. HAOMA NORTH WEST NL
(Unreported, Full Court of the Supreme Court of Western Australia, 24 November 1992)

This matter arose on the return of an order nisi seeking a writ of certiorari to quash a decision made by the Minister for Mines in refusing applications for two prospecting licences.

The area the subject of those prospecting licences had previously been held by the applicant therefor (the Applicant) as a mining lease. That mining lease was the subject of a plaint for forfeiture by a Mr McKnight (the Claimant). Forfeiture was sought on the basis that the holder of the mining lease had not paid rents and royalties at prescribed times and in the prescribed manner, had not expended the required amount on the tenement and had not filed reports in relation to expenditure in the required manner.

Prior to the hearing of the plaint, the Applicant surrendered the mining lease and applied for the two prospecting licences. The Claimant subsequently applied for prospecting licences over the same area.

The Claimant's solicitors then wrote to the Minister seeking that the Minister exercise his discretion pursuant to s. 111A(1)(b)(ii) of the *Mining Act*

1978 (W.A.) (the Act) to refuse the Applicant's prospecting licence applications. Section 111A(1) of the Act relevantly provides:

> 111A(1) Where an application is made for a mining tenement but in respect of the whole or any part of the land to which the application relates—
> (b) the Minister is satisfied on reasonable grounds in the public interest that—
> (i) the land should not be disturbed; or
> (ii) the application in question should not be granted,
> the Minister may, by notice served on the warden to whom the first mentioned application for a mining tenement has been made, refuse that application, whether or not the application has been heard by the warden.

The Minister also received a memorandum from the Director-General of Mines recommending that he refuse those prospecting licence applications.

The Minister endorsed the memorandum "approved" and wrote to the solicitors for the Applicant advising that he intended to refuse the Applicant's prospecting licence applications under s. 111A(1)(b)(ii) prior to their hearing date.

An order nisi against the Minister's decision was sought on three grounds.

First, the Applicant contended that s. 111A(1)(b)(ii) requires the Minister to be satisfied on reasonable grounds in the public interest that something relating to the whole or any part of the *land* to which the application relates requires the Minister to exercise her or his discretion. In other words, the Applicant contended that there had to be something significant in the piece of land itself justifying the Minister making such a determination.

Nicholson J., with whom Walsh and Pidgeon JJ. agreed, held that that section, prior to its amendment, did relate to the land and that the construction contended for by the Applicant may have then applied. His Honour held that it did not apply to the section in its present form.

The reason is that the section now provides that the object of the Minister's satisfaction is the application in question and not the land. Even if that were not so, this may not necessarily exclude the exercise of the discretion on the failure to comply with expenditure conditions because that might be a feature of the land.

His Honour, however, believed that s. 111A(1)(b)(i) supported his view of s. 111A(1)(b)(ii), because the former does refer to the land, and if the latter also relates to it, then both subsections would have an identity of content.

Accordingly, this ground was not made out.

Secondly, the Applicant contended that the Minister's decision was beyond power on the basis that the conditions precedent to the exercise of the power were not satisfied. The applicant contended that the Minister's decision was based on the fact that the applicant's action was contrary to the spirit and intention of the Act, yet the Applicant's action in surrendering the mining lease and making application for prospecting licences was taken in accordance with the Act. Thus the Minister could not have been satisfied on reasonable grounds that it was in the public interest that those applications not be granted since it would be unreasonable to give preference to preserving the principle of the Act over an activity carried out in accordance with the Act. It was contended that, even if the decision of the Minister was in the public interest, it could not be said to have been made on reasonable grounds.

His Honour noted that s. 111A(1) entitled the Minister, by notice to the Warden, to refuse an application and, accordingly, allowed the Minister to intrude into the advancement of the normal processes of an application whether or not that application had been made in accordance with the law. The Minister was entitled to prevent an application proceeding to a stage of hearing by a Warden

and thus to prevent it from being granted. The fact that the application might have been made in accordance with the Act, His Honour accordingly held, does not limit the exercise by the Minister of an entitlement to issue a notice under s. 111A(1) having the effect of refusing the application.

His Honour noted that there was no dispute that the effect of the lodgment of the surrender of the mining lease deprived the Claimant of a statutory right under s. 98 to continue with his application for an order for forfeiture, and deprived him of the potential right in priority to any other person to mark out and apply for a mining tenement in accordance with s. 100 of the Act. The Applicant had been the first to comply with the marking out requirements in respect of its prospecting licence applications and would be entitled to claim priority over the Claimant's prospecting licence applications: s. 105A and *Tortola Pty Ltd v. Saladar Pty Ltd.*[4] Thus the Applicant would, under s. 49 of the Act, have acquired a pre-emptive right to apply for a mining lease if its prospecting licence applications were successful. In the event of such a mining lease application, the Minister would have been obliged to grant the mining lease under s. 75(5) of the Act. Thus the Applicant could have obtained a second mining lease over the same ground in relation to which it had not met expenditure conditions.

Accordingly, the second ground was not made out.

Finally, the Applicant contended that the Minister's decision was contrary to the laws of natural justice in that he failed to provide reasons for the exercise of his power.

His Honour held that the rules of natural justice themselves do not require that reasons be given for the exercise of a power and that, accordingly, the Applicant's argument was that s. 111A in the context of the Act required that a statutory obligation to give reasons be implied in respect of the Minister's decision to effectively refuse the Applicant's prospecting licence applications.

His Honour held that it was not necessary to decide this issue since the Minister had endorsed his approval on the submission made to him by the Director-General of Mines and, therefore, had adopted that submission as the reasons for his decision. It was accepted by counsel for the Applicant that disclosure of the submission after the formulation of this ground of review meant that events had overtaken the ground.

Accordingly, the third ground could not be made out, and the application was dismissed.

WARDEN'S COURT DECISIONS

HIGGINS v. SABMINCO NL
(Kununurra Warden's Court, 10 November 1992)

This case concerned application for Exploration Licence 80/1442 (E80/1442) and an objection thereto.

E80/1442 was over land identical to land comprising Exploration Licence 80/1302 (E80/1302). E80/1302 was allegedly forfeited by the Minister for breach of the conditions that costeans be backfilled and other disturbances of the land be rehabilitated, waste material, rubbish, abandoned equipment and temporary buildings be removed from the tenement prior to termination of the exploration

4. [1985] W.A.R. 195.

programme and the written approval of the district mining engineer to use mechanised earthmoving equipment be obtained.

The Director, Mining Registration Division of the Mines Department wrote to the holder of E80/1302 setting out the alleged breaches of condition. There was no response to that letter, and by notice published in the *Government Gazette* that tenement was allegedly forfeited pursuant to the provisions of s. 96A(1) of the *Mining Act* 1978 (W.A.) (the Act).

Subsequently, the holder of E80/1302 sought restoration of that tenement, but the Warden recommended pursuant to s. 97A(7)(b) that such restoration be refused.

However, the alleged breaches of condition in fact occurred before E80/1302 was granted. The objector to the present application for E80/1442 alleged that the land the subject of that application was already the subject of E80/1302, the purported forfeiture of that licence being invalid and of no effect.

The Warden first considered whether that objector, being a different party to the holder of E80/1302, was entitled to raise that objection or whether the objector would have to be a party aggrieved by the purported invalid forfeiture before being entitled to so object. The Warden considered s. 75(2) of the Act, and held that any person who desires to object to the grant of an exploration licence may lodge an objection, including the objector in this case. He noted that if the forfeiture of E80/1302 was invalid, then it would make no sense for that to be considered to be so only in relation to the party directly aggrieved.

The Warden referred to s. 96A(1) and the section to which it referred, namely s. 63A, and held that those sections only applied to an exploration licence already in existence. He held that the purported forfeiture of E80/1302 amounted to retrospective application of the conditions of the exploration licence and that such a forfeiture was accordingly fundamentally unsound.

The Warden appeared to be of the view that undertaking mining on the area the subject of E80/1302 prior to its grant amounted to carrying on mining without authority, and was therefore in breach of s. 155 of the Act. A penalty is provided for such a breach, but, the Warden held, it is not a basis for forfeiture.

The Warden further held that he was entitled to consider his finding on the invalidity of the forfeiture in making his recommendation on the application now before him. He accordingly upheld the objection and recommended that E80/1442 be refused.

WESTRALIAN SANDS LTD v. SHIRE OF SERPENTINE-JARRAHDALE (Perth Warden's Court, 25 September 1992)

Reference was made to this decision in the previous edition of the *AMPLA Bulletin.*[5] At that time the written decision was not yet available.

The Warden has now delivered the written decision summarised below.

In this case the applicant applied for a mining lease over land it previously held as a prospecting licence. A number of objections were lodged, broadly being of an environmental nature.

The Warden noted that pursuant to s. 75 of the *Mining Act* 1978 (W.A.) (the Act) any person is entitled to object to the grant of a mining lease and be heard by the Warden in opposition to that grant.

5. (1992) 11 *AMPLA Bulletin* 150.

The Warden referred to a decision of the Full Court of the Supreme Court in *Hazlett and Soklich v. Rasmussen*,[6] where in the case of an objection to an application for a mineral claim the court confirmed that the Warden's duty to hear such an objection was confined to matters going to the applicant's title, and not to the "equities" between the parties.

The Warden then referred to the case of *Tortola Pty Ltd v. Saladar Pty Ltd*,[7] which related to an objection to an application for a prospecting licence. In particular, the Warden referred to Brinsden J.'s decision in that case and said that his Honour found the Warden was only entitled to take into account matters necessarily involved in discovering whether the applicant had complied with the requirements of the Act.

Finally, the Warden referred to *Re Roberts; Ex parte Western Reefs Ltd v. Eastern Goldfields Mining Co. Pty Ltd.*[8] In that case the Full Court distinguished the decision in *Tortola v. Saladar* in considering an application for a miscellaneous licence. However, the Warden noted that in that case the reason why the "equities" were to be considered was that in an application for a miscellaneous licence the effect on any existing tenement needs to be considered (it being possible to apply for a miscellaneous licence over an existing tenement).

The objectors in the present case argued that the Warden was not bound by *Tortola v. Saladar*. First, the objectors argued that *Tortola v. Saladar* dealt with two parties both seeking grant, and that the situation was different where the objectors were not also seeking grant. It was argued that in the latter context s. 105A (which deals with priorities) is not relevant.

The objectors also argued that the case of *Tortola v. Saladar* is limited to applications for prospecting licences which lie in the grant of the Warden, and does not apply to applications for mining leases where the Warden merely makes a recommendation. It was submitted that the role of the Warden in the case of mining lease applications was wider and in the nature of an inquiry. In this case, it was argued, the Warden should collect evidence and "pass it on to the Minister".

The Warden rejected the first of those arguments, and held that the Warden's entitlement to take into account only a limited range of matters also applied where the objectors objected on environmental grounds and did not themselves seek grant.

The Warden also rejected the argument that she had a wider discretion here because her role in this case was recommendatory and not determinative.

The Warden noted that *Hazlett v. Rasmussen* concerned a recommendation and not a determination by the Warden, but noted that Brinsden J. in *Tortola v. Saladar* did not consider this to be a distinguishing consideration.

The Warden also noted that the provisions in the present Act are similar to those contained in the *Mining Act* 1904, and that the present Act was drafted in the light of, and with the knowledge of, the interpretation placed on those earlier provisions in the case of *Hazlett v. Rasmussen*. In the Warden's view, this raised a presumption that no change was intended.

The Warden noted that she could find no mention in the second reading speech preceding the passing of the present Act, or in the protracted parlia-

6. [1973] W.A.R. 141.
7. [1985] W.A.R. 195.
8. [1990] 1 W.A.R. 546; (1990) 9 *AMPLA Bulletin* 8.

mentary debate that preceded its passing, or in the Hunt Committee report on the Act published in 1983,[9] of any need to change the provisions governing the hearing of applications or objections.

Finally, the Warden noted that in the past Wardens had often taken a broad view of the Warden's discretion but indicated that she believed this practice seemed to be based more upon considerations of expediency rather than sound analysis of the relevant legislative provisions as judicially interpreted. She also noted that the practice had not been uniform and referred to the decisions in *Berkley Arrow Pty Ltd v. Conlan Management Pty Ltd*[10] and *Hamersley Exploration Pty Ltd v. Western Desert Puntukurnuparna (Aboriginal Corp.)*[11] as examples where the narrow view was adopted.

The Warden also referred to *Hardman Resources NL v. Conservation Council of Western Australia*,[12] where Warden Reynolds found that the Warden did have power to entertain environmental objections. The Warden noted that Warden Reynolds in that case based his decision on what he called the wide and general language of the legislation and the fact that objectors were not provided with an opportunity under the *Environmental Protection Act* 1986 (W.A.) to have those objections aired in a public forum. She agreed with Warden Reynolds that there were advantages in objections of an environmental nature being heard in a public forum, but found his reasoning unsustainable in relation to the legislation as it presently stands.

She noted the difficulty for a Warden in following a broad interpretation of the right to object, given that there is no indication in the Act regarding the extent of the discretion and the criteria to be applied by the Warden. Whilst the Minister has a wide discretion, the Minister's discretion is subject to different constraints and is exercised in different circumstances, there being no statutory obligation on the Minister to give reasons nor to conduct a public inquiry.

Accordingly, the Warden found that, presently, there is no basis for environmental objections and the objections in this case were accordingly dismissed with no order as to costs.

WESTERN TITANIUM LTD v. DAISY DOWNS PTY LTD
(Perth Warden's Court, 24 November 1992)

In this case Western Titanium Ltd applied for seven mining leases over land previously held by it as exploration licences.

Daisy Downs Pty Ltd objected to three of those mining lease applications on the grounds that it was the registered proprietor of an estate in fee simple over part of the land the subject of those applications, and that the relevant land is in bona fide and regular use as land under cultivation for the purposes of, and as defined in, s. 29(2)(a) of the *Mining Act* 1978 (W.A.) (the Act).

At the hearing of the applications the applicant amended the relevant applications to apply for subsurface rights only. The objector maintained its objection on the basis that it was allegedly impractical to grant subsurface rights in circumstances where no consent had been given or was contemplated in relation to surface grant, and it would be impossible to effectively mine the subsurface

9. *Inquiry into Aspects of the Mining Act 1983 (W.A.).*
10. (1990) 9 *AMPLA Bulletin* 52.
11. (1990) 9 *AMPLA Bulletin* 57.
12. (1989) 8 *AMPLA Bulletin* 44.

without substantial interference with the surface of the land. In particular, the objector submitted that it was not practical to mine from the margins of the land, and that it was inconsistent with the intent and purpose of the grant of a mining tenement to grant it when it could not be mined.

The Warden noted that pursuant to s. 27 of the Act mining tenements may be applied for over private land.

Section 29 of the Act refers to specific categories of land where the landholder's consent is required prior to grant. However, s. 29(2) of the Act states that the requirement for consent does not apply to mining tenements granted in respect of that part of the private land which is not less than 30 metres below the lowest part of the natural surface of the land.

The Warden accordingly found that, whilst private landowners are entitled to object to the grant of tenements over their land, they are not entitled to so object where the application is for subsurface rights only and the application otherwise complies with the Act.

The Warden further held that, even where it might be impractical or impossible without access to surface rights to undertake mining on that land, this would not prevent the application being recommended for approval if it otherwise complied with the requirements of the Act. She held that the Act clearly contemplates such a situation because s. 29 does not limit the grant of subsurface rights to prospecting licences or exploration licences only (where it may be possible to explore or prospect without gaining direct access to the surface of the land because of the techniques involved). Thus the exception relating to subsurface grant also applies to mining leases, and, further, the provisions of s. 29(5) provide for the grant of surface rights at a later date if the consent of the private landowner is subsequently obtained. Finally, s. 33(1a) dispenses with the requirement for service of notice on the owner or occupier of the land where the application relates to subsurface rights only.

The Warden accordingly held that, even if there could be no access to the surface and no reasonable likelihood of access to the surface being obtained in the future, she did not have power to refuse an application, or recommend an application for refusal, made in relation to private land below 30 metres from the natural surface where that application otherwise complied with the Act.

The Warden noted that s. 57(3) of the Act provides that the Warden shall not recommend grant of an exploration licence unless the Warden is satisfied that the applicant is able to effectively explore the land. However, the Warden noted that there is no such provision in relation to the grant of a mining lease and, in any event, found that the applicant had sufficient access to the balance of the land the subject of the relevant three applications here, and to land adjacent to those applications, to satisfy any requirement that it be able to effectively explore and conduct mining operations on that land.

The Warden accordingly recommended the relevant applications for grant.

OPTIMUM RESOURCES PTY LTD v. KALGOORLIE LAKE VIEW PTY LTD

(Kalgoorlie Warden's Court, 24 September 1992)

This case concerned an application for a mining lease and an objection thereto.

The applicant, after lodging the application, sought to amend the date of marking out referred to on the form 21. The Registrar made that amendment.

Subsequently, further amendment was sought to the description of the ground referred to in the form 21, by adding the words "the external boundaries of" in relation to reference to the boundaries following the boundaries of late surveyed gold mining leases. It was contended that this was merely to make it clear that the land being applied for was all the land available within the outer boundaries of those gold mining leases.

The objector lodged an objection at the outset, but, after the first amendment, withdrew its objection believing that there was no land available for the application.

However, when the applicant sought to amend the description the objector sought to injunct registration of that amendment, objected to that amendment application and sought leave to file an objection to the original application out of time.

The Warden dealt with those preliminary matters by dismissing the injunction application and the objection to the amendment application and allowing late filing of the proposed objection.

In particular, the Warden concluded that the registration of the amendment application was a matter for the Registrar.

However, on the return date of the application, the Registrar had not dealt with that amendment application. The Warden nonetheless proceeded with the hearing.

The grounds of the objection were essentially that at the time the ground was initially marked out and applied for, no ground was available for mining and that the amendment application, if granted, would result in the ground being applied for being substantially different from the original application. The objector also alleged that it had a right in priority to land not included in the original application but sought to be included by way of amended application, and that that amended application was in effect a fresh application for a mining lease.

It seems that the applicant intended to apply for a tenement over a large area of land which admittedly included land not open for mining, on the basis that available "windows" within that area were sought pursuant to the new application.

Although not entirely clear, it also appears that the objector was alleging that the original description, if interpreted literally, did not cover these "windows" because a tenement with identical boundaries to the late surveyed gold mining leases would not include land within their boundaries but excised because it was the subject of existing tenements at the time of grant of those gold mining leases. These "excised" areas were apparently the available "windows".

The Warden ruled at the hearing that no evidence could be led, nor could there be cross-examination, on the question of marking out since this had not been raised in the objection and it was now too late to raise that matter.

The applicant held all underlying tenements and had marked out the present application relying on reg. 61 of the *Mining Regulations* 1981, which states that it is not necessary to mark out land in respect of which a mining tenement is sought where the boundaries are identical with any surveyed land other than by fixing at a corner of the boundaries a datum post to which the notice of marking out is affixed.

The Warden referred to *Consolidated Gold Mining Areas NL v. Oresearch NL*[13] and noted that in that case Commissioner Heenan concluded that in

13. [1990] 3 W.A.R. 208; (1990) 9 *AMPLA Bulletin* 124.

identifying the subject matter of an application it is permissible to have regard both to the written description contained in the formal application and to the accompanying map. That was relevant to the present case because the applicant submitted that the map it had lodged with its application made the intention of that application clear, and that in this sense the amendment it sought to the description was not strictly necessary.

However, the Warden in any event found that the matters which Commissioner Heenan considered were distinguishable from the present case because in that case there was a dispute as to a boundary of a granted tenement, whereas in the present case there had been no grant and the issue was what land had been applied for.

The Warden held that, given the accompanying map and the proposed amendment application, the land applied for was clearly apparent and that, in the circumstances, the application should be recommended for grant. He rejected the argument that the amendment to the description was in effect a fresh application and, although he believed that the question of the amendment was one for the Registrar, felt that in the circumstances it would be reasonable and proper of the Registrar to allow it.

The Warden also held that, although grant of the tenement would result in the tenement consisting of two areas of ground not contiguous and separated by a large area excised from that tenement, that was not decisive.

Finally, whilst the Warden accepted that when marking out is undertaken in accordance with reg. 61 the description used is critically important, he held that in the present case the proposed amendment to that description was not an amendment to the marking out itself, but was simply to clarify rather than to alter the land applied for.

Accordingly, he recommended the application for grant.

DOWNE v. MAJOR
(Coolgardie Warden's Court, 4 December 1992)

This case concerned two applications for prospecting licences, both of which were the subject of identical objections.

The objections claimed that the respective datum posts for the two applications were within Prospecting Licence 15/3106 (P15/3106) (which was in existence at the time they were placed) and, therefore, on land not open for mining under s. 18 of the *Mining Act* 1978 (W.A.) (the Act). It was accordingly alleged that the applicant had not complied with the marking out provisions of the Act and the *Mining Regulations* 1981.

The applicant argued that the objector had not shown that the datum posts were situated on P15/3106 and, even if they were, the land the subject of existing tenements would be automatically excised from any grant.

The Warden referred to *Kreplins and Golding v. Holden*,[14] and to the decision by the Warden in that case that any marking out over existing tenements is invalid. He also referred to *Pratt v. Parker and CRA Exploration Pty Ltd*[15] where Pidgeon J. held that it would be contrary to the intent of the Act to say that an application was invalid merely because a very small portion of it contains an area that had already been granted under the Act.

14. (1989) 8 *AMPLA Bulletin* 19.
15. Unreported, Supreme Court of Western Australia, 14 November 1984.

The Warden then referred to the case of *Atkins v. Egypt Holdings Pty Ltd*,[16] and in particular to the comments in that case by each of Brinsden, Kennedy and Olney JJ. to the effect that land the subject of an existing tenement is not generally available to be marked out.

Finally, the Warden referred to *Egypt Holdings Pty Ltd; Ex parte Esso Exploration*[17] and in particular to comments by Burt C.J. that s. 18 simply means that where Crown land is the subject of a mining tenement no other person may set up pegs or otherwise mark out that land, and by Wallace J. that if a person wishes to mark out Crown land, that person must bring herself or himself within s. 18 unless able to point to some other section of the Act which permits her or him to mark out Crown land which is a mining tenement.

The Warden then referred to s. 104(1) which allows access to land for the purpose of marking out, to s. 117(1) which provides that the grant of a mining tenement cannot have the effect of revoking or injuriously affecting any existing mining tenement, to s. 117(2) which provides that each grant of a mining tenement shall be deemed to contain an express reservation of the rights to which the holder of any existing mining tenement is entitled, and to s. 44 which provides that a prospecting licence may be granted in respect of all or part of the land to which the application therefore relates.

The Warden held that he was not satisfied on the evidence that the datum posts were situated within existing tenements, and that that was sufficient to dispose of the matter. However, he disagreed with the views expressed in the *Kreplins and Golding v. Holden* case and purported to follow Pidgeon J. in the *Pratt v. Parker* case.

He said that it would necessarily be the case that, where there is intensive pegging, pegs will be placed on existing tenements held by other parties. He held that boundary disputes are resolved by survey and by the operation of s. 117 and that it was most undesirable that whole tenements be struck down by minor encroachment.

Finally, whilst he accepted that existing tenements cannot be "marked out", he believed that s. 18 could be read down so as to provide that, while areas of existing tenements may be physically encroached upon, that is not the "marking out" contemplated by the Act and is permissible to the extent that the boundaries are subject to the excision of existing tenements and to the extent that boundaries may be definitively established only upon survey.

Accordingly, he granted the prospecting licences and dismissed the objections.

PEKO EXPLORATION LTD v. CULLIMORE MANAGEMENT PTY LTD (Kalgoorlie Warden's Court, 5 March 1992)

In this case the applicant initially applied for an exploration licence over a particular area, but when the applicant learnt of forfeiture of an adjoining tenement, made fresh application for a new exploration licence which included that area forfeited and additionally incorporated the area originally applied for. The applicant then foreshadowed with the mining registration division of the Department of Mines that the original application would be withdrawn upon receipt of a favourable recommendation in relation to the second application.

16. Unreported, Full Court of the Supreme Court of Western Australia, 10 July 1987; reported in (1987) 6 *AMPLA Bulletin* 109.
17. [1988] W.A.R. 122; (1988) 7 *AMPLA Bulletin* 143.

It appeared that the second application, whilst over an apparently contiguous area, was in fact cut in two by an existing exploration licence, which initially was shown on the wrong place on the relevant Department map.

Argument focused on whether the fact that the larger application was cut in two was fatal to that application. The Warden distinguished the cases of *CBM Nominees Pty Ltd v. Austwhim Resources NL*[18] and *Reynolds Australia Metals Ltd v. Capricorn Resources Australia NL*[19] on the basis that in both those cases the applicants knew they were applying for discrete areas whereas in the present case the applicant legitimately, albeit mistakenly, believed that it was applying for one area.

In the circumstances the Warden recommended the application for grant and dismissed the objection.

KEAN v. HOMESTAKE GOLD OF AUSTRALIA LTD
(Kalgoorlie Warden's Court, 3 December 1992)

In this case a mining lease was granted over a particular area of land, but subject to the excision to a depth of 30 metres of "Hampton Location 138". Subsequently the special lease which gave rise to the excision of that location expired.

The applicant applied for a prospecting licence covering that excised area on the basis that that land was now open for mining. The underlying mining lease was still in existence.

The Warden referred to *Peko Exploration Ltd v. Jurien Bay Pastoral Co. Pty Ltd*[20] and *Mineral Deposits Ltd v. Hildaglen Pty Ltd*,[21] where the Warden in each of those cases appeared to find against the concept of "strata tenements". The Warden in the present case also noted the comments by Malcolm C.J. in *Re Roberts; Ex parte Western Reefs Pty Ltd v. Eastern Goldfields Mining Co. Pty Ltd*[22] to the effect that the basic scheme of the *Mining Act* 1978 (W.A.) is that there should not be competing mining tenements over the same ground and that the rights conferred by those should be exclusive.

These decisions notwithstanding, the Warden held that no persuasive arguments were advanced as to why he could not grant a "strata tenement" in respect of the first 30 metres above an underlying tenement, and he granted the prospecting licence in this case.

ARIMCO MINING PTY LTD v. TALBOT PTY LTD
(Meekatharra Warden's Court, 15 January 1992)[23]

This case concerned an application for an exploration licence lodged at the Mining Registrar's office at Meekatharra, and an objection thereto on the basis that the application was not lodged at the correct mineral field district registry.

The area applied for was partly in the Wiluna District 53 and partly in the Black Range District 57. Those districts 53 and 57 together constituted the

18. (1990) 9 *AMPLA Bulletin* 62.
19. (1990) 9 *AMPLA Bulletin* 57.
20. (1991) 10 *AMPLA Bulletin* 12.
21. (1991) 10 *AMPLA Bulletin* 14.
22. [1990] 1 W.A.R. 546; (1990) 9 *AMPLA Bulletin* 8.
23. This case has since been the subject of the application for certiorari reported above.

East Murchison Mineral Field. However, the Warden at Meekatharra is the relevant Warden for district 53, and the Warden at Mount Magnet the relevant Warden for district 57.

The application was for a graticular exploration licence comprising six blocks. Two blocks lay in district 53, two lay in district 57, and two straddled the boundary between those two districts.

The objection was based on reg. 95(1) of the *Mining Regulation* 1981. That regulation states that where an application for a mining tenement is made in respect of land situated within more than one mineral field or district, the application is to be lodged with the Warden of the mineral field or district apparently containing the largest portion of the ground applied for.

In this case if one considered the area contained in all six blocks, the largest area was in district 57. However, if one considered only the ground available for mining within those areas applied for, then the largest area was in district 53.

The objector contended that the Warden should consider the whole area of the six blocks falling within each district, and that, on that basis, the application had not been lodged at the correct mineral field district registry.

The applicant contended that failure to comply with reg. 95 was not fatal to the application, not being a regulation which requires strict compliance. The applicant further contended that under the new graticular boundary system, as both full and part graticular blocks count as whole blocks, blocks over boundaries can be treated as belonging to either district. Alternatively, the applicant contended that it is necessary to look at the ground actually available within those blocks.

Finally, the applicant contended that the test to be applied is a subjective one. The uncontested evidence was that the person who lodged the application believed that it should be lodged at the Mining Registrar's office at Meekatharra.

The Warden referred to the fact that ultimately, under reg. 95(2) the Director-General of Mines determines to which mineral field or district an application is to be assigned. He said that this suggested that reg. 95(1) relates simply to lodgment and is only discretionary and not imperative. Accordingly, the applicant determines which registry he or she believes the application should be lodged at, and if the Director-General of Mines determines otherwise, then that application is simply transferred without loss of priority.

The Warden further held that the regulation does not impose a strict test. This would not be logical having regard to the fact that the ultimate decision regarding which mineral field or district the tenement application should be assigned to is one for the Director-General of Mines. Accordingly, failure to comply with reg. 95(1) is not fatal to an application. The Warden held that the registry may decline to accept an application if it clearly does not comply with reg. 95(1), but, once accepted, that application is valid notwithstanding subsequent determination that it should be assigned to a different mineral field or district.

As to the use of the word "apparently" in reg. 95(1), the Warden rejected that this imported a subjective test. He held that the test was an objective one.

The Warden then dealt with how the amount of ground in each district is to be assessed. He noted that the introduction of graticular sections means that an applicant for an exploration licence is now obliged to apply for a block within a graticular system even if only part of the land within that block is available for mining.

Section 57 of the Act provides that the part block shall be deemed to be a full block for all purposes including its area, shape and the surrender of the exploration licence. Further, for the purposes of s. 105(2) the boundaries of the

land the subject of the exploration licence are deemed to be the same as the boundaries of the block.

The Warden rejected the contention that it is only the ground available that is to be considered in determining which mineral field or district contains the greater area of the application. The Warden held that the wording of the relevant regulation simply refers to the ground applied for, and that that ground is the area of the graticular blocks applied for.

The Warden then considered whether one should consider a graticular block straddling two districts as a block which may be allocated to either district or whether one should determine the area of the block falling within each district. The Warden held that it was inappropriate to make calculations regarding the amount of the block falling within each district. This was because it was the whole area of the block that was being considered notwithstanding that only part of that block might be available. He held that where a block falls over a boundary it may be regarded as belonging to either mineral field or district.

It followed that in this case, where two blocks respectively fell within each district, and two blocks straddled both districts, the application could have been lodged at either registry, and the Warden recommended the application for grant.