- Maintaining market price signals by providing a clear policy statement of non-intervention by the Government
- Extending market price signals and consider demand response functionality in the design of the full retail contestability framework
- Facilitate the entry of demand response aggregators
- Improve certainty of use of standby generators
- Enhance the role of the network service providers in facilitating demand response
- Explore the potential for wholesale and retail market solutions

A copy of the full study is available on VENCorp's website: <http://www.vencorp.vic.gov.au>.

WESTERN AUSTRALIA

OBJECTION TO MISCELLANEOUS LICENCE APPLICATION ON ENVIRONMENTAL AND PUBLIC INTEREST GROUNDS, APPLICATION TO DISMISS OBJECTION (SS42, 46A, 92 AND 111A OF THE *MINING ACT* 1978)*

***Striker Resources NL v Benrama Pty Ltd, Bruce and Robyn Ellison* [2001] WAMW 7**

(Perth Warden's Court, Warden Calder SM, 25 May 2001)

Striker Resources NL is the applicant for the grant of a miscellaneous licence for the purposes of constructing a barge landing site, a lay-down area and an access road. Objections were lodged on grounds including that *"the application is not in the public interest in that provisions of Section 111(c)(sic) of the Mining Act 1978 apply."* Particulars of the objection included:

- that the ground applied for is within a proposed national park;
- the failure to consider alternative landing sites and the need for flora and fauna assessments as expressed by CALM; and
- the proposed barge landing site would be located approximately 1.5 km away from the objector's "eco-tourism wilderness resort" and areas of Gumboot Bay used by the objectors extensively for recreational fishing and visitors' activities.

The submissions as to the warden's power to hear the objection

The applicant sought orders dismissing the objection. It contended that the warden when hearing an objection to an application for a miscellaneous licence is not empowered to hear an objection based on the public interest. The applicant:

- relied on comments of Ipp J in *Re: Warden French; Ex-parte Serpentine-Jarrahdale Rate Payers' and Residents' Association*[2] that "the public interest plays no part in the decision of

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* Mark Gerus, Clayton Utz, Perth.

2 (1994) 11 WAR 315 at 328. (*"Re: Warden French"*).

the warden" in prospecting licence applications, a view not departed from in *Re: Warden Calder; Ex-parte Cable Sands (WA) Pty Ltd;*[3]

- relied on comments of Brinsden J in *Tortola v Saladar Pty Ltd and Holloway*[4] which purported to limit the Warden to a consideration of whether the application complied with the strict requirements of the *Mining Act*;
- distinguished the Full Court's decision in *Re Roberts; Ex-parte Western Reefs Limited*[5] as being confined to cases where miscellaneous licence applications conflicted with an existing mining tenement or where an objection was based on mining issues;
- contended that there was no policy nor any discernible intention on the part of Parliament emerging from the *Mining Act* for the warden to consider objections to miscellaneous licences based on environmental considerations; and
- submitted that there is no express power given to the warden to consider the public interest in s111A and he had no role to play in the Minister's exercise of this power as it related to miscellaneous licence applications.

Counsel for the objectors highlighted:

- the doubt expressed by Kennedy J in *Re: Warden French*[6] and Steytler J in *Re Warden Calder*[7] as to the authority of *Tortola*;
- that *Tortola* did not apply to miscellaneous licences by reason of the Full Court's decision in *Re: Roberts*; and
- the reasoning utilized by Ipp J in *Re: Warden French*[8] in relation to mining lease applications (referring to the unqualified right to object and wide ranging notice provisions, which were a strong indication that objections should not be "confined to matters going to the applicant's title"[9]).

It was submitted by counsel for the objectors that that if the warden in hearing an application for a miscellaneous licenses considered that there were public interest grounds that would adversely impact upon the grant, the warden may either refuse the application or advise and report to the Minister to give consideration to the provisions of section 111A.

Warden Calder's decision

Warden Calder detailed the amendments to the relevant provisions of the *Mining Act* since the various decisions of the Supreme Court in order to highlight the scope of each of the decisions.

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2 (1994) 11 WAR 315 at 328. ("*Re: Warden French*").
3 (1998) 20 WAR 343 ("*Re: Warden Calder*").
4 (1985) WAR 195 ("*Tortola*").
5 (1990) 1 WAR 547 ("*Re: Roberts*").
6 at 317.
7 at 354.
8 at 323 and 324.
9 at 327.

The Warden distinguished the comments of Brinsden J in *Tortola* and held that *Re: Roberts* was not limited to cases where a miscellaneous licence is applied for over an existing mining tenement.

The Warden placed considerable importance on the condition setting power under section 46A, as did Steytler J in *Re: Warden Calder,*[10] in relation to preventing or reducing injury or damage to land. He could see no reason why these comments in the context of environmental objections to mining leases should not apply equally to objections to the grant of miscellaneous licenses. Therefore, section 46A was an important indicator that environmental objections and public interest considerations were relevant to the warden's exercise of power to grant a miscellaneous licence.

The Warden considered that he did have a role to play in respect of the operation of the provisions of section 111A. He concluded that in an application for a miscellaneous license a warden could give consideration to and, in an appropriate case, inform the Minister that circumstances exist (or may exist) which may require the Minister to give consideration to the provisions of section 111A. The Warden held that his role in hearing applications for miscellaneous licence applications is a broad one and can extend to objections which go to the public interest and environmental issues.

APPLICATION FOR MISCELLANEOUS LICENCE PARTLY OVER PRIVATE LAND SUBJECT TO A SUBSTANTIAL IMPROVEMENT (section 29(2)(D)) — MARKING OUT OF AREA COVERED BY SEA AND AT EACH EXTREMITY (section 107, r37(1))

Striker Resources NL v Benrama Pty Ltd and Others* [2001] WAMW 20[*]

(Before the Warden in Open Court, Perth; Warden G Calder SM; Delivered 7 September 2001).

The Applicant applied for a Miscellaneous Licence. The ground applied for comprised two parts:

- barge landing site and laydown area ("the Laydown Area") - approximately 150 m x 150 m, the northern boundary of which was at the low water mark of a bay
- access road ("The Striker Access Road") – 50 m in width and approx 3.6 km long, commencing in the north at the southern boundary of the Laydown Area, and ending in the south at the boundary of a proposed National Park.

One of the Objectors was the Lessee of a Crown Lease for land in the vicinity, including a connecting dirt access road ("the Benrama Access Road"). The Striker Access Road intersected the Benrama Access Road at two points.

The Benrama Access Road Constitutes a Substantial Improvement

The Applicant conceded that the Benrama Access Road was private land for the purpose of the *Mining Act 1978* (WA). Section 29(2)(d) provides that except with the consent of the owner and occupier of private land, a mining tenement shall not be granted in respect of private land on

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[10] at 358.

[*] Michael Workman, Lawyer, Subiaco, Western Australia.