electricity in Tasmania, also currently provides this service, overseen by Workplace Standards Tasmania. In the past, Aurora recovered the costs associated with the ESIS through its distribution revenue determination process Data provided in the second reading speech indicate that approximately 17,000 safety inspections are carried out in Tasmania each year, at a cost of around $1.8 million.

VICTORIA

ROLE OF THE MINING WARDEN*

Introduction

There have been Mining Wardens in Victoria since 1855[1] and since these times, this statutory office has operated independently from the executive government and the courts, although their role has historically involved the exercise of judicial functions to deal with encroachments on claims and mining leases, grant injunctions against mining and order the deposit of disputed gold or minerals.[2] Today the role of the Mining Warden may be described as the exercise of administrative functions and powers with some judicial elements.[3] The Warden has some of the powers exercised by Boards appointed by the Governor in Council under the *Evidence Act 1958.* These powers include the ability to summons a person to appear and produce documents and to take evidence on oath. The effect of conferring such powers means that a hearing conducted by the Mining Warden is recognised as a legal proceeding and in this context the Warden is acting in a judicial capacity as a court.[1] The current Mining Warden, has occupied the office since 2000 and describes his role as multifaceted, but essentially composed of four main functions – investigations, referrals from the Minister regarding competing mining activities, dispute settlement between applicants or licensees and disputes involving the Secretary or Department.

Investigations

The Warden's broad investigatory function arises from the ability of the Minister or the Secretary to refer any matter to the Warden for investigation, report and recommendation under s 98 of the *Mineral Resources (Sustainable Development) Act 1990* (the Act). Typically this may involve a referral to the Warden to consider whether or not an applicant for an exploration or mining licence meets the requirements of s 15(6) as a fit and proper person and has the intention to comply with the Act and undertake work with appropriate finance and work program.[2]

For the purposes of an investigation, the Mining Warden, legal practitioners and witnesses appearing before him and the Warden's report to the Minister are subject to the same privileges and immunities that would arise if the matter came before the Supreme Court.[3] The Warden also has the power to make orders for the inspection, custody or preservation of any relevant minerals or to restrain a person from dealing with, or removing minerals from Victoria.[4] Such orders are

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1 *Goldfields Act 1855* 18 Vict 37.

2 Ralph Birrell, *Staking a Claim – Gold and the Development of Victorian Mining Law,* 1998, 74.

3 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 98(2).

1 *Evidence Act 1958* (Vic) s 3, see definitions of 'person acting judicially', 'legal proceeding' and 'court'.

2 During 2005-2006, 26% of all matters investigated by the Mining Warden related to the ability of applicants to satisfy s 15(6). Office of the Mining Warden Annual Report 2005 – 2006, p 2.

3 *Evidence Act 1958* (Vic) s 14, 15, 16 and 21A.

4 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 99(1)(c)(d).

capable of being enforced as if they were orders made by the Magistrates' Court in a civil proceeding.

In *John Pennington Morgan and Philip Robert Taylor v Kevin Ryan Mining Warden and the State of Victoria & Ors*[5] the court considered the scope of the Mining Warden's powers of investigation in the context of a complaint to the Minister concerning a joint venture and the activities and management of a gold mine. The plaintiff argued that the Warden did not have jurisdiction because the inquiry involved a complaint about a commercial dispute which was outside the scope of the Warden's powers under s 108 of the Act.[6] Further, the plaintiff argued that the Warden's powers were not unfettered and there must be a nexus between the subject matter for investigation and the operation and administration of the Act.[7]

The defendant argued that this case was an example of the administration of an industry by means of a public act and a broad meaning should be adopted as to the matters which could be referred to the Mining Warden. Provided that the reference by the Minister to the Warden was exercised bona fide and for the purpose for which it was given, the Warden's power should not be restricted as this would in effect restrict the powers of the Minister.[8] The court adopted the view that the Minister, and through him the Mining Warden, had broad powers associated with the regulation of the mining industry, particularly on Crown land. The exercise of such powers could include considerations of the proper management and operation of the mine which could be relevant to the renewal, grant or refusal of future mining leases.[9] However Mr Justice Coldrey went further to say that the Minister's role also extended to ensuring that mining operations created or maintained an environment conducive to investment.[10] In this context issues which may be interwoven with a commercial dispute do not deprive the Minister of the power to refer a matter to the Mining Warden.

In an investigation, the Mining Warden will advise an applicant that a referral has been made and it typically includes the gathering of information from public sources including ASIC and other agencies and a site visit. The Warden may also summons a person or agency to appear before him and bring all relevant documents that may be in their possession. Usually such a request results in an interview rather than a formal hearing. Where a hearing is conducted, evidence is usually taken on oath but the Warden is not otherwise bound by the rules of evidence and the rules of natural justice apply.[11]

The rules of natural justice were tested in *Creswick Mining Resources NL & Ors v Kevin Ryan Mining Warden*[12] where the existence of a file note by the Mining Warden that suggested the mining licences should not be granted was not sufficient to establish bias that precluded the Warden from conducting a hearing into the matter. The file note merely established that the Warden had formed a view on a prima facie basis that for the time being a licence ought not to be granted and that it was his duty to say so and advise the Minister.[13]

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5 Supreme Court of Victoria (unreported, Coldrey J), 30 August 1991.
6 Ibid, 5.
7 Ibid, 4.
8 Ibid, 9.
9 Ibid, 11.
10 Ibid.
11 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 100(1).
12 Supreme Court of Victoria, Practice Court (unreported, Southwell J) 13 June 1995.
13 Ibid, 2.

Ministerial Referrals – competing activities

The Mining Warden may also receive a referral under s 25A of the Act regarding an application to the Minister for a waiver of an exploration licensee's consent in relation to a mining licence application over land that is covered by an exploration licence. In 2005-2006, 8% of all new matters related to a recommendation under s 25A.[14]

Dispute Settlement – between applicants/licensees/landowners

The Mining Warden may also undertake a dispute settlement role in matters between licensees or applicants which may relate to the existence of a licence or the boundaries covered by a licence or application.[15] A dispute between a licensee and a landowner or occupier often involve land access issues for mining purposes and compensation issues. In 2005-2006, 20% of all matters related to such disputes[16] and the majority were successfully resolved with the assistance of the Mining Warden.

Disputes Involving the Secretary/Department

The Mining Warden also has a role that he describes as similar to the Ombudsman, in that he can investigate a dispute between a member of the public, an applicant or licensee with the Secretary or employee of the Department of Primary Industries arising under the Act. In 2005-2006, 16% of these disputes related to proposals by the department to cancel licences.[17] In such matters the Warden has the power to require a departmental employee to produce any document that is in the possession or control of the department and provide such other assistance as the Warden may require.[18]

Discontinued Investigations

The Warden is required by the Act to discontinue an investigation into a dispute or other matter referred to him, if the dispute or referral is voluntarily withdrawn, or it appears that the person or body that referred the matter to the Warden is not directly or substantially affected by the dispute, or where the dispute appears to be the subject of proceedings before a court or tribunal.[19] However, in 2005-2006 only one referral was withdrawn and in four other disputes, (16% of all matters) the Mining Warden determined that he did not have jurisdiction on other grounds.[20] In two of these latter disputes, the Warden considered that the nature of the dispute did not relate to the administration of the Act but rather commercial issues between the parties. One dispute referral failed to establish a prima facie case for the existence of a dispute while another dispute related to a Ministerial decision which cannot be reviewed by the Mining Warden.[21]

Conclusion

While the number of disputes that have been referred to the Mining Warden have remained relatively constant in number since 2000, he has observed that there is a trend towards an increasing number of disputes relating to the use of private and Crown land for mining purposes but fewer disputes involving small miners which the Mining Warden believes is due to their smaller representation in the mining industry. Also the greater degree of scrutiny given to mining

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14 Office of the Mining Warden Annual Report 2005-2006, 1.
15 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 4 definition of 'dispute'.
16 Op cit 17, 2 - 5.
17 Op cit 17, 2.
18 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 99(1)(e).
19 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 103.
20 Op cit 17, 3-5.
21 *Mineral Resources (Sustainable Development) Act 1990* (Vic) s 4 definition of 'dispute'.

applications and performance of licensees has resulted in increased work for the Mining Warden that is expected to continue well into the future.

WIND ENERGY PROVOKES NIMBY ATTACK*

Perry v Hepburn Shire Council [2007] VCAT 1309 (Planning & Environment List)

The Issues

For the first time in more than five years, the Victorian Civil and Administrative Tribunal (VCAT) has had occasion to consider a proposal for the development and operation of a wind energy facility. VCAT has the primary court/tribunal responsibility in planning matters under the *Planning and Environment Act 1987* (Vic). In a time of increasing pressure to abandon traditional energy sources in favour of renewable supplies, VCAT's decision in *Perry v Hepburn Shire Council* serves as a timely reminder of the planning considerations for wind energy generation, and issues commonly raised both in support of, and opposition to, such proposals.

The Hepburn Renewable Energy Association (Association) devised a proposal to develop and operate Australia's first community-owned wind farm, to be situated at Leonard's Hill, approximately 10 kilometres south of Daylesford in central Victoria. Hepburn Shire Council (Council) granted the Association a permit to construct two wind turbines on the site, designed to produce up to 14,000 megawatt hours of energy per year, or enough to service approximately 2,000 homes. The Association's proposal opposed by residents and property owners in the area, who argued that construction and operation of the facility would detrimentally affect the Leonard's Hill site and their enjoyment of their nearby properties. Their objections brought the matter to VCAT for review of the Council's decision to issue a planning permit.

VCAT commented that the issues raised by those opposing the Association's proposal were those commonly raised in opposition to the construction and operation of such facilities, namely:

- whether projected greenhouse and wind energy benefits would be achieved;
- whether the visual impact would be acceptable for the area's residents and tourists;
- whether noise emissions from the turbines would be acceptable in terms of resident amenity;
- whether the turbines would be too close to existing dwellings and roads with respect to shadow flicker, blade glint and safety;
- whether the mortality and risks to existing animals in the area would be acceptable; and
- whether the presence of the turbines would impact on traffic and aviation safety.[1]

VCAT heard argument and expert evidence from each side on these issues, including submissions from acoustic engineers, environmental scientists and a representative from Sustainability Victoria. Much of this evidence centred on the potential visual and aural impact of the proposed facility on local residents. These aspects were considered generally, and with specific reference to 24 dwellings identified as those closest to the proposed facility. Other discussion of note included the potential impact on local wildlife, including bats and threatened or protected bird species.

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* Peter Rawling and Scott Fitzgibbon, Macpherson+Kelley Lawyers.

1 *Perry v Hepburn Shire Council* [2007] VCAT 1309, paragraph 16 per Senior Member Baird and Member Potts.