

JUDICIAL REVIEW OF WARDENS' DECISIONS

By Daryl R. Williams*

Under the Mining Act 1978-1982 of Western Australia, the warden and the warden's court have significant functions, both administrative and judicial, in relation to the granting and forfeiture of rights to prospect and mine and in relation to the determination of issues arising in the course of prospecting and mining operations. This paper briefly addresses the subject of the review of acts and decisions of the warden and the warden's court by the Supreme Court of Western Australia.¹ The term 'judicial review' is used to refer to the prerogative remedies of *mandamus*, *certiorari* and prohibition and the remedies of declaration and injunction. It does not ordinarily encompass review by way of appeal. However, some comments on appeals are offered.

APPOINTMENT OF WARDENS AND ESTABLISHMENT OF WARDENS' COURTS

The Act authorizes the constitution and re-constitution of the State into mineral fields and of mineral fields into districts.² There are presently 25 mineral fields, of which 8 are divided into districts.³ Each mineral field has a mining registrar.⁴ The Act authorizes the appointment of a person holding office as a stipendiary magistrate as a warden of mines.⁵ Most wardens in fact service several mineral fields.

Wardens' courts may, under the Act, be established at places in the State where they are thought necessary and mineral fields or districts may be assigned to the different wardens' courts.⁶ At present there are 16 wardens' courts.⁷ Each is a court of record.⁸ The court is held before the warden at

* LL.B. (W.A.), B.C.L. (Oxon.), Q.C., Barrister, Western Australia. The writer records his appreciation to Mr. A. A. Head, LL.B., Research Officer of the Law Reform Commission of Western Australia, for suggestions and for commenting on a draft of the paper. Neither Mr. Head nor the Commission is to be taken as necessarily concurring with any view expressed.

1 Generally see—Lang A.G., 'The Mining Warden's Discretion and Judicial Controls over its Exercise' (1970) 2 *Aust. Current Law Reviewed* 142; Lang A.G. and Crommelin M., *Australian Mining and Petroleum Laws* (1979) ch. 11; Franklyn E.M., Q.C., 'Supreme Court Procedures and Practice in Mining Law', a paper in the 'Mining Law Course 1981' of the Law Society of Western Australia; Hunt M.W. and Lewis M.A., *Mining Law in Western Australia—a Guide* (1983) ch. 15; Franklyn E.M., Q.C., 'Judicial Review of Warden's Decisions', a paper in 'The Practice of Mining Law in Warden's Courts' course (1984) of the Law Society of Western Australia.

2 S.16.

3 Hunt and Lewis, *op. cit.*, Appendix F, 206; *Law Almanac* 32-33.

4 Most mining registrars in fact act as registrar of several fields.

5 S.13(1). Other 'fit and proper persons' may also be appointed (s.13(2)). Appointments of Mines Department officers have been made.

6 S.127(1).

7 *Supra* n.3.

8 S.128. It is also an inferior, as distinct from a superior court. As to the significance of the warden's court being a court of record and an inferior court, see Crawford J., *Australian Courts of Law* (1982) 111-112; and *Halsbury's Laws of England* vol. 10, paras. 709-714, 319-322.

such times as he appoints.⁹ In practice, the warden's court in Perth sits fortnightly, while those in country towns sit monthly or at longer intervals. Each warden's court has jurisdiction throughout the State, but proceedings in relation to a mining tenement must be brought in the warden's court to which is assigned the mineral field or district in which the tenement is situated.¹⁰ If the warden is satisfied that any proceeding in his court may more conveniently be dealt with in another warden's court, he may make appropriate orders whereby the proceedings are heard in that court.¹¹ Orders are commonly made enabling proceedings in courts at distant centres to be removed to Perth for hearing.

It is important, for present purposes, to distinguish between the acts and decisions of wardens, on the one hand, and the acts and decisions of wardens' courts, on the other hand. The Act distinguishes between the warden, acting as a warden of mines,¹² and the warden's court constituted for a mineral field or district.¹³ However, there appears, regrettably, to be some confusion as to the distinction in some provisions of the Act.¹⁴ To examine the scope of judicial review, it is necessary to delineate the functions of the warden and the jurisdiction of the warden's court.

FUNCTIONS OF WARDEN

Under the Mining Act the warden of mines has a variety of functions. The two principal functions are, first, determining whether or not a right in relation to mining should be granted or forfeited and, secondly, recommending to the minister whether or not a right in relation to mining should be granted or forfeited. The difference between the power of determining that a right be granted or forfeited and that a grant or forfeiture of it be recommended is of significance in relation to judicial review of a warden's decisions. The powers of the warden of mines are reviewed in the following paragraphs with a view to identifying the warden's powers of determination as distinct from those in which his power is only to make a recommendation to the minister.

A warden, among other officials, may issue a Miner's Right.¹⁵ The warden is also empowered to grant a written permit to enter private land to search for any mineral or to mark out a mining tenement, on being satisfied that the relevant application is made in good faith.¹⁶

A warden may grant a prospecting licence under the Act.¹⁷ In relation to an application for a prospecting licence, the warden of the mineral

9 S.130.

10 S.132(2).

11 S.132(3) and (4).

12 See interpretation of 'warden' in s.8(1).

13 See interpretation of 'warden's court' in s.8(1).

14 See 83-85 *infra*.

15 S.20(1). The warden also has an ancillary power to direct that the holder of a Miner's Right or mining tenement may, without the consent of the occupier, enter Crown land under cultivation or used for other specified purposes to prospect, explore or mine (s.20(5)). The warden must, however, be satisfied that the land is *bona fide* required for mining purposes and that compensation to the occupier has been agreed upon or assessed (s.20(6)).

16 S.30.

17 S.40.

field or district in which the relevant land is situated is designated as the person with whom the application and any objection to it is to be lodged.¹⁸ The warden may require specified information in relation to the application to be furnished to him.¹⁹ The application is 'heard by the warden in open court'.²⁰ His power is to grant a prospecting licence with or without conditions or to refuse it.²¹

A warden has, under the Act, a power to grant the holder of a prospecting licence, exploration licence or mining lease, in respect of any land that is open for mining or is the subject of a mining tenement, any of a variety of licences, generically referred to as miscellaneous licences.²² A miscellaneous licence may only be granted for a purpose directly connected with mining operations.²³ The warden is empowered to impose terms and conditions on the licence.²⁴ An application for a miscellaneous licence is also heard by the warden in open court.²⁵

The warden does not have power to grant an exploration licence, a mining lease or a general purpose lease. An application for such a licence or lease or an objection to the grant of such a licence or lease is lodged with the warden of the relevant mineral field or district.²⁶ The application is heard by the warden in open court and an objector is entitled to be heard.²⁷ As soon as practicable after the hearing the warden must transmit to the minister the notes of evidence and any maps or documents referred to and his report recommending the granting or refusal of the licence or lease.²⁸ The warden may not recommend the grant of an exploration licence unless he is satisfied that the applicant is able effectively to explore the land the subject of the application.²⁹ Receipt of the recommendation of the warden by the minister is a condition precedent to the minister's power to grant an exploration licence,³⁰ mining lease³¹ or general purpose lease.³²

The Act makes special provision for the grant of prospecting licences for gold or precious stones within the area of prospecting licences³³ and exploration licences.³⁴ The role of the warden is the same in each case. The applicant is required to give notice to the holder of the prospecting licence or exploration licence,³⁵ who may object.³⁶ If he does not object, the warden

18 Ss.41(1)(e) and 42(2).

19 S.41(3).

20 S.42(1).

21 S.40(1); and as to conditions, see s.46.

22 S.91. The heading to Division 5 of Part IV of the Act introduces the description 'miscellaneous licences'.

23 S.91(3).

24 S.91(4).

25 Ss.42(1) and 92.

26 Exploration licence, ss.58(1)(d) and 59(2); mining lease, ss.74(1)(d) and 75(2); general purpose lease, ss.74(1)(d), 75(2) and 90.

27 S.59(1) and (2), s.75(1) and (2), and s.90.

28 Ss.59(3), 75(3) and 90.

29 S.57(3).

30 S.57(1).

31 S.71.

32 S.86(1).

33 S.56A.

34 S.70.

35 Prospecting licence, s.56A(2); exploration licence, s.70(2).

36 S.56A(4); s.70(4).

may grant the special prospecting licence,³⁷ with or without conditions.³⁸ If the holder of the prospecting licence or exploration licence does object, the warden is required to obtain a report from the Director, Geological Survey as to whether prospecting for gold or precious stones or both on the relevant land could be carried out without detriment to the prospecting or exploration carried on by the tenement holder.³⁹ After hearing the objection, the warden may refuse the application for the special prospecting licence or he may recommend the application to the minister.⁴⁰ In relation to these special prospecting licences the warden has mixed powers of determination and recommendation.

As with the granting of rights in relation to mining, the warden has the power of ordering forfeiture of some types of licences and the power only of recommending to the minister that other licences and leases be forfeited. The warden has no function in relation to the forfeiture of an exploration licence, a mining lease or a general purpose lease except in respect of breach of expenditure conditions.⁴¹

The warden has power to order the forfeiture of a prospecting licence and a miscellaneous licence on application by any person, including the minister or an authorized officer of the department.⁴² The warden may not make the forfeiture order unless he is satisfied that the requirements of the Act in relation to the licence have not been complied with in a material respect and that the matter is of sufficient gravity to justify the forfeiture.⁴³ In lieu of ordering forfeiture, the warden may, as he thinks fit in the circumstances of the case, impose a fine on the holder of the licence.⁴⁴ He also has power to cancel an order for forfeiture of a prospecting licence or miscellaneous licence for any cause that he deems sufficient and either with or without conditions.⁴⁵

In relation to an exploration licence, a mining lease or a general purpose lease, any person may apply to the warden for forfeiture where the requirements of the Act in relation to expenditure conditions are not being complied with.⁴⁶ The application is to be heard in open court.⁴⁷ If the warden finds that the tenement holder has failed to comply with the requirements referred to he is empowered to recommend forfeiture, to impose a fine not exceeding \$500 or to dismiss the application.⁴⁸ The warden may not recommend forfeiture unless he is satisfied that the non-compliance is, in the circumstances of the case, of sufficient gravity to justify the

37 S.56A(3); s.70(3).

38 S.56A(6); s.70(6).

39 S.56A(4); s.70(4).

40 S.56A(5); s.70(5). Where the warden refuses the application, the applicant may appeal to the minister (*ibid.*).

41 Ss.63A, 96A, 97 and 98.

42 S.96(1). The Act does not require that the application be heard in open court. However, the Mining Regulations 1981 contemplate a hearing (regs. 48-49 and forms 15 and 33).

43 S.96(2); and see *Pacminex (Operations) Pty. Ltd. v. Australian (Nephrite) Jade Mines Pty. Ltd.* (1974) 7 S.A.S.R. 401.

44 S.96(3).

45 S.96(8)-(9).

46 S.98(1).

47 S.98(3).

48 S.98(4).

forfeiture.⁴⁹ As soon as practicable after hearing the application the warden must forward to the minister the notes of evidence, with a report and the warden's recommendation, if any. The minister may before acting on a recommendation require the warden to take further evidence or rehear the application.⁵⁰ The tenement will not be forfeited for non-compliance with expenditure conditions if the holder satisfies the warden or the minister that the non-compliance was occasioned by a strike.⁵¹ The warden's powers in relation to the forfeiture of an exploration licence, a mining lease and a general purpose lease appear to involve a mix of powers of determination and powers of recommendation.

The Act provides for a holder of a mining tenement to be granted exemption, either totally or partially, from prescribed expenditure conditions.⁵² Where the amount in respect of which exemption is sought exceeds 1/12th of the amount required to be expended in any one year in respect of the tenement, the application must be heard by the warden in open court.⁵³ After the time allowed for lodging objections,⁵⁴ the warden is required to receive, in open court, evidence in support of the application and any objection and to forward, as soon as practicable after the hearing, to the department his notes of evidence and recommendation for the decision of the minister.⁵⁵

Where a dispute arises between a licensee or permittee under the Petroleum Act 1967 and any person authorized to mine or search for minerals under a mining tenement or other authority under the Mining Act as to operations within the area of the licence or permit, either party or both may refer the matter to the warden for inquiry and report.⁵⁶ On receipt of the warden's report the minister may make an order and give directions in the public interest.⁵⁷

JURISDICTION OF WARDENS' COURTS

The Act confers on a warden's court 'jurisdiction to hear and determine all such actions, suits and other proceedings cognizable by any court of civil jurisdiction as arise in respect of' a wide range of specified matters 'and generally all rights claimed in, under or in relation to any mining tenement or purported mining tenement, or relating to any matter in respect of which jurisdiction is under any provision of this Act conferred upon either the warden's court or the warden'.⁵⁸ The reference to the jurisdiction, not only of the warden's court but of the warden, is potentially misleading.⁵⁹ It is submitted that it is not intended thereby to confer on the warden's court jurisdiction which is, under the Act, properly exercisable by the warden ac-

49 s.98(5).

50 S.98(6).

51 S.98(7).

52 S.102(1).

53 S.102(5).

54 See reg. 55.

55 Reg. 56.

56 S.159(1).

57 S.159(2).

58 S.132(1).

59 Compare Franklyn, *op. cit.* (1984), 2.

ting as warden of mines. The intention is to give the warden's court jurisdiction to hear proceedings relating to claims of right arising from matters that the warden deals with under the Act. The warden sitting as the warden's court could not, therefore, hear an application for grant or forfeiture of a mining tenement. That is a matter for the warden sitting as the warden of mines. The warden's court could, however, entertain proceedings relating to a dispute as to the rights arising out of the grant or forfeiture of a mining tenement. The very terms in which the general jurisdiction is conferred on the warden's court—'actions, suits and proceedings cognizable by any court of civil jurisdiction'—make it plain that the court exercises a jurisdiction which is concurrent with that of the Supreme Court⁶⁰ and, in relation to some proceedings, concurrent with that of the District Court of Western Australia⁶¹ and, in relation to some proceedings, concurrent with that of the Local Courts.⁶²

In addition to the general jurisdiction, the warden's court has particular jurisdiction conferred on it under the Act in respect of the determination of compensation. Compensation is payable in a variety of circumstances. The most common situation is in relation to mining activities on private land.⁶³ The owner and occupier of land in respect of which a mining tenement has been granted are entitled to compensation for all loss and damage respectively suffered or likely to be suffered by them as a result of the grant of the mining tenement or the exercise of the rights conferred by the grant.⁶⁴

The Warden's court determines the amount of compensation payable to the owner and occupier upon the application of the owner, occupier or tenement holder.⁶⁵ In determining compensation the warden's court must give consideration to specified matters.⁶⁶ It may order the tenement holder to undertake restoration of the surface of the land.⁶⁷ If the warden's court considers it impracticable or inexpedient to determine the full compensation payable, it may make a determination relating to a specified period or in respect of part of the total claim.⁶⁸

CLARIFICATION OF FUNCTIONS OF WARDEN AND WARDEN'S COURT

The Act envisages that the warden's court will exercise judicial func-

60 See Supreme Court Act 1935-1982, (W.A.) s.16.

61 See District Court of Western Australia Act 1969-1982, s.50.

62 See Local Courts Act 1904-1982, (W.A.) ss.30, 31, 32, 99, 100, 101 and 103.

63 Part VII, ss.123-126.

64 S.123(2). The tenement holder must pay or tender to the owner or occupier of private land or make an agreement with him as to payment of the compensation before the tenement holder may commence mining on the land (s.35(1)). The nature of the loss and damage for which compensation is payable is particularized in the Act (s.123(4)). There are particular provisions in relation to pastoral leases (ss.123(7) and (7a) and 125).

65 S.123(3). The warden's court may also determine the amount of any additional compensation payable in respect of damage not covered by a determination (s.123(6)).

66 S.124(1) and (3).

67 S.124(2).

68 S.123(8).

tions. The determination of the respective rights and liabilities of disputing parties in relation to matters relevant to mining is properly a judicial task.⁶⁹ The determination of compensation for loss or damage is also a familiar judicial function. The scheme of the Act appears, in general, to be that the warden as warden of mines will carry out inquiries and administrative functions not involving a determination of rights or liabilities between parties.⁷⁰ The fact that the warden as warden of mines sits in open court and has some of the powers and duties of a court does not of itself mean he exercises judicial functions.⁷¹

There is, regrettably, a number of provisions of the Act where either the drafting is defective or the division of functions between the warden as warden of mines and the warden's court has not been maintained consistently.

Provisions of the Act appear, by their terms, to confer power to determine compensation, not on the warden's court but on the warden. The Act gives the warden, as warden of mines, a power to direct that the holder of a Miner's Right or mining tenement may, without the consent of the occupier, enter Crown land which is under cultivation, or used for other specified purposes, to prospect, explore or mine.⁷² The warden must, however, be satisfied that the land is *bona fide* required for mining purposes and that compensation to the occupier has been 'agreed upon or assessed and settled by the warden under this Act'.⁷³ It is submitted that this latter reference to 'the warden' is simply a drafting error and should be a reference to the warden's court. This is supported by related provisions in the same section which contemplate determination of compensation by the warden's court.⁷⁴ There is, it is submitted, a similar drafting error in relation to the provisions of the Act which confer on the warden, rather than the warden's court, power to assess and settle compensation payable to an owner or occupier of land for damage resulting from a Departmental survey, aerial, geological, geophysical or geochemical, of any land.⁷⁵ This submission is supported by the provisions of the section itself which contemplate assessment and settlement of compensation under Part VII of the Act.⁷⁶ Part VII confers the power of determination of compensation on the warden's court.

The Act provides for a person claiming an interest in a mining tenement to lodge in the department or in the office of the warden for the relevant mineral field or district a caveat forbidding the registration of any transfer or other instrument affecting the mining tenement or interest.⁷⁷ In general terms, a caveat lapses and ceases to have effect upon 'the warden'

69 As to the concept of judicial power, see *Shell Co. of Aust. Ltd. v. F.C. of T.* [1931] A.C. 275, 296-297 per Lord Sankey L.C.; *Attorney-General (Commonwealth) v. R. and the Boilermakers' Society of Australia* [1957] A.C. 288.

70 Aspects of these functions, may, however, involve the warden acting judicially (see 85 *infra* and n.83 *infra*).

71 *Shell Co. of Aust.* case, n.69 *supra*.

72 S.20(5); see n.15, *supra*.

73 S.20(6).

74 S.20(5b) and (5c).

75 S.115(1) and (3).

76 S.115(3).

77 S.121(1).

ordering its removal.⁷⁸ An order for removal of a caveat may involve a determination of the respective rights of the caveator and the tenement holder or of competing caveators.⁷⁹ Having regard to the scheme of the Act, and in particular the division of functions between the warden of mines and the warden's court, it is submitted that in such circumstances an order should only be made by the warden's court, not by the warden acting as warden of mines, and that the Act should be amended accordingly.

There are other provisions which appear to be inconsistent with what is perceived as the scheme of the Act.⁸⁰ In a submission to the Hunt Committee of Inquiry into Aspects of the Mining Act in 1983, AMPLA noted the confusion in the Act and the Regulations between the warden's court, the warden acting judicially and the warden acting administratively.⁸¹ The Committee adopted the AMPLA recommendation that the Act and Regulations should be amended to clarify the distinction between the warden's court and the warden on the basis that references to the warden mean the warden acting administratively and references to the warden's court include the warden sitting judicially.⁸² There may be difficulty in applying that principle strictly since the warden in carrying out some functions in relation to applications for the grant or forfeiture of tenements, traditionally functions of the warden and not the warden's court, is required to act judicially.⁸³ The Act requires review to eliminate the confusion and inconsistencies that presently exist. It is submitted that the correct basis for delineation of the roles of the warden and the warden's court is by reference to the functions. Powers to grant or forfeit rights in relation to mining and powers to recommend grant or forfeiture of rights in relation to mining and any other function involving inquiry or report should be given to the warden. The court should have jurisdiction to make final and binding determinations of rights or liabilities of parties in dispute and as to compensation payable under the Act.

APPEALS FROM DECISIONS OF WARDENS' COURTS

Any party aggrieved⁸⁴ by any final judgment, determination or decision of a warden's court may appeal to the Supreme Court, subject to excep-

78 S.122(1)(a).

79 Different considerations might apply where the basis of the order is a procedural defect. The granting of leave for the lodging of 'successive caveats' (s.121(4)) is an administrative function appropriately conferred on the warden (see Hunt and Lewis, *op. cit.*, 113-114). (In the legislative context, use of the term 'successive caveats' is less than explicit.)

80 Examples are s.134(1)(d)—the warden's court has power to make orders for the determination of objections to applications; s.143(1)—a warden grants an injunction; s.145—a judgment of a warden is contemplated; s.146(1)—the warden may in proceedings under the Act reserve a question of law for the opinion of the Supreme Court; and s.146(7)—the warden may make an injunction, appoint a receiver, or order that money be paid into court.

81 Submission (September 1983) Section 4.

82 Report sub-s.4.7, 64.

83 See *Ex parte Keogh; Re Heffernan and Driscoll* [1961] N.S.W.R. 585, 587 *per* Owen J. and 588 *per* Jacobs J.; and *R. v. Brooks; Ex parte Hayes* [1965] Qd.R. 441, 447-448 *per* Hanger J.

84 See *Attorney-General of The Gambia v. N'jie* [1961] A.C. 618, 634 *per* Lord Denning.

tions.⁸⁵ The Act provides that there is no right of appeal in three situations. The first is where in proceedings before the warden's court the parties agreed that the decision of the warden's court would be final.⁸⁶ The second situation is where the matter is one in respect of which the Act provides that the determination of a warden or mining registrar is final and conclusive and not subject to appeal.⁸⁷ This refers to the situation where the warden, or in his absence the mining registrar, hears a dispute, which would otherwise have to be heard by the warden's court, in a summary way without formal proceedings at the request of the parties.⁸⁸ The third situation where there is no right of appeal is stated to be 'in respect of any decision, order or recommendation of the warden or of the minister upon any application for a mining tenement, the forfeiture thereof, or exemption from expenditure or other conditions'.⁸⁹ It is submitted that since no decision, order or recommendation referred to in the third situation is or could be an act of the warden's court, this particular provision is unnecessary.

The nature of the review on appeal warrants comment. The Act provides that where the grounds of appeal include any matter of fact, the Supreme Court may order, or the parties to the appeal may agree, that the appeal shall be by way of rehearing before a judge.⁹⁰ Otherwise, the Act provides, every appeal is to be heard and determined upon the proceedings in the warden's court.⁹¹ Although not expressly provided for, this second category of appeal is, it is submitted, also to be heard by a judge rather than the Full Court.⁹²

Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a fresh hearing.⁹³ It is submitted that that is what is intended in respect of appeals from the warden's court involving issues of fact — where the Supreme Court so orders or the parties agree.⁹⁴ The direction that all other appeals shall be heard and determined upon the proceedings in the warden's court is capable of more than one interpretation. It may refer to an appeal in the strict sense or an

85 S.147(1). As to the nature of a final decision, see *Hall v. The Nominal Defendant* (1966) 117 C.L.R. 423; *Carr v. Finance Corporation of Australia Ltd.* (1981) 55 A.L.J.R. 398. The Act expressly provides that certain determinations of the warden's court are final determinations for the purposes of s.147(1) (ss.20(5c) and 123(9)). It is essential, in order that the Supreme Court may hear and determine the appeal, that the warden has made a valid determination (*Sykes v. Collins* [1971] A.L.R. 672). If the determination of the warden is not valid, procedure by way of prerogative writ or for declaratory relief should be used.

86 S.151(a).

87 S.151(c).

88 S.135. Presumably the reference in s.134(5) to the warden is necessary only because of the jurisdiction conferred on the warden under s.135. It is not readily apparent why the summary jurisdiction could not have been conferred on the warden's court and, in the absence of the warden, the mining registrar as delegate of the warden's court.

89 S.151(c).

90 S.148(1).

91 S.148(2).

92 Rules of the Supreme Court 1971 Order 65 rule 6.

93 *Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd.* (1976) 135 C.L.R. 616, 621 per Mason J.

94 Compare Franklyn, *op. cit.* (1984) 3.

appeal which is by way of rehearing but does not involve a fresh hearing. On an appeal strictly so-called the question is whether the decision of the court from which the appeal is brought was right on the materials which that court had before it⁹⁵ and the law applied is the law at the time of the decision appealed from.⁹⁶ A direction that an appeal is to be by way of rehearing is, in the absence of indications that a fresh hearing is to be undertaken, often construed as not involving a fresh hearing.⁹⁷ Instead the appellate court considers for itself the issues of fact that the trial court had to determine and the effect of the evidence the latter heard as appearing in the record of the proceedings applying the law at the time of the appeal.⁹⁸ The powers of the Supreme Court in hearing the second category of appeal from the warden's court do not include a power to receive further evidence.⁹⁹ On the other hand, there is a wide range of powers as to the orders that can be made on the appeal.¹⁰⁰ In the circumstances, it is submitted that the intention is that appeals which are not by way of fresh hearing should be by way of rehearing in the other sense. The decision of the Supreme Court would be made on the proceedings before the warden's court but applying the law at the time of the appeal.

JUDICIAL REVIEW REMEDIES

The principal remedies that can be sought from the Supreme Court to review administrative decisions are, first, the prerogative writs of *mandamus*, *certiorari* and prohibition, and, secondly, a declaration or an injunction. While it is not proposed to consider the nature or scope of the remedies,¹⁰¹ a summary description of the remedies is offered.

Mandamus is a writ issued by the Supreme Court under which the respondent is directed to perform a public duty. *Mandamus* is a discretionary remedy and will readily be refused where an alternative remedy is available. It is only available to a person with a specific interest in the performance of the duty in question. *Certiorari* is a writ under which the official record of a decision of the tribunal is removed into the Supreme Court where the decision is quashed. Prohibition is another writ issued by the Supreme Court. By it a tribunal is restrained from doing something which it is about to do or from continuing a course of action already commenced which is beyond its powers. Prohibition is in substance a remedy to prevent the tribunal exceeding its powers. *Certiorari*, on the other hand, is a remedy available to quash a decision which is beyond power and available also where the record of the proceedings before the tribunal displays an

95 *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (1931) 46 C.L.R. 73, 107 per Dixon J.

96 *Ibid.* at 110-111 per Dixon J.

97 *Da Costa v. Cockburn Salvage & Trading Pty. Ltd.* (1970) 124 C.L.R. 192, 208-209 per Windeyer J.; *Edwards v. Noble* (1971) 125 C.L.R. 296, 304 per Barwick C.J.; *Builders Licensing Board* case, n.93, *supra*, 619 per Mason J.

98 *Da Costa's* case n.97 *supra*, 108; *Builders Licensing Board* case, n.93 *supra*, 620 per Mason J.

99 S.149.

100 *Ibid.*

101 For a useful summary see Law Reform Commission of Western Australia 'Working Paper on the Judicial Review of Administrative Decisions, Project No. 26—Part II' (1981). A number of texts on administrative law is listed in the paper (at 10).

error of law. The issue of each of the writs is within the discretion of the Supreme Court. They will only be issued on the application of a person whose rights are or will be at risk. Prohibition may be granted to a person not a party to the relevant proceedings. In relation to *certiorari* the court will take into account the conduct of the applicant.

When the Supreme Court makes a declaration, it declares the rights or liabilities of a person. Of itself the declaration does not compel performance of a duty or restrain the interference with a right. This is also a discretionary remedy and a declaration will generally not be made unless circumstances exist which call for it to be made. An injunction is usually an order to restrain the respondent from interfering with a proprietary right of the applicant. In some cases an injunction is made to order the performance of an act.

The law relating to the prerogative writs is complex and fraught with technicalities. The procedure for obtaining a prerogative writ is quite different from that for obtaining a declaration or an injunction and regrettably it is not possible to obtain a declaration and a prerogative remedy in the same proceedings. The choosing of the remedy to be sought is therefore often crucial. The Law Reform Commission of Western Australia has been asked to report on the principles and procedure which should apply in Western Australia in relation to the judicial review of administrative decisions by the Supreme Court and by way of appeal. The Commission has published a working paper on the part of the project dealing with judicial review by the Supreme Court.¹⁰² The discussion in that paper applies to the judicial review of decisions of the warden and the warden's court. Procedural reform is urgently required.¹⁰³

JUDICIAL REVIEW OF DECISIONS OF WARDEN

The Act provides for appeals from actions of the warden as warden of mines only in limited circumstances, and in those circumstances the appeal is not to a court but to the minister.¹⁰⁴ The policy of the Mining Act is that wardens' actions should not be subject to an appeal to a court. There is therefore little scope for review of the actions of the warden on their merits. The judicial review remedies therefore provide the major avenue for challenging the decisions of the warden.

An erroneous finding of fact disclosed in reasons for a warden's determination or in a report accompanying a recommendation is generally not susceptible to judicial review. However, where it can be suggested that a finding of fact is unsupported by any evidence at all, courts treat the issue

¹⁰² *Op. cit.*, n.101 *supra*.

¹⁰³ The W.A.L.R.C. working paper sets out reforms effected in other jurisdictions (ch. 6).

¹⁰⁴ S.32(2)—appeal from refusal of warden to issue permit to enter private land; s.56(1)—appeal from refusal of warden to grant prospecting licence or from grant of prospecting licence on condition the applicant considers unreasonable; s.56A(5)—appeal against refusal of warden to grant special prospecting licence within prospecting licence; s.70(5)—appeal against refusal of warden to grant special prospecting licence within exploration licence; and s.94(3)—appeal from refusal of warden to grant miscellaneous licence or from grant of miscellaneous licence on conditions the applicant considers unreasonable.

not as an issue of fact-finding but as an issue of law.¹⁰⁵ Some errors of law on which determinations or recommendations are based can be reviewed.

In the absence of a right of appeal, *certiorari* may be available for correction of an error of law. *Certiorari* is only available in relation to the decisions of bodies obliged to act judicially.¹⁰⁶ Whether the warden's function is to make a determination or a recommendation as to the grant or forfeiture of a right in relation to mining, the warden has a duty to act judicially, in the sense that he has a duty to the parties to act fairly in relation to the hearing.¹⁰⁷ It is also a condition of the issue of *certiorari* that the decision-maker has 'legal authority to determine questions affecting the rights of subjects'.¹⁰⁸ In *Centamin Exploration (W.A.) Pty. Ltd. v. Gething*¹⁰⁹ the Full Court of the Supreme Court of Western Australia declined to issue a writ of *certiorari* on the ground that the recommendations of a warden under the Mining Act 1904-1981 that applications for coal mining leases be refused did not of its own force prejudicially affect any right of the applicants. There was no decision in the relevant sense to be quashed.¹¹⁰ There appears to be no basis for distinguishing the functions of the warden under the repealed Act and the 1978 Act in recommending the grant or refusal of rights in relation to mining.¹¹¹ It is submitted, therefore, that the Supreme Court would follow the decision in respect of a similar situation under the 1978 Act.¹¹²

When an error of law is disclosed on the face of the record of proceedings in which the warden himself determines whether a right in relation to mining should be granted or forfeited, such as in respect of applications for prospecting and miscellaneous licences, the rights of the applicant and objector are affected and it is submitted that *certiorari* is available. In such a case, however, there may be difficulty in determining what for relevant purposes is the record. It is well established that the actual record of decision is part of the record for relevant purposes.¹¹³ An error apparent in the decision itself will usually be an error as to jurisdiction. The remedy would have much greater scope if it applied to an error of law apparent in the warden's reasons for decision. In Australia the question of whether reasons for decision also constitute part of the record has expressly been left open by the High Court for further consideration.¹¹⁴

In relation to the grant of some rights to mine, such as special pros-

105 *R. v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 151 *per* Lord Sumner; but see Wade H.W.R., *Administrative Law* (1982) 288-290.

106 *R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee* [1924] 1 K.B. 171, 205 *per* Atkin L.J. (as he then was).

107 *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222.

108 *Supra* n.106.

109 Unreported, Supreme Court of Western Australia (Full Court), 28 May 1982.

110 *Ibid.* 10-11 *per* Burt C.J.

111 Under the repealed Act the Governor-in-Council issued a coal mining lease (s.76), but under the 1978 Act the minister issues a mining lease (s.71).

112 There is some basis for suggesting that the High Court might take a different view (see *Testro Bros. Pty. Ltd. v. Tait* (1963) 109 C.L.R. 353, 367-370 *per* Kitto J. (diss.); and *Brettingham-Moore v. St. Leonards Municipality* (1969) 121 C.L.R. 509, 522-523 *per* Barwick C.J. (*obiter*)).

113 *R. v. Cook; ex parte Twigg* (1980) 147 C.L.R. 15, 28 *per* Gibbs J. (as he then was).

114 *Ibid.* 27-28 *per* Gibbs J.

pecting licences, and in relation to the forfeiture of some mining tenements, the warden has a mix of powers of determination and powers of recommendation. It would be odd if the availability of *certiorari* were to depend upon whether the decision of the warden in such circumstances was a determination or a recommendation.

A declaration may be obtained from the Supreme Court in circumstances where *certiorari* or prohibition would not be given. There are examples under the repealed Act. In *Delhi International Oil Corporation v. Olive*¹¹⁵ the applicants marked off mineral claims over a temporary reserve. The warden recommended grant of the applications against the objections of the occupant of the temporary reserve. The latter sought a declaration that the applications for mineral claims could not lawfully be granted. The court granted a declaration to protect the occupant's interests and rejected an argument by the applicant for the mineral claims that the proceedings were tantamount to an appeal which the statute prohibited. Similar declarations were made in *Australian Anglo American Prospecting Ltd. v. CRA Exploration Pty. Ltd.*¹¹⁶

The obtaining of a declaration from the Supreme Court is a useful means of resolving an incidental question of law arising in proceedings pending before the warden. It is not, however, an alternative to proceedings before the warden. In the exercise of its discretion the Supreme Court would, it is submitted, decline to entertain an action for a declaration that the applicant for a mining tenement had not validly marked off the relevant area. In relation to proceedings before the warden in which the warden has only a power to make a recommendation to the minister, it will generally be desirable that the declaration be obtained before the minister acts on the recommendation. The Court may in its discretion decline to make a declaration where action has been taken on the recommendation, except, perhaps, where a valid recommendation is a condition precedent to the minister's power and the recommendation can be shown to be beyond power.

If a warden misconceives his duty and in consequence fails to perform it, the Supreme Court will issue *mandamus* to require him to perform his duty whether his function is to determine or to recommend. In *Ex parte Turnbull; Re Storey*¹¹⁷ a New South Wales warden refused an application for an authority to enter land on the basis that the applicants had at the time of the hearing a current authority. The Court of Appeal of the Supreme Court of New South Wales, holding that view to be wrong, granted *mandamus* to require the warden to hear the application. *Mandamus* will not go, however, to correct an error of law made by a warden acting in the course of an undisputed jurisdiction. There must be such an error of law as results in the conclusion that there has been an abdication of duty.¹¹⁸ In order to obtain *mandamus*, the applicant must show that he has a substan-

115 [1973] W.A.R. 52.

116 [1981] W.A.R. 97. Another example of a declaration is *C.R.A. Exploration Pty. Ltd. v. Monarch Petroleum N.L.* (Unreported, Supreme Court of Western Australia (Burt C.J.), 12 June 1980). In *Bowen v. Stratigraphic Exploration Pty. Ltd. & Kay* [1971] W.A.R. 119 an application for a declaration was refused on the ground that the warden was correct in his interpretation of the law.

117 [1967] 1 N.S.W.R. 667.

118 Compare *R. v. Harlock; Ex parte Stanford & Atkinson Pty. Ltd.* [1974] W.A.R. 101, 113

tial personal interest at risk. In the N.S.W. case *Ex parte Northern Rivers Rutile Pty. Ltd.; Re Claye*¹¹⁹ the applicant instituted an enquiry into breaches of the labour conditions of a mining lease. If his application were granted and the lease was cancelled, the applicant would have the opportunity to obtain a lease of the area. The Supreme Court of New South Wales rejected this as being a sufficient interest.

Brief comment has already been offered on the technicalities, particularly procedural technicalities, relating to the prerogative writs. While the judicial review of decisions of wardens on the merits should not be seen as a goal, it is in the interests of the public that the judicial review remedies be reformed to provide a consistently available means of remedying jurisdictional and procedural errors by the warden and significant errors of law affecting a warden's determination or recommendation.

JUDICIAL REVIEW OF DECISIONS OF WARDEN'S COURT

An error of fact or law in a final determination by a warden's court can, except in the circumstances excluded under the Act, be reviewed by the Supreme Court on appeal.¹²⁰ There is, accordingly, considerably less need to turn to the alternative methods of judicial review. The Supreme Court will, however, undertake judicial review other than by way of appeal in some circumstances.

When a warden sitting in the warden's court refuses to exercise jurisdiction vested in the court, the Supreme Court may, in its discretion, grant *mandamus* to compel him to perform his duty. In *R. v. Harlock; Ex parte Stanford & Atkinson Pty. Ltd.*¹²¹ applications were made under the repealed Mining Act to the warden's court for forfeiture of mineral claims on the ground that labour conditions had not been complied with.¹²² At an early stage of the hearing the warden determined that the plaintiffs disclosed no cause of action on the ground that they did not allege default existing at the date of the plaintiffs. The Supreme Court determined that this was an error and issued *mandamus* requiring the warden to conduct a hearing. In *R. v. Mining Warden at Heberton; ex parte LeGrand*¹²³ an applicant for a mining tenement sought an injunction in the warden's court to restrain an applicant for another mining tenement from occupying the same area. The warden held that he had no jurisdiction to hear the proceedings. The Full Court of the Supreme Court of Queensland held that the warden did have jurisdiction and issued *mandamus* to compel him to exercise it. Prohibition would be available to restrain a usurpation of jurisdiction by the warden's court.

The need for judicial review remedies, and in particular actions for declarations, to determine questions of law arising in the course of pro-

per Wickham J. This case related to an application for *mandamus* to the warden's court rather than the warden.

119 [1968] 3 N.S.W.R. 294.

120 See 85-87 *supra*.

121 [1974] W.A.R. 101.

122 Under the 1978 Act, such an application would be heard by the warden of mines.

123 [1971] Q.W.N. 36.

ceedings in the warden's court is lessened by the power of the court at any stage of any proceeding under the Act to reserve any question of law for the opinion of the Supreme Court.¹²⁴ However, it is submitted that *certiorari* would lie to quash a decision of a warden's court arrived at in the exercise of non-existent jurisdiction or when an error of law appears on the face of the record.

CONCLUSION

The provisions of the Mining Act 1978-1982 dealing with the functions of the warden as warden of mines, on the one hand, and the jurisdiction and powers of the warden's court on the other hand, should be reviewed and amended in order to delineate them clearly. Remedies for judicial review of the actions of the warden of mines, particularly procedural aspects, require reform in the context of general reform of the law relating to judicial review of decisions of tribunals and other decision-makers.

124 S.146(1). It is submitted that the references in s.146 to the warden, rather than the warden's court, are drafting errors (see n.80 *supra*).