OBTAINING ACCESS TO WATER FOR MINING PURPOSES IN WESTERN AUSTRALIA

Katie Winterbourne*

The conflicts between the regime for the management and control of water resources under the Rights in Water and Irrigation Act 1914 and the provisions granting rights to water under the Mining Act 1978 have plagued miners since the two Acts commenced co-existence. Although the conflicts have not been resolved, the imminent reformulation of water management legislation presents a good opportunity to revisit the issues. This article provides an overview and attempts to reconcile the regimes under the two Acts and addresses the Warden's role in hearing objections to miscellaneous licence applications for water supply purposes.

1. INTRODUCTION[1]

The statutory regimes for the management and control of water resources and mineral resources have disparate origins, objects and functions and are administered by distinct bodies. Although the two regimes inevitably conflict, miners have long been faced with the task of reconciling those conflicts so that the requisite water supply may be obtained for mining purposes.

In Western Australia the legislation which prescribe the respective regimes are the *Mining Act 1978* (the "*Mining Act*") and the *Rights in Water and Irrigation Act* 1914 (the "*RIWI Act*"). The disparities between the two Acts are not new and they have not yet been resolved, but now is an opportune time to revisit the issues and address the problems. The water industry in Western Australia has recently been restructured and there are current obligations on the State Government to amend aspects of the legislation pertaining to the management and use of water resources. The mining industry should become involved in the review of the water legislation to ensure that its concerns are heard.

This article addresses the current prescriptive and administrative regimes which affect a miner's access to water for mining purposes under the *Mining Act* and the *RIWI Act*.[2] It also outlines some of the recent and anticipated developments in the water industry. An interesting development, which will be briefly discussed, is the imminent introduction of a scheme permitting transferable water entitlements.

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* Solicitor, Blake Dawson Waldron

1 The following articles also address the conflicts between the water and mining regimes in Western Australia: Crommelin M. and Hunter R., Water and Mining: Controls in Conflict (1989) *AMPLA Yearbook* 201; Gerus M., Mining and Water Resources in *Water Resources Law and Management in Western Australia*, ed Bartlett R.H. et. al. Centre for Commercial and Resources Law, University of Western Australia 1996 at 326; Watson P.J. Comment on Water and Mining: Controls in Conflict, (1989) *AMPLA Yearbook*, 239

2 Some related issues which have not been discussed in this paper but which should be considered by mining tenement holders seeking access to a water supply and the Water and Rivers Commission as manager of the State's water resources are:

(a) the impacts of mining activities upon the management of water resources;
(b) the implications of Native Title to water access issues;
(c) the regulation of water service providers, including the Water Corporation; and
(d) the access regime under the *Trade Practices Act* 1974.

2. THE IMPETUS FOR CHANGE TO WATER MANAGEMENT AND REGULATION

The Western Australian community has a limited understanding of the legal and administrative framework for water resource management and allocation and consequently few people realise that the framework is currently under major review. Some significant changes have already been implemented and more will be made.

In 1994, the Council of Australian Governments ("COAG") agreed to a framework for the reform of the water industry[3]. Pursuant to another COAG agreement, the National Competition Policy[4], certain requirements of legislative reform under the COAG Water Resources Policy must be implemented in each State and Territory within prescribed time limits before the State or Territory is entitled to tranches of Commonwealth payments. The water reform framework is to be fully implemented by the various State and Territory governments by 2001.

One of the recent changes to the water industry was the restructuring of the former Water Authority of Western Australia. The Western Australian Government responded to COAG requirements of institutional reform[5] by separating the Water Authority's water resource management, regulatory and utility functions and placing them in the control of the following three entities which were established on 1 January 1996:

(a) The Water and Rivers Commission;

(b) The Office of Water Regulation; and

(c) The Water Corporation.

The Water and Rivers Commission (the "Commission") has the responsibility of managing the State's water resources and has the power to license water use. It also assumes the monitoring role of the former Hydrology and Groundwater Branch of the Department of Minerals and Energy.

The Commission is currently reviewing all legislation related to the management of water resources in the State. The review is likely to result in some fundamental changes to the licensing regime. The legislation will also be amended to enable the transferability of water entitlements. These changes are likely to affect the rights of access to water of mining tenement holders.

3. THE LEGISLATIVE REGIME FOR OBTAINING ACCESS TO WATER FROM A NATURAL SOURCE

3.1 Tenement Holders' Rights to Water Under the *Mining Act 1978*

The holder of a prospecting licence, exploration licence or mining lease granted under the *Mining Act* has the following rights:

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3 The COAG Agreement on Water Resources Policy was signed on 25 February 1994.

4 This agreement was signed on 11 April 1995.

5 The requirements were based on the recommendations of the Independent Committee of Inquiry (the Hilmer Committee), *National Competition Policy Review*, AGPS, Canberra 1993.

> "to take and divert, subject to the *Rights in Water and Irrigation Act* 1914, or any other Act amending or replacing the relevant provisions of that Act, water from any spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with [prospecting/exploring/mining] for minerals on the land."[6]

The holder of a tenement granted over private land is not permitted to use water artificially conserved by the owner or occupier of the land without the consent in writing of both the owner and the occupier.[7]

3.2 Miscellaneous Licences Under the *Mining Act 1978*

One of the mining tenements which may be granted under the *Mining Act* is a miscellaneous licence. A miscellaneous licence is one of only two types of tenements under the *Mining Act* which may be granted over the same land as and operate concurrently with any other tenement granted under the *Mining Act*.[8] A miscellaneous licence grants the holder access to land for purposes which are ancillary to mining without requiring the holder to conduct mining operations on the land and meet the various expenditure requirements under mining leases.

Section 91 of the *Mining Act* provides:

> "Subject to this Act, and in the case of a miscellaneous licence for water to the *Rights in Water and Irrigation Act* 1914, or any Act amending or replacing the relevant provisions of that Act, the mining registrar or the warden, in accordance with section 42 (as read with section 92), may, on the application of any person, grant in respect of any land a licence, to be known as a miscellaneous licence, for any one or more of the purposes prescribed."

The *Mining Act* states that a miscellaneous licence will not be granted unless the purpose for which it is granted is directly connected with mining operations.[9] "Mining operations" are defined under the Act to mean:

> "any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted or refined or dealt

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6 Sections 48(d) (prospecting licence), 66(d) (exploration licence) and 85(1)(c) (mining lease) of the *Mining Act* 1978. See also s20(2)(d) which provides similar rights for the holder of a Miner's Right.

7 Ibid s 29(7)(c)

8 Ibid ss 91(8) and 94A(2); note the other type of tenement which may be granted concurrently is the special prospecting licence granted under s 56A.

9 Ibid s 91(6)

with for the purpose of obtaining any mineral therefrom whether it has been previously disturbed or not..."

The definition of "mining operations" is generally considered to restrict the availability of miscellaneous licences to the holder of a mining lease. In practice, a miscellaneous licence for water will generally be granted to any mining lessee who complies with the formal requirements of the *Mining Act* unless an objection is lodged, although it is questionable whether some purposes for which a miscellaneous licence is sought are directly related to mining operations.[10]

A miscellaneous licence is subject to terms and conditions prescribed under the *Mining Regulations* 1981[11] and any other terms or conditions which the Warden may impose upon granting the licence[12]. A miscellaneous licence is generally granted for a period of 5 years.[13]

An appeal may be made to the Minister if the Warden refuses to grant a water licence or if the applicant considers that the conditions imposed under the licence are unreasonable.[14] The Warden's court has jurisdiction to hear and determine disputes in respect of water to be used for mining and any related questions.[15] An objection against the grant of a miscellaneous licence is made under the same procedures as an objection against the grant of a prospecting licence.[16]

3.3 Rights to Take Water Under the Rights in Water and Irrigation Act 1914

The *RIWI Act* prescribes the regime under which a person may obtain the right to take water. The traditional common law distinction between groundwater and surface water is maintained under the *RIWI Act*.

The *RIWI Act* vests the right to the use, flow and control of water in certain water-courses, lakes, lagoons, swamps, marshes or springs within irrigation districts and other proclaimed areas[17] in the Crown, subject to the Act and until appropriated under that Act or any other Act.[18] The entire regulatory regime of the *RIWI Act* (including the vesting provision) does not apply to:

(a) water in a spring which rises to the surface of land granted or demised by the Crown until that water passes beyond the land boundaries; or

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10 A miscellaneous licence for water will be granted for diverse purposes including compliance with dust suppression requirements under the *Mines Safety and Inspection Regulations* 1995 or rehabilitation requirements under a mining lease.

11 Regulation 41 prescribes the standard terms and conditions.

12 Section 94(2) of the *Mining Act* 1978

13 Ibid s 91(2)

14 Ibid ss 93(3) and (4)

15 Ibid s 132(1)(c)

16 Section 92 of the *Mining Act*

17 Section 6(3) of the *RIWI Act* states that the Governor may proclaim an area so that the provisions of Division 1 will apply to it.

18 Section 8(1) of the *RIWI Act*

(b) water found wholly within the boundaries of a parcel of land granted or demised by the Crown.[19]

The *RIWI Act* vests the use, flow and control of all underground water in the Crown.[20]

3.3.1 Surface Water Licensing Requirements

Whether a licence is required to permit surface water use in Western Australia depends upon the location from which the water is to be abstracted.

Within a proclaimed surface water area, a person may take any water to which that person has access for domestic and ordinary purposes.[21] An owner or occupier of land will have access to the water which flows over or adjacent to that parcel of land. Access to water is also available over Crown land. Before surface water can be taken or diverted for any other purpose in a proclaimed area, a licence must be obtained from the Commission.[22] A surface water licence is generally granted for a period not exceeding 5 years and is subject to conditions imposed by the Commission.

Surface water areas have been proclaimed throughout the State to prevent the overuse of water from a specific source, to equitably apportion rights between users and to enable various works, such as flood mitigation, to be carried out. Originally only major rivers with high use requirements were proclaimed but now approximately 25 river systems of all sizes have been proclaimed.[23]

In areas which have not been proclaimed, water to which a person has access may be taken for domestic and ordinary purposes or for other purposes to the extent that the flow of water is not sensibly diminished.[24] The *RIWI Act* states that, in relation to surface water in areas which have not been proclaimed, no right to take and divert water shall be acquired except under the *RIWI Act* or any other Act.[25]

3.3.2 Groundwater Licensing Requirements

Whether a licence is required to permit groundwater use in Western Australia depends upon the location of abstraction and the type of aquifer from which the water is to be drawn.

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19 Ibid s 6(1)
20 Ibid s 26
21 Ibid ss 9(1) and 10(1)
22 Ibid s 11
23 Watercourses are proclaimed in the Government Gazette. Information about which watercourses have been proclaimed throughout the State may be obtained from the Water and Rivers Commission.
24 Section 20(1) of the *RIWI Act*
25 Ibid s 21(2)

A licence is required before a person commences, constructs, enlarges, deepens, alters or draws water from any artesian well.[26] An artesian well is defined to mean a well, including all associated works, from which water flows or has flowed naturally to the surface.[27] A licence is also required before a person commences, constructs, enlarges, deepens, alters or draws water from any well located in a proclaimed groundwater area.[28] Most of Western Australia has now been proclaimed a groundwater area. A groundwater licence is generally granted for 10 years and is subject to conditions imposed by the Commission.

A licence is not required under the *RIWI Act* before drawing water from a non-artesian well in an area which has not been proclaimed. Even if a licence is not required, information about a non-artesian well must be given to the Commission if requested.[29]

3.3.3 Appeals and Objections

The *RIWI Act* provides a right of appeal to the Minister if an applicant is aggrieved by a licensing decision of the Commission.[30]

There are limited third party rights of objections to the grant of a licence or to the conditions attached to a licence. The *Rights in Water and Irrigation Regulations* 1941 state that an objection may be made against an application for a surface water licence by the owner or occupier of any land contiguous to a watercourse within 4.8 kilometres of the land to which the application relates.[31]

There are no statutory rights of objection against the grant of a groundwater licence.

4. CONFLICTS AND UNCERTAINTIES IN APPLYING THE LEGISLATION

A mining tenement holder will want to know:

(a) how the tenement holder can obtain the right to take water required for mining purposes; and

(b) whether anyone can prevent the tenement holder from obtaining the right to take water.

Conflicts between the legislation make these questions difficult to definitively answer.

4.1 Under Which Act Does a Tenement Holder Obtain Rights to Take Water

The *Mining Act* and the *RIWI Act* both appear to grant rights to take water. Any rights to water under the *Mining Act* purport to be *subject to the RIWI Act* and yet the provisions underlying the

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26 Ibid s 26A(1)
27 Ibid s 2(1)
28 Ibid s 26B(3)
29 Ibid s 26E(1)
30 Ibid ss 14 and 26D(4)
31 Regulation 15(1)

licensing regime in the *RIWI Act* envisage that rights to water may also be obtained under *any other Act.*

Crommelin and Hunter[32] contend that in relation to surface waters, although the provisions of the *RIWI Act* are more recent than those of the *Mining Act*, it is not conclusive that the *RIWI Act* prevails because the provisions of the *RIWI Act* do not assert exclusive authority over surface waters within irrigation districts and proclaimed areas.[33] It was held, however, in *Garbin v Wild* [34] that provisions in the *Land Act* 1933, which provided a grantee of land with a right to enjoy wells and springs, were general provisions which had to yield to the special provisions of the *RIWI Act.* Specifically, it was held that the provisions of the *RIWI Act* which restrict the right to draw water from artesian and non-artesian wells are in clear terms and impose definite obligations and restrictions to which an owner of relevant land is subject.[35]

As the *Mining Act* states specifically that it is subject to the *RIWI Act*, there is a strong argument that the *RIWI Act* prevails. This is consistent with the current practice in granting water licences.

4.1.1 Reconciling the Rights to Take Water Under the Two Acts

The *RIWI Act* creates a regime which determines rights to take or divert water. It does not provide access to the resource but only a right to use the resource if a person has already obtained legal access to it. Access to land may be obtained under other legislation, primarily the *Land Act* 1933. The *Mining Act* prescribes access to land for limited purposes connected to mining. Using this distinction between the fundamental purposes of both Acts, the two regimes of water "rights" may be reconciled. It may be argued that the *Mining Act* does not actually provide any rights to take water. It provides the tenement holder with an entitlement to apply for a licence under the *RIWI Act* to take water for purposes related to mining. Applying the argument, a tenement holder would not have sufficient tenure over the land to provide it with access to water resources on that tenement for the purposes of on-selling the water to raise revenue because that is not a purpose directly related to mining.

The argument that the *Mining Act* merely provides access to water resources becomes tenuous when the wording of the relevant provisions in the *Mining Act* is examined. The *Mining Act* does not state that the holder of a mining lease has access to water for the purposes of taking or diverting water, but rather specifically says that a mining lease authorises the lessee to take and divert water.[36] Further, section 85(3) of the *Mining Act* provides that the right to take water on a mining lease is an exclusive right for mining purposes in relation to the land in respect of which the mining lease was granted.

The purpose and effect of the rights to take water under the *Mining Act* remain to be clarified.

4.1.2 When is a Licence Under the Rights in Water and Irrigation Act Required?

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32 Water and Mining: Controls in Conflict (1989) *AMPLA Yearbook* 201, 206
33 This argument may also be applied in respect of groundwater; see section 26 of the *RIWI Act.*
34 [1965] WAR 72
35 Ibid p 75
36 Section 85(1)(c) of the *Mining Act* 1978

Crommelin and Hunter[37] conclude that:

(a) the water rights obtained under the *Mining Act* may be exercised without further authorisation in respect of surface waters outside proclaimed areas or irrigation districts;

(b) the water rights under the *Mining Act* are of limited effect with respect to groundwater; and

(c) although surface waters in proclaimed areas present some difficulty, they incline to the view that a licence under the *RIWI Act* is required.

The issue of whether water rights under the *Mining Act* permit water to be taken in unproclaimed surface water areas is not finally resolved. There is no licensing system in place for those areas and the Commission does not have the power to impose a licensing system, unless the areas are proclaimed, because the use, flow and control of water in those areas are not vested in the Crown. The *RIWI Act* does, however, prohibit the taking or diversion of water in areas which have not been proclaimed except in accordance with the *RIWI Act* or any other Act.[38] The *RIWI Act* provides that in unproclaimed areas, surface water may be taken:

"(a) for domestic and ordinary use;

(b) for watering cattle or other stock; and

(c) to the extent that the flow of water in the water-course or the amount of water in the lake, lagoon, swamp or marsh, as the case may be, is not thereby sensibly diminished, for any other purpose."[39]

The Commission may issue directions to a person who has diverted, taken or used water for a purpose or to an extent not authorised by the Division of the *RIWI Act*.[40] Failure to comply with directions constitutes an offence under the *RIWI Act*.[41]

If the argument is accepted that the water rights under the *Mining Act* merely provide access to water resources, a tenement holder will not be able to acquire any rights to take surface water for mining purposes in areas where licensing under the *RIWI Act* is not required. This result is consistent with the common law principles from which the Western Australian water rights regime developed. Common law riparian rights afford primacy to the use of water for domestic purposes, to sustain life. A tenement holder would not be permitted to take water for mining purposes if that would prevent downstream landowners taking water for domestic purposes. While this result may reflect fundamental tenets of common law riparian rights, it clearly conflicts with the object of the *Mining Act*, which is to encourage mining. Fortunately there are

37 op cit, n 32
38 Section 21(2) of the *RIWI Act*
39 Ibid s 21(1)
40 Ibid s 22(1)
41 Ibid s 22(4)

few unproclaimed surface waters in Western Australia which provide a water source for land owners located downstream of mining tenements.

The restriction discussed above applies only to surface waters in unproclaimed areas. If the watercourse flows entirely within the boundaries of the tenement then the limitations of the *RIWI Act* do not apply. There are no similar restrictions on the purposes for which water may be taken in areas where groundwater licensing is not required.

The prohibitions against taking water from an artesian well or a non-artesian well in a proclaimed groundwater area are not subject to rights obtained under any other Act or other qualifications. Clearly, a licence pursuant to the *RIWI Act* is required before water can be taken from those sources. A licence should also be obtained from the Commission before taking water from a proclaimed surface water area or irrigation district.

4.2 Is a Mining Tenement Holder Eligible to Obtain a Licence Under the Rights in Water and Irrigation Act?

A licence under the *RIWI Act* can only be granted to the owner or occupier of land. The *RIWI Act* does not expressly require that a surface water licence holder is the owner or occupier of land adjacent to the water-course from which water is taken. In respect of groundwater licences, however, the *RIWI Act* states that:

> "[A] licence shall be deemed to be held by, and shall operate for the benefit of, the lawful owner and the occupier, for the time being, of the land whereon the well is sunk or is proposed to be sunk."[42]

The term "occupier" is not defined in the *RIWI Act*. The *RIWI Act* states, however, that:

> "[T]erms not otherwise assigned a meaning under subsection (1) but referred to in section 3 of the *Water Agencies (Powers) Act* 1984 as having a meaning assigned for the purposes of a relevant Act have that meaning in and for the purposes of this Act."[43]

The term "occupier" is defined in section 3(1) of the *Water Agencies (Powers) Act* 1984 to mean:

> "the person in actual occupation of land, or if there is no person in actual occupation, the person entitled to possession of the land."

If the tenement holder is not in actual possession of the land, the eligibility of the tenement holder to obtain a licence under the *RIWI Act* depends upon whether the holder is entitled to possession of the land. The mining lease is the only mining tenement which specifically gives the tenement holder the right to use, *occupy* and enjoy the relevant land for mining purposes.[44] The provisions under which a miscellaneous licence may be granted do not similarly prescribe that the holder has

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42 Ibid s 26D(3)
43 Ibid s 2(2)
44 Section 85(2)(a) of the *Mining Act* 1978

the right to occupy the land. Yet it is pursuant to this form of access that most water licences under the *RIWI Act* are granted to miners.

The Commission considers that the only tenements which grant sufficient tenure to support a licence to take water are a mining lease and a miscellaneous licence.[45]

4.3 Is a Licence Required for Water Exploration?

Although the *Mining Act* states that an exploration licence authorises the holder to take water for any purpose in connection with exploring for minerals on the land, the Commission will not issue a licence to take water to the holder of an exploration licence.[46] Once again, this raises the question of what is the purpose and effect of the water rights prescribed under the *Mining Act*. The Commission will grant a water exploration licence to the holder of an exploration licence under the *Mining Act*. In practical terms, a water exploration licence will meet most of the requirements of the holder of the exploration licence under the *Mining Act*.

It has been argued that the Commission has no power to issue water exploration licences and that water exploration for mining purposes should be monitored under the regime of the *Mining Act*.[47] The *RIWI Act*, however, requires that the commencement and construction of artesian and non-artesian wells in proclaimed areas are licensed. A well is defined in section 3(1) of the *Water Agencies (Powers) Act* 1984 to include a bore sunk for the purpose of obtaining a water supply. The exploration of water arguably involves the sinking of bores for the purpose of obtaining a water supply.

The claim that the former Water Authority of Western Australia was not the appropriate body to monitor water exploration for mining purposes is no longer valid as the functions of the former Hydrology and Groundwater Resources Branch of the Department of Minerals and Energy have been assumed by the Commission since its inception on 1 January 1996.

4.4 Can A Third Party Prevent Access to Water?

There are limited third party rights of objection to the grant of a surface water licence and no third party rights of objection to the grant of a groundwater licence under the *RIWI Act*.

Although objections may be made under the *Mining Act* to the grant of any mining tenement, the procedure under which objections are determined contemplates conflicts between miners and focuses upon the promotion of mining. The Warden's role in considering non-mining and public policy interests in determining a tenement application is limited and competition for water outside of the mining sphere is unlikely to be an issue which is considered.[48] Further, the

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45 Ventriss H.B., *General Principles and Policy for Groundwater Licensing in Western Australia,* Water Authority of Western Australia, 30 March 1990. This policy statement has been adopted by the Commission but is currently under review.

46 Ibid

47 Watson P.J. Comment on Water and Mining: Controls in Conflict, (1989) *AMPLA Yearbook*, 239

48 The Minister, however, has the power under s 111A of the *Mining Act* to terminate or summarily refuse tenement applications if satisfied on reasonable grounds in the public interest that the land

Commission is not named in the *Mining Act* as a prescribed person on whom a notice of tenement application must be served.

The procedure for objecting to a miscellaneous licence is the same as that for objecting to the grant of a prospecting licence. The power of the Warden to determine objections to prospecting licences has been limited to deciding whether there had been compliance with the formal requirements of the Act.[49] The Warden has a wider discretion in determining whether a miscellaneous licence should be granted or refused[50] but it is uncertain whether the Warden's discretion extends to considering issues of water conservation, water allocation between competing users or potential water needs.[51]

4.4.1 Who May Object?

The *Mining Act* provides that any person is entitled to object to the granting of the application for a miscellaneous licence.[52] This suggests that non-miners may also object against the grant of a miscellaneous licence.

In *Foxton v Gensch* [53]a pastoral lessee objected to the grant of a miscellaneous licence for water. Although the case provides an example of an objection made by a non-miner, the pastoral lessee's objection was based on rights given to the pastoral lessee under the *Mining Act.* Similarly, private landowners may object if an applicant has not complied with provisions of the *Mining Act* which operate for the benefit of the landowner.

Although the *Mining Act* does not qualify the right of any person to object, in practical terms any rights to object will be limited to the extent that the Warden is empowered to hear and determine the objection.

4.4.2 Exclusivity of a Mining Lessee's Water Rights

A number of objections against the grant of miscellaneous licences have been made by competing tenement holders for scarce water supplies. Some mining lessee's have argued that a

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should not be disturbed or the application should not be granted. The question of whether the Warden should consider issues of public interest in hearing objections was considered, in relation to an application for a mining lease, in *Ex parte Serpentine Jarrahdale Ratepayers and Residents Association* 11 WAR 315. For a discussion of the application of s 111A see C Hayward, Section 111A of the *Mining Act* Summary Refusal by the Minister, (1995) 14 *AMPLA Bulletin* 113.

49 *Tortola Pty Ltd v Saladar Pty Ltd and Holloway* [1985] WAR 195

50 See the cases referred to under paragraph 4.4.3 of this article

51 Although the majority of the court in *Ex parte Serpentine Jarrahdale Ratepayers and Residents Association* 11 WAR 315 decided that the Warden may consider public interest issues in hearing an objection against the grant of a mining lease, *Tortola Pty Ltd v Saladar Pty Ltd* [1985] WAR 195 was distinguished because it concerned a prospecting licence application which was to be determined solely by the Warden. A miscellaneous licence, like a prospecting licence, lies solely within the grant of the Warden.

52 Sections 92 and 42 of the *Mining Act* 1978

53 Coolgardie Warden's Court, 18 September 1991

miscellaneous licence should not be granted over their mining tenement by relying on section 85(3) of the *Mining Act*. Section 85(3) provides that the right to take water on a mining lease is an exclusive right for mining purposes in relation to the land in respect of which the mining lease was granted.

The effect of section 85(3) of the *Mining Act* was discussed in *Homestake Gold of Australia & North Kalgurli Mines Ltd v Croesus Mining NL*[54] It was argued on behalf of a mining lessee, over whose lease an application was made for a miscellaneous licence, that the grant of a miscellaneous licence for water was subject to the *Mining Act* and therefore subject to the exclusive right of the mining lessee to water on the tenement pursuant to section 85(3). In rejecting that argument, Warden Lane S.M. stated:

> "Underground water rights cannot be exclusive rights within the meaning of section 85(1), because they vest in the Crown under section 26 of the Rights in Water and Irrigation Act and come under the control of the Water Authority in areas gazetted to come within the Rights in Water and Irrigation Act. As such the use of the water under the *Mining Act* is subject to the *Mining Act* and the *Rights in Water and Irrigation Act*."[55]

Conversely, in *Nova Resources NL v Metals Exploration Ltd* [56]it was held that if a miscellaneous licence for the purpose of taking water was granted over an existing tenement it would in effect take away the existing tenement holder's reserved right to water.[57] Warden Thobaven S.M. rejected the application for the miscellaneous licence stating that because of the acute shortage of water in the area, any draining of water by others would injuriously affect the mining tenement held by the objector.[58]

The effect of section 85(3) of the *Mining Act* has not been finally resolved.

4.4.3 What is the Role of the Warden in Hearing and Determining Objections?

In *Re Roberts; Ex Parte Western Reefs Ltd,*[59] the Supreme Court distinguished the function of a Warden in hearing an objection for a miscellaneous licence from the function in hearing an objection to a prospecting licence. Malcolm CJ explained that section 91 of the *Mining Act*, pursuant to which a miscellaneous licence may be granted, is subject to section 117, which prescribes that the grant of a tenement should not have the effect of revoking or injuriously affecting any existing tenement. Malcolm CJ stated that:

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54 Kalgoorlie Warden's Court, 18 September 1991

55 Ibid p 23. The Warden does not seem to have considered the effect of the works "until appropriated under...any other Act" in the vesting provisions of the *RIWI Act*.

56 Perth Warden's Court, 2 February 1990

57 Ibid p 17

58 This case may be distinguished from the *Homestake Gold* decision, above n 34, because there was no licensing regime in place over the area. The Warden assumed that if a miscellaneous licence was granted, the holder would automatically be able to take water and that this would affect the primary tenement holder's automatic right to take water under the *Mining Act*.

59 [1990] 1 WAR 546

> "[T]he Warden is bound to consider whether the grant of the licence will injuriously affect the existing tenement or hinder and obstruct the holder in execution of his rights. Any potential for injurious affection or obstruction may be covered by reasonable conditions. Where no reasonable condition could prevent the injurious affection... the Warden should exercise his discretion to refuse the application."[60]

Further, Brinsden J noted that section 105A, which prescribes the first in time priority in determining competing applications, expressly excludes miscellaneous licences. He said that competing applications for miscellaneous licences would need to be determined based on some other consideration and this may involve the Warden in considering the merits of an application.

Brinsden J limited the discretion of the Warden in considering the merits of an application by stating that:

> "In reaching the decision the Warden would be entitled to take into account the current and prospective operation upon the primary tenement. The overriding consideration would be whether the grant of the miscellaneous licence would, or would not, promote the objects of the [Mining] Act, the encouragement of mining."[61]

Gerus has suggested that if the Warden's role is discretionary but otherwise limited to furthering the aims of the *Mining Act*, the Warden's role becomes one of merely setting conditions rather than determining whether the application should be granted.[62] While that may be true in practice, the office of the Warden is created by the *Mining Act* and Wardens' powers are prescribed by the *Mining Act* and should, therefore, be limited to pursuing the purposes of the *Mining Act*. In granting a miscellaneous licence for water, the Warden is enabling the holder to apply to the Commission for a licence to take water. The Commission has the role of allocating water resources between users and this role should not be usurped.

In an earlier decision, *Pan Australian Mining Ltd v Resman Pty Ltd*,[63] Warden Brown S.M. held that it was the task of the Water Authority and not the Warden to assess competing applications for water production and to allocate specific volumes of water. He claimed:

> "The role of the Warden is to give effect to the *Mining Act* and Regulations and recognising that the policy of the Act is to encourage mining it is sufficient in my view to assess applications for and objections to, Miscellaneous Licences on the basis of whether such a licence is needed. If the need exists and the *Mining Act* and the Regulations are complied with the licence may be granted."[64]

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60 Ibid at 554

61 Ibid at 560.

62 Gerus M., Mining and Water Resources in *Water Resources Law and Management in Western Australia*, ed Bartlett R.H. et. al. Perth Western Australia 1996 at 326.

63 Coolgardie Warden's Court, 31 March 1988

64 Ibid p 8

The Warden agreed to hear evidence of the likely demands on groundwater resources in the area but asserted that it was not his role to conduct a detailed assessment of competing claims. He granted the application on the basis that to refuse it would effectively prevent the applicant pursuing a claim with the Water Authority for a share of the underground water supply.

These decisions suggest that although the Warden has a role in hearing objections which go beyond compliance with the formal requirements of the *Mining Act*, the Warden should limit the exercise of his discretion to issues pertaining to the purposes of the *Mining Act*. Gerus has suggested that the Warden may take into account the protection or conservation of a water resource, but only in so far as it would jeopardise other mining operations.[65] A consideration of this sort appears to be consistent with the purposes of the *Mining Act*, to encourage mining.

It is unlikely that the objection process under the *Mining Act* can be used to prevent a person obtaining a licence from the Commission unless that would be contrary to the purposes of the *Mining Act*. If the appropriate body to determine competing applications for water is the Commission, then the *RIWI Act* should provide a mechanism for objections to be made to the Commission by any person whose interests would be affected by the grant of a licence under that Act.

5. TRANSFERABLE WATER ENTITLEMENTS

The COAG Agreement on Water Resources Policy 1994 requires each State and Territory to have legislation in place by 1998 which enables the transfer of water rights between users. The mechanism to create a water market has not been prescribed. Most States already have a scheme for the transfer of water rights between irrigators.

The legislation in Western Australia does not currently permit water licences to be transferred. In respect of groundwater licences, the *RIWI Act* precludes trading of a groundwater licence. Section 26D(3) of the *RIWI Act* states:

> "A licence shall be deemed to be held by, and shall operate for the benefit of, the lawful owner and the occupier, for the time being, of the land whereon the well is sunk or is proposed to be sunk."

The legislation must be amended at the very least to separate water entitlements from land title. This will significantly affect the regime of water allocation and water rights in Western Australia although it is not yet clear exactly how far reaching the effects will be.

Transferable water entitlements are not a new concept. Loh has commented:

> "While the concept of Transferable Water Entitlements have [sic] been discussed over the last 10 to 15 years in Western Australia, the interest in the establishment of TWE markets, particularly by irrigators, has not been high. Reasons for this were initially

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65 op cit, n 62 at p 326

> related to unfamiliarity with the concept and a basic conservatism. However, the main reason has been lack of real competition for water among irrigators."[66]

Western Australia does not have established irrigation schemes which have faced the problems of inadequate supply to an extent comparable with those in the Murray-Darling Basin region. Western Australia does, however, support a strong mining industry which requires large quantities of water and is frequently faced with inadequate supplies and competition between users.

A water market will encourage efficient use of water resources and promote flexibility. As surplus water or the right to take surplus water may be on-sold, access to water resources may be more widely distributed. Transferable water entitlements will also encourage project managers to acquire access to water only during periods when it is needed rather than obtaining a licence for the life of a project. The mining industry should promote the introduction of a scheme which permits licences to be transferred at least between mining projects but possibly also between other users of water.

6 CONCLUSION

This paper illustrates some of the potential difficulties faced by miners attempting to acquire access to water for purposes related to mining. Problems arise because the relevant Acts provide two prescriptive regimes without clearly distinguishing between the administrative roles under those regimes. The problems have not been satisfactorily resolved even though they have existed since the co-existence of the two regimes.

All legislation pertaining to water resource management and allocation in Western Australia is currently under review. Further, COAG has prescribed specific issues which must be addressed in the legislative review, a time frame for review and incentives to complete the review and implement legislative amendments. One requirement of COAG, which is likely to lead to a complete remodelling of the framework for water allocation and licensing, is the introduction of transferable water entitlements. The legislative review provides the mining industry with a great opportunity to ensure that tenement holder's rights to water are clarified. The mining industry should also contribute to the development of the transferable water entitlements scheme so that tenement holder's interests may be promoted.

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66 Loh I., Water Resources Allocation and TWE Market Reform in WA in *Water Resources Law and Management in Western Australia*, ed. Bartlett R.H. et. al. Perth 1996 at 375