JURISDICTION	**:**	MINING WARDEN
TITLE OF COURT	**:**	OPEN COURT
LOCATION	**:**	PERTH
CITATION	**:**	BHP BILLITON MINERALS PTY LTD & ORS -v- WESTOVER HOLDINGS PTY LTD [2006] WAMW 4
CORAM	**:**	CALDER M
HEARD	**:**	9 FEBRUARY 2006
DELIVERED	**:**	24 MARCH 2006
FILE NO/S	**:**	APPLICATION FOR MISCELLANEOUS LICENCE 45/116
TENEMENT NO/S	**:**	L45/116
BETWEEN	**:**	BHP BILLITON MINERALS PTY LTD, ITOCHU MINERALS AND ENERGY OF AUSTRALIA PTY LTD **(**Applicants) AND WESTOVER HOLDINGS PTY LTD (Objector)

Catchwords:

DELEGATION - By Governor in Regulations - To Departmental officer
LEGISLATION - *Ultra vires* - Power of Warden to rule that *ultra vires*
MISCELLANEOUS LICENCE - Objection to - Hindrance to underlying tenement holder

MISCELLANEOUS LICENCE - Objection to - Sufficiency of evidence of proposed activities
OBJECTION - Opportunity to be heard
OBJECTION - Terms of - Objector bound by at hearing
OBJECTOR - Opportunity to be heard
OBJECTOR - Bound at hearing by terms of objection
PRACTICE AND PROCEDURE - Objection - Objector bound by particulars at hearing
PRACTICE AND PROCEDURE - Objector - Bound by particulars of objection at hearing
REGULATIONS - Delegation by Governor under Regulations to Departmental officer
REGULATIONS - *Ultra vires* - Power of Warden to find the Regulation *ultra vires*
WARDEN - *Ultra vires* legislative provisions - Power of Warden to rule the *ultra vires*

Legislation:

Interpretation Act 1984 (WA)
Mining Act 1978 (WA), s 42, s 91, s 160
Mining Regulations 1981, reg 37, reg 54B

Result: *Application for miscellaneous licence 45/116 refused.*

Representation:

Counsel:

Applicants	:	Mr B D Luscombe
Objector	:	Mr T J Kavenagh

Solicitors:

Applicants	:	Mallesons Stephen Jaques
Objector	:	Corser and Corser

Case(s) referred to in judgment(s):

Allingham v Minister of Agriculture (1948) 1 All ER 780

Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1) (1991) 32 FCR 219

Dainford Limited v Eric Kenneth Smith & Anor (1985) 58 ALR 285

Hawke's Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board (1961) NZLR 218

Hoffman-La Roche & Co v Secretary of State for Trade & Industry [1975] AC 295

King Gee Clothing Co Pty Ltd v The Commonwealth (1945) 71 CLR 184

Morton v Union Steamship Co of New Zealand (1951) 83 CLR 402

Pennings v Selby, unreported; SCt of WA; Library No 970097; date???

R v McLennan (1952) 86 CLR 46

Racecourse Cooperative Sugar Association Ltd v Attorney-General (Qld) (1979) 26 ALR 321

Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Company Pty Ltd (1990) 1 WAR 546

Turner v Owen (1990) 96 ALR 119

Welsbach Light Co of Australia Ltd v Commonwealth (1916) 22 CLR 268

Westover Holdings Pty Ltd v BHP Billiton Minerals Pty Ltd & Ors [2005] WAMW 20

CALDER M

WARDEN'S DECISION CONCERNING APPLICATION FOR MISCELLANEOUS LICENCE 45/116

THE APPLICATION

1 The application ("L45/116") of BHP Billiton Minerals Pty Ltd, Mitsui Iron Ore Corporation Pty Ltd and Itochu Minerals and Energy of Australia Pty Ltd (formerly CI Minerals Australia Pty Ltd) ("the Applicants") was lodged in October 2003. The hearing of the application was delayed pending the outcome of the decision of the Warden sitting in the Warden's Court and exercising the Warden's judicial function in ***Westover Holdings Pty Ltd ("the Objector") v BHP Billiton Minerals Pty Ltd & Ors*** [2005] WAMW 20 ("the 2005 decision").

2 In the 2005 decision I made several findings of fact which, both counsel agree, I should apply and take into account in determining the application for miscellaneous licence 45/116. The 2005 decision was tendered in evidence as an exhibit in this case.

3 At the commencement of the hearing counsel for the Applicant submitted that the Objector was not entitled to be heard in respect of whether or not the Applicant had complied with the formal requirements of the legislation in connection with, for example, marking out, lodgement, advertisement, giving of notices and the like because the objection did not raise such matters as being issues at the hearing of the application. .

4 The objection contains four paragraphs setting out the grounds for objection. The first paragraph refers to the uncontested fact that within the ground applied for in L45/116 there is an overburden dump that encroaches upon exploration licence 45/2278 ("E45/2278") held by the Objector. The second paragraph of the objection says that the overburden covers a line of strike important to the exploration of E45/2278 and makes reference to the plaint of the Objector in respect of which the 2005 decision was given and to the order that was therein unsuccessfully sought by the Objector for removal of the overburden. The third paragraph of the objection simply states the fact that as at the date of the lodgement of the objection the said Objector's plaint had been adjourned for mention only before the Warden in Marble Bar. The final paragraph of the

objection contends, consistently with the Objector's case in the Objector's plaint, that the overburden was placed on what was then Crown land but is now land the subject of E45/2278 without authority under the *Mining Act 1978* (WA) ("the Act") and that such occupation of the land by the Applicant is unlawful and prejudicial to the rights of the Objector.

5 In the 2005 decision I found that there was an encroachment from what is now the Applicants' tenement adjoining E45/2278 onto what was then vacant Crown land but which is now the subject of E45/2278 held by the Objector. I found that the overburden had been placed on the vacant Crown land without any lawful authority. I found that it prevented the Objector, as the holder of E45/2278, from carrying out standard, basic surface exploration activities such as visual observation and hand sampling on and just below the natural surface of the land that is within E45/2278 and upon which the overburden is spread. Both parties agreed that such findings of fact should be adopted for purposes of the hearing of the present application.

6 Counsel for the Applicants submitted that when the findings of fact made in the 2005 decision, including the abovementioned facts, are taken into account, together with the absence in the objection of any ground related to compliance with the abovementioned matters, I should exercise the discretion given to me by subs 42(3) of the Act and should not give the Objector an opportunity to be heard at all in the hearing of the application. He said that every matter that had been set out as a ground of objection had been dealt with in the 2005 decision.

7 In response, counsel for the Objector noted that pursuant to s 42 of the Act any person could object to the grant of a miscellaneous licence upon any ground, there being no restriction or limitation expressed in s 42 or elsewhere in the Act. He referred to the decision of the Supreme Court of Western Australia in ***Re Roberts; Ex parte Western Reefs Ltd v Eastern Goldfields Mining Company Pty Ltd*** (1990) 1 WAR 546. In particular counsel referred to what was said by Malcolm CJ in connection with the applicable requirements and procedures for the making of and the hearing of an application for the grant of a miscellaneous licence. Counsel said that what Malcolm CJ said, in effect, was that before there may be a grant of a miscellaneous licence the Warden

must be satisfied that all necessary obligations on the part of the Applicant have been properly fulfilled.

8 Counsel also referred to the decision of Brinsden J (560) where his Honour said that the overriding consideration in the determination of whether a miscellaneous licence should be granted is whether or not such a grant would or would not promote the objects of the Act, namely, encouragement of mining. He said that in the present case such issues were properly raised by the Objector. He also said that in this case the Objector still did not know what the Applicants intended to do if they obtained the miscellaneous licence over the ground applied for. He submitted that, in any event, apart from the issue of whether or not the Objector could be heard as to formal compliance, the Objector was entitled to be heard as to whether or not the Objector, as the holder of the tenement over which the miscellaneous licence is sought to be granted, should be heard as to the question of whether or not the Objector would be adversely affected by such a grant. He submitted that the Objector is also entitled to be heard concerning the admissibility of any evidence that the Applicants wished to call.

9 I ruled that the Objector could not be heard in relation to issues connected with the formal compliance requirements of the Act because the purpose of specifying in the objection the grounds of objection was to alert the Applicants to the nature of the case that the Applicants had to face and prepare for. Not having been alerted to any intention on the part of the Objector in this case to dispute that there had been formal compliance, the Applicants were given no reason to seek particulars of any such alleged compliance and, as I was informed by counsel for the Applicants, and which I accepted as true, had therefore come to the hearing armed with no more than basic evidence in respect of formal compliance.

10 Ultimately counsel for the Applicants did not pursue the submission that the Objector should not be given any opportunity to be heard or give evidence and conceded that the Objector was entitled to be heard concerning conditions and may be able to cross-examine and give evidence about conditions. In the circumstances I ruled that the Objector could not contest any issues of formal compliance (although it would still remain the case that the Applicants would have to satisfy me that there had been compliance in accordance with the legislation) but that the Objector could be heard in respect of the effect upon the Objector as the

holder of E45/2278 in respect of any effect that the grant of the miscellaneous licence may have upon the exercise by the Objector of its rights and obligations as the holder of the exploration licence and may also be heard in connection with any conditions to be imposed if the miscellaneous licence is granted.

THE EVIDENCE

11 The Applicants produced a number of documents and called one witness, namely, Mr Waters. The Objector produced no evidence.

12 From the affidavit of Christopher Clegg, a tenement consultant, which affidavit I find to be true and correct, I find that the ground applied for in respect of miscellaneous licence application 45/116 was marked out in accordance with the Act and Regulations, that a copy of the application was fixed to the datum post to the ground applied for within the prescribed time and that copies of the required application were served on affected landowners or occupiers in accordance with the Act and Regulations. The Objector was also served with a copy of the application in accordance with the legislative requirements, as was the Shire of East Pilbara. The application was duly advertised in accordance with the Act and Regulations.

13 Pursuant to subreg 37(3) of the Mining Regulations and within the prescribed period of time, the Applicants lodged with the Registrar the details required by the sub regulation. Those details that were lodged included the purpose for which the land applied for is required by the Applicants, together with a very brief description of the activities to be conducted. It is said in the document that was lodged that the area is required for the purpose of:

> "*Overburden management including rehabilitation and on-going monitoring and drainage control for the purposes of the Iron Ore (Mt Goldsworthy) Agreement Act 1964 (WA).*"

14 It is also stated therein that on 14 August 2003 the Director-General of Mines, pursuant to reg 42B (n), approved that purpose as being a prescribed purpose for a miscellaneous act. Concerning the activities to be conducted, the document that was

lodged by the Applicants says that there are three principal activities for the work planned on the licence area, being overburden storage, rehabilitation monitoring and drainage control. In respect of overburden, reference is made to the overburden that is on land that is now within the boundaries of the Objector's exploration licence. It is said that ongoing monitoring of the rehabilitation of the overburden is required to ensure stability and to monitor surface water activity. It is said that additional work will be done to further enhance the completed rehabilitation, including growth of plants, earthworks and ongoing surface drainage control. It is said that those operations would be conducted over the forthcoming two to five years with constant monitoring.

15 In support of the statement concerning the approval by the Director-General of Mines, pursuant to reg 42B(n), the Plaintiff tendered a letter signed on behalf of the Director of Mineral Titles and dated 19 August 2003, addressed to Mr Clegg, in which advice is given that the Director-General had, on 14 August 2003, approved the inclusion, for purposes of a miscellaneous licence, of the purpose of "*Overburden management including rehabilitation and on-going monitoring and drainage control for the purposes of the Iron Ore (Mt Goldsworthy) Agreement Act 1964*". The wording of that purported approval is identical to the wording of the purpose for which it is said, in the application for the miscellaneous licence, that the licence is sought.

16 The only witness who gave evidence in open court on behalf of the Applicants was Mr Waters. He is a manager of resource strategy employed by BHP Billiton Iron Ore ("BHP"). One of his roles in that capacity is to look at closure issues on mining sites. He is suitably qualified and experienced to give the evidence that he did concerning management of the overburden that is now on the Objector's exploration licence. Mr Waters said that the evidence that he had given at the hearing before me on 20 August 2004 in connection with the 2005 decision was true and correct. A transcript of that evidence (pages 95 to 137) was tendered in evidence. In the 2005 decision I summarised the evidence of Mr Waters as follows: *" 25 Mr Waters gave evidence on behalf of the Defendants. He is employed as a principal environmental specialist with BHP Billiton. He has a considerable degree of expertise relating to acid rock drainage. He is a geologist. He has been employed by BHP Billiton since 1990 and has worked in connection with its iron ore operations from then until now. In*

early 2001 he visited and inspected the Billygoat dump. He identified the presence of black shale which is a prime acid-generating substance. He observed two drainage lines at the southern point of the dump running from the toe of the dump away from the dump to the south. He said that acid rock drainage is more likely to occur in material that is mined from lower down in an ore body, particularly below the water table. He said that the best long-term option to try and overcome the acid rock drainage problem in the overburden is to place a five to seven-metre thick cover of suitable inert material over it in order to prevent or minimise the amount of water from rain reaching the acid-producing material. Mr Waters said that the method of covering the overburden had been tried successfully at Mount Whaleback. That option had been trialled at the Mount Whaleback iron ore mine for several years. He said that the cover option allowed for revegetation and gave the most stable and best looking outcome. He agreed that one option would be to cart the material away and put it back into the pit below the water table. *18*
Mr Waters also said that the Defendants had identified acid rock drainage issues with the Rosemary dump, another dump associated with the old Goldsworthy mine. He said that environmental issues had to be dealt with in respect of both the Billygoat and the Rosemary dumps, in particular, with a view to making the dumps more amenable for revegetation without compromising stability.

17 In his evidence given before me for purposes of the application L45/116 Mr Waters said that since he had given his evidence in August 2004 at the previous hearing the view that he had expressed at that hearing had consolidated and that the now preferred option was, as before, to cover the overburden with a dry cover of inert material at least five and up to seven metres thick over the entire surface of the overburden in order to prevent rainwater falling upon what is now the surface of the overburden. He said that another option had been discussed during the giving of his evidence in August 2004, namely, carting the encroaching overburden away from the Objector's exploration licence and dumping the overburden into the pit that had been dug when mining operations had been conducted on the mining lease that is now registered to the Defendants.

18 He said that that option was now considered to be of relatively high risk requiring more machinery and creating more safety issues than the now preferred option of covering the top of the dump. He said that it had also emerged that there was the potential to use the water that had accumulated in the pit, being between 100 and 120 metres deep, to be used for aquaculture or possible hydro-electricity production. Mr Waters produced a map on which is depicted the extent to which the toe of the encroaching overburden would be further extended into E45/2278 if L45/116 is granted and if the top of the overburden is covered with a five-metre thick layer of inert material in accordance with the Applicants' most favoured option.

19 It is expressly noted on the plan that the maximum distance that the toe of the covered overburden would extend beyond the northernmost boundary of the proposed L45/116, taken at right angles to that boundary, is approximately 70 metres. The encroaching overburden is at its widest lateral extension on E45/2278 where it crosses the northernmost boundary of E45/2278. Judging from the scale on the map, it appears that, after reshaping the top of the overburden to a 15-degree slope to the horizontal and covering it with a five-metre thick inert layer, it will extend for a distance of roughly 250 metres along that tenement boundary. Mr Waters said that there is sufficient suitable waste material from close by on the Applicants' lease to cover the encroachment surface to the required depth.

20 Mr Waters also said that if the miscellaneous licence were granted, the Applicants would carry out investigations to the south of the toe of the dump into acid rock drainage contamination. Those investigations would be conducted in an area near the centre of the proposed miscellaneous licence and extending in an arc running generally east to west. In addition, he said, monitoring equipment would be installed within the miscellaneous licence to discover whether or not the measures taken by the Applicants to counter the contamination had been successful or not.

21 The witness said that it was the intention of the Applicants to address rehabilitation and contamination issues on other dumps connected with mining operations which had taken place on the lease but that the Billygoat dump, from which the subject encroachment extends, would be done first. He estimated that it would take approximately 14 months to complete work on the

whole of the Billygoat dump and not just on the encroaching part of it. Work would initially be carried out using heavy machinery, possibly with the establishment of a workers' campsite, and, after re-contouring and covering, re-vegetative seeding would be undertaken. He estimated that monitoring for contamination and successful re-vegetation could continue for as long as 20 to 25 years and perhaps longer.

22 Mr Waters explained that at present all that had been developed by the Applicants was a conceptual rehabilitation plan with cost estimates. That plan had yet to be submitted for final budget approval. He anticipated that, if approved, the proposed work would be commenced during the 2006 to 2007 financial year. He said, however, that it was only after budget approval was given that a more detailed rehabilitation plan and design would be prepared and tenders called. He said the estimated cost for the whole of the Billygoat dump was about $7.2 million out of an estimated total of $25,000,000 for rehabilitation of all of the dumps. That estimate, he said, could be out by plus or minus 30 per cent. He said that the final decision-making process for planning approval and budget approval would be lengthy and would ultimately be made by senior management and not by him.

SUBMISSIONS

23 The Applicants submitted that there had been compliance with the formalities of the Act and Regulations in relation to the making of the application for the miscellaneous licence. I find, on the basis of the material that has been placed before me, that the Applicants have fully complied with all of the legislative formalities connected with the making of the application.

24 I am satisfied, on the balance of probabilities, that the Applicants will, if granted the miscellaneous licence, carry out all of the work identified by Mr Waters in his evidence. I am satisfied that the proposed activities are consistent with current best practice. They appear to be practical, having been well researched, and to have the potential to achieve the desired result. The end effect, however, will be that the Objector will be left with an even greater area of inaccessible surface area on E45/1128 upon which usual surface prospecting and exploration activities may not be undertaken.

25 Concerning the evidence from the Applicants about proposed activities on the ground applied for, the Objector has said that there is such a lack of detail of what is proposed and what might happen on that ground that the Objector does not really know what will finally happen, nor whether or not the proposals will be ultimately adopted and followed through by the Applicants. Counsel observed that the plan that was tendered through Mr Waters had only been approved by Mr Waters on 7 February 2006, two days before the hearing. An example of the uncertainty, it is said, can be found in the evidence of Mr Waters concerning possible placement of monitoring bores and piezometers within the proposed miscellaneous licence.

26 The witness, it is said, was vague about numbers of and locations of such monitoring devices. The Objector submits that the vagueness of such detail, together with the absence of any final rehabilitation plan approval by those who have the power to do so on behalf of the Applicants, together with the absence of any final budget approvals, means that there is such uncertainty about what will occur on the Objector's exploration licence that makes it impossible for the Warden to give adequate consideration to the way in which the Objector may be adversely affected by the grant of the miscellaneous licence and, therefore, impossible to formulate conditions of grant which would adequately protect the interests of the Objector as the holder of the underlying tenement.

27 It is also said that the insufficient clarity and detail that has been presented on behalf of the Applicants at the hearing means that the Warden is unable to determine whether the purpose for which the miscellaneous licence is sought is directly connected with mining operations, as is required by subs 91(6). Counsel for the Objector submits further that the inadequacy of information and detail coming from the Applicants means that it will not be possible to properly ascertain what, if any, compensation the Objector is or may be entitled to pursuant to s 123 of the Act.

28 In summary, it is the submission of the Objector that it is impossible to know precisely what will happen on the Objector's exploration licence if the miscellaneous licence is granted and that, therefore, the Warden is unable to ascertain what impact the granting of the licence to the Applicants will have upon the exercise by the Objector of its rights under its exploration licence and

whether or not or in what way those rights may be obstructed or hindered.

29 The Objector also argues that reg 42B (n) of the Regulations is invalid. Alternatively, the Objector submits that if reg 42B(n) is valid, the exercise of the power pursuant to it by the Director-General in approving the purpose of "overburden management" for purposes of the *Iron Ore (Mt Goldsworthy) Agreement Act 1964* (WA) was repugnant to or *ultra vires* reg 42B and s 87 of the Act.

30 In respect of the invalidity of reg 42B (n), it is said that it constitutes an unauthorised delegation of the power granted by subs 91(1) of the Act and that, therefore, any purported exercise of any such power by the Director-General in approving a purpose for which a miscellaneous licence can be granted is invalid. Subsection 91(1) of the Act says that a miscellaneous licence may be granted for "… *any one or more of the purposes prescribed*". Regulation 42B says that for purposes of subs 91(1) a miscellaneous licence may be granted for any of the following purposes. Included as a "following purpose" is par (n) which says, "*Any other purpose directly connected with mining operations approved by the Director General of Mines*."

31 Pursuant to subs 162(1) of the Act, the Governor may make "… *such regulations as are contemplated by this Act, or as he deems necessary or expedient for the purposes of this Act and any such regulations may confer upon a prescribed person or body specified in the regulations a discretionary authority*". Subsection 162(2) then says that without limiting the generality of the powers conferred by subs 162(1), such regulations may prescribe or provide for all of the things then set out in the following pars (a) to (y) inclusive. Paragraph (a) says that regulations may "*prescribe and regulate the powers, functions and duties of … any officer … appointed under this Act or employed or acting in the administration of this Act*". That paragraph appears to be the only one that could be relevant to the issue raised by the Objector in this matter.

32 The Objector submits that a legislative power that has been delegated to any person cannot be delegated by such person to someone else unless the legislation, properly construed, allows that to be done. It is submitted that the Mining Act does not allow any

such sub-delegation. It is said that par (n) of reg 42B is invalid to the extent that it, in effect, purports to be a delegation by the Governor to the Director-General of the power that is delegated to the Governor to make a regulation that prescribes a purpose for which a miscellaneous licence may be granted.

33 Counsel referred to Pearce "Delegated Legislation in Australia", 2nd ed, 1999, ch 23, in particular pars 23.1 and 23.5. At 23.2 the authors observe that is now accepted law in Australia that Parliamentary legislative powers may be delegated. They say, however, that there is a qualification to that general power, namely, that it does not allow the legislature to create a new legislative power which can function independently of the Parliament establishing it and without being answerable to that Parliament (page 258). The authors (23.5) state that the broad principle that a person cannot delegate legislative power that has been delegated has been accepted with only one or two minor expressions of doubt.

34 They go on to say that in Australia the principle has been accepted, but not often applied, that the attitude of validity being determined by an analysis of the empowering provision and the delegated legislation made under that power has dictated that result. By way of demonstration reference is made to the decision of Gibbs CJ in ***Racecourse Cooperative Sugar Association Ltd v Attorney-General (Qld)*** (1979) 26 ALR 321 at 337. Reference is made also to ***Dainford Limited v Eric Kenneth Smith & Anor*** (1985) 58 ALR 285 at 290. It is said that in both cases Gibbs CJ doubted whether recourse to the delegation test was of much assistance and said that the questions that should be asked were, first, was the power exercised by the person upon whom it was conferred and, secondly, was it exercised in the manner and within the limits laid down in the empowering Act? The authors note there have, however, been cases where the decision has been made on the basis that there has been an unauthorised delegation.

35 ***Racecourse Cooperative Sugar Association Ltd v Attorney-General*** is a case relied upon this matter by the Objector. In that case the Act of Parliament provided that the Governor, by proclamation, was to determine what price would be paid for sugar acquired from growers by the Sugar Board. The Governor issued a proclamation that required the Sugar Board to determine the price. It was held by all members of the High Court that the proclamation was invalid insofar as it purported to allow the Board to determine

the price to be paid for sugar. Gibbs CJ (26 ALR 321 at 337) referred to ***King Gee Clothing Co Pty Ltd v The Commonwealth*** (1945) 71 CLR 184, that being another case involving the fixing of prices by an authority, where Dixon J said:

> "*But it is another matter when the basis of the price, however clearly described, involves some matter which is not an ascertainable fact or figure but a matter of estimate, assessment, discretionary allocation, or apportionment, resulting in the attribution of an amount or figure as a matter of judgment. When that is done, no certain objective standard is prescribed; it is not a calculation and the result is not a price fixed or a fixed price.*"

36 Gibbs CJ later said (337/line 34):

> "*When a discretionary power is conferred by statute upon the Executive Government, or indeed upon any public authority, the power can only be validly exercised by the authority upon whom it was conferred. Its exercise cannot be delegated to someone else, unless the statute, upon its proper construction permits such delegation. Some cases which illustrate this proposition, such Allingham v Minister of Agriculture … may perhaps be regarded as applying the maxim delegatus non potest delegare, whereas others … may simply provide authority for the obvious proposition that a statute which on its proper construction confers a power on A does not permit the power to be exercised by B. … A power given to one person to determine the value or fix a price will not be validly exercised by allowing another to exercise a wide and unreviewable discretion in determining that price, although the person upon whom the power is conferred may, instead of actually fixing a money sum himself, 'lay down a method of finding it which will produce the same result whoever applies it, so long as he uses it correctly'; Cann's Pty Ltd v Commonwealth, at p 228.*"

37 Stephen, Mason and Wilson JJ, agreed with the reasons stated by Gibbs CJ.

38 The Objector also made reference to the case of ***Allingham v Minister of Agriculture*** (1948) 1 All ER 780 that was referred to by

Gibbs CJ in the ***Racecourse Cooperative Sugar*** case. In ***Allingham*** an Act gave to a Minister power to exercise certain functions and a regulation made under that same Act said that the Minister could delegate any of his functions to a person or body of persons appointed or approved by the Minister. The Minister did delegate to a body of persons, a committee, a function concerning the selection of land in respect of which the Minister or his delegate could give directions concerning the cultivation of the land. The Committee then delegated to an individual the function of making a decision and, as part of that function, namely, selecting the land to which the direction would apply. That person made such a decision concerning a piece of land. The Court (King's Bench Division) unanimously held that the function that the individual had performed was of no effect and that the order that had been made by that person as a consequence of the decision that he had made in selecting the piece of land was not binding on the landowners. It was observed that there was nothing in the Act or the Regulations that permitted the Committee to which the Minister had delegated his functions to further delegate any such function to any other person or body.

39 Returning to the text of Pearce and Argument, the authors say (23.7) that "*… the empowering Act must be interpreted to see whether or not the legislature intended the delegate to exercise the power personally or whether it was permissible to sub-delegate that power*". They go on to say that there are some cases which give a little more specific guidance as to the approach a court may adopt in interpreting a power to delegate. The authors then refer to a number of cases where the delegate had abdicated responsibility and sub-delegated the whole of the power to another person or body and where a delegation of that type had been held to be invalid. In discussing the application of the abdication approach in Australian courts, the authors refer to a passage from the decision of French J in ***Turner v Owen*** (1990) 96 ALR 119 at 142 where his Honour, in considering whether or not there had been an unlawful delegation, said:

> "*On any functional analysis of the regulation it effectively places the power of prohibition in the hands of the Minister. The words 'dangerous character and menace to the community' are not indicative of a factual criterion or class description limited by any intelligible boundary. They are almost entirely normative. They may be applied*

> *with equal facility to offensive weapons, non-biodegradable plastic bags, or publications espousing political ideas with which the Minister disagrees. They are legislative in character. … They ask the Minister to do what the Governor-General is supposed to do, that is, to prohibit.*"

40 There is a discussion in Pearce and Argument (23.12) of the distinction between the inclusion in a regulation of an administrative control that does not amount to sub-delegation. The authors say that a general power to make regulations may be exercised in such a way as to include an administrative control without being considered to be a sub delegation. Reference is made to the High Court decision of ***R v McLennan*** (1952) 86 CLR 46. There the Court considered the validity of regulations made under the *Customs Act* to prohibit the exportation of goods if their export would in the opinion of the Governor-General be harmful to the Commonwealth.

41 The regulations under the Customs Act provided that no persons could export non-ferrous metals without the approval of a government department. The Court said that the fact that the regulation prohibited exportation without departmental approval did not mean that the decision of the question whether exportation is harmful is delegated, nor that the Governor General must have been of the opinion that to export the goods would be harmful subject to the department not thinking otherwise. The Court said that the regulation was consistent with an opinion that it would always be harmful but that justice or wisdom required or made it desirable to permit exceptions pursuant to an administrative discretion. It was said to be also consistent with a view that uncontrolled exportation would be harmful but that the harm could be reduced or mitigated by an administrative control.

42 Pearce and Argument (23.13) also discuss the situation where the person or body empowered to make delegation does not pass on the totality of the power but, instead, makes some provision pursuant to the power but leaves part of the power to be exercised by another person or body. It is said that the cases concerned with that situation have often employed a dichotomy between sub-delegation of legislative power and of administrative power. It is noted, however, that what is an administrative as distinct from a legislative activity is often difficult to define with precision. They

say, "*The courts have used different nomenclature at various times to describe what is at heart very much a value judgment.*"

43 Reference is made to the case of the ***Welsbach Light Co of Australia Ltd v Commonwealth*** (1916) 22 CLR 268. That case concerned an Act under which a person was to be deemed to trade with the enemy if he took part in an act that was prohibited "by or under" a proclamation made by the Governor-General. The Governor-General made a proclamation that specified certain transactions with certain companies to be prohibited. Among the categories of such companies were those specified by the Attorney-General to be companies to which the proclamation was to apply. The High Court held that the Governor-General had not sub-delegated to the Attorney-General.

44 Griffith CJ said that the word "under" in the act permitted the employment of the device of the Attorney-General's notice. Isaacs and Higgins JJ said that the Attorney-General was not legislating but was simply exercising a machinery function. Higgins J said that Parliament had legislated conditionally on the declaration of the Attorney-General. The authority that was conferred upon the Attorney-General by the Governor-General in the ***Welsbach*** case is in some respects similar to the power that has been purportedly conferred upon the Director-General by the Governor pursuant to reg 42B(n) of the Mining Regulations in that, in both cases, it appears that the person to whom the power is given is discretionary, requires a judgment to be made upon the basis of relevant factual material and appears to have the effect of extending the subject matter to which the proclamation, in the one case, or the regulation, in the other, applies. There appear to be some differences, however.

45 In the ***Welsbach*** case the proclamation specified transactions and specified companies. Some of the companies were specified according to their category and some companies were able to be specified by the Attorney-General. The power given to the Attorney-General related only to part of the second element of the proclamation and, then, only to a part of that second element in that the second element was to be made up of companies that were specified in the proclamation, together with any specified by the Attorney-General. In the case of the Mining Regulations it appears that, subject only to the caveat that the purpose must be one directly connected with mining operations, the Director-General has a

power that is equal to that given to the Governor by ss 91 and 162 of the Act. In limiting the purpose that may be approved by the Director-General to one that is directly connected with mining operations, the Governor, in reg 42B (n), has done no more than introduce a qualification that has the practical effect that the Director-General cannot approve a purpose for which, in any event because of subs 91(6), a Warden or Registrar could not grant a miscellaneous licence. It would appear to be arguable that it is implied that where the Governor exercises the power under s 162 of the Act to make "… *such regulations as are contemplated …*" by the Act or as are "… *necessary or expedient for the purposes of …*" the Act that he may only do so for the purposes of s 91 where the purpose is directly connected with mining operations and, further, it is arguable that it is to be implied in reg 42B that all of such purposes as are specified therein in paras (a) to (m) are purposes that must be directly connected with mining operations.

46 Pearce and Argument go on to discuss some of the criteria that have been considered by Australian and New Zealand courts in respect of the distinction between a legislative as opposed to an administrative power or function being delegated. One such criterion is that the conferral of the power or function contains no guidance as to how it is to be exercised. Another criterion is whether or not there has been a complete passing over of the power or function from the delegate to the other person or body. Another approach is to acknowledge that there must be some point at which the decisions of administrative officials come into play in the administration of, as distinct from the formulation of, regulations.

47 By way of summary of the administrative-legislative approach the authors (23.17) have said that the effect of the cases that they have referred to appears to have been correctly summarised by the Court of Appeal in ***Hawke's Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board*** (1961) NZLR 218 at 223, namely:

> "*The principle enunciated … does not preclude the making of regulations which confer on a subordinate body or official authority to make decisions and exercise discretionary powers within the limits prescribed by the regulations, but it is always to be borne in mind that the legislative power itself cannot be deputed.*"

48 The authors go on to say:

> "*The wider the field of operation left to the sub-delegate, the more likely it is that the Court will take the view that there has been a sub-delegation of legislative power. Where, on the other hand, the matters that are left to be carried out by the sub-delegate are questions of detail which merely fill the gaps left in the legislation itself, or which are to be carried out in accordance with guidelines laid down in the legislation, the more likely it will be that the courts will determine the sub-delegate is exercising administrative powers only, and the sub-delegation will be valid.*"

49 The Objector drew my attention to the unanimous decision of the High Court in ***Morton v Union Steamship Co of New Zealand*** (1951) 83 CLR 402. The Court said that where a statute enables regulations to be made that are incidental to the administration of the Act, then they may be made for the more effective administration of the provisions that are in the Act but regulations may not be made:

> "*… which vary or depart from the positive provisions made by the Act or … which go outside the field of operation which the Act marks out for itself. The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.*
>
> *In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically an in detail with the subject matter to which the statute is addressed.*"

50 The Objector also submits that one reason why a delegation by the Governor such as that which appears within reg 42B(n) is *ultra vires* and invalid is that the making of regulations and their coming into effect requires a procedure which includes them being placed

before Parliament and, in effect, approved by Parliament and thus being subject to the control of Parliament before and after they come into operation, whereas the Director-General, in approving a purpose under reg 42B(n), is not subject to any such procedure or anything like it and the process of approval by the Director-General is never the subject of any scrutiny or immediate control by Parliament.

51 The Objector submits that there is no admissible evidence that the Director-General has approved the purpose for which the miscellaneous licence is sought. It is noted that the letter dated 19 August 2003 signed for the Director of Mineral Titles and addressed to the Applicants' tenement manager would not be admissible as evidence in a court of law. It is conceded that these are administrative proceedings but stated that the Warden must act judicially in dealing with matters that are sought to be introduced as evidence at a hearing. Given that there is no evidence to the contrary and that I have no reason to doubt the authenticity or the truth of the contents of the letter of 19 August 2003, I am satisfied that, as is stated in the letter, the Director-General did purport pursuant to reg 42B (n) to approve as a purpose for a miscellaneous licence "*Overburden management including rehabilitation and on-going monitoring and drainage control for the purposes of the Iron Ore (Mt Goldsworthy) Agreement Act 1964*".

52 Counsel for the Objector also argued that even if reg 42B (n) is valid, the approval by the Director-General of the particular purpose in this case is repugnant to or *ultra vires* of reg 42B as being inconsistent with the type of purpose prescribed by the regulation and repugnant to reg 87 of the Act relating to general purpose leases. It is said that reg 42B deals with and is intended to deal with temporary or movable activities such that when mining operations cease, the need for the miscellaneous licence will abate. It is said that, on the other hand, more permanent and lasting activities such as tailings dams and overburden dumps are intended, upon a proper construction of the Act, to be the subject of a general purpose lease. He noted that the relevant State Agreement anticipated the grant of a lease in cl 8(2) (c) rather than a licence.

The Applicants' Submissions

53 In summary, it is submitted by the Applicants that a Warden sitting in open court cannot review the action of the Governor in

relation to the making of reg 42B (n) and cannot review any approval purportedly given by the Director-General under that regulation and must proceed to deal with the application for the licence upon the basis that it is *intra vires* and valid. In response to the Objector's submissions concerning the absence of sufficient detail as to the activities that the Applicants will undertake if the licence is granted, counsel for the Applicants say that the evidence of Mr Walton given at the previous hearing and adopted in the present hearing contains a significant amount of detail and, in any event, there is now sufficient detail before the Objector and the Warden. It is submitted that it is not necessary for present purposes for any more information as to proposed activities to be presented.

54 Concerning the submission that the purpose approved by the Director-General is a purpose for which a general purpose licence is reserved by the Act, the Applicants simply say that that is an argument that carries no weight because a general purpose licence cannot be granted over the Objector's pre-existing exploration licence. It is also noted that unless the Minister is satisfied that a larger area of land is required, a general purpose lease may only be granted over an area of up to 10 hectares (s 86(3)).

55 The Applicants submit that the real issue to be determined in these proceedings is whether or not the grant of the miscellaneous licence would be so detrimental to the interests and rights of the Objector that it ought not to be granted. That issue, it is said, must be determined in the context of the total size of the Objector's exploration licence - 93 square kilometres - and the relatively small area of the ground applied for - 49 hectares. Counsel submits that, given the size of the overburden, relative to the size of the exploration licence, any such hindrance that is presented by the overburden to the Objector is of no practical significance or consequence.

56 Concerning the submission by the Objector as to the effect of the lack of information concerning future activities that may take place if the miscellaneous licence is granted, counsel for the Applicants submits that the compensation regime established by s 123 of the Act is one whereby the person towards whom the tenement holder may have some liability in that regard is required to wait until the work has been done, or at least commenced, to then endeavour to reach agreement with the tenement holder as to compensation and, if no agreement is reached, may then commence

proceedings under par 123(2)(b). In that regard the Objector notes that in subs 123(2) there is reference to "… *damage suffered or likely to be suffered …resulting or arising from the mining …*".

57 In respect of the issue of what, if any, conditions should be imposed if a miscellaneous licence is granted, the Applicants submit that no special conditions should be imposed and that the standard conditions that are normally imposed on the grant of miscellaneous licences will be adequate.

58 The Applicants submitted that a Warden sitting in an administrative capacity hearing an application for the grant of a mining tenement cannot make a ruling as to whether or not a provision in an Act or regulation is *ultra vires* or invalid. In any event, the Applicants say that reg 42B (n) is valid. They submit that it does not undermine any function of the Warden under s 91. It is said that what it does is to provide a practical alternative to the Warden granting a licence for several of the purposes that are set out in pars (a) to (n) of the Regulations which, in this case, would enable the Applicants to undertake the activities that they wish to undertake in connection with the encroaching overburden. For example, counsel said in the present case, purposes such as a road, a pipeline, a power line, a bridge, taking water, transport of tailings, hydraulic reclamation, and a sulphur dioxide monitoring station would all enable the Applicants to achieve the purpose set out in the Director-General's approval previously referred to.

CONCLUSIONS

The *Ultra Vires* Issue

59 I am of the opinion that the Governor in making reg 42B (n) has acted beyond power and that that regulation is invalid. My reasons for arriving at that conclusion are as follows.

60 In hearing an application for the grant of a miscellaneous licence I am exercising the administrative and not the judicial jurisdiction and powers of a Warden. There is nothing in the Act or Regulations which expressly or impliedly gives to a Warden exercising such power any power to review any administrative or legislative action with a view to the Warden expressing a conclusion that the action was beyond power and making any consequential order or taking any consequential action. A Warden,

for example, has no power in such proceedings to make any binding declaration. The power to make a declaratory order in connection with administrative proceedings before a Warden to the effect that legislation, whether delegated or not, is invalid because it is *ultra vires* or for any other reason is generally reserved to the Supreme Court.

61 The commentary in Pearce and Argument, including those matters which I have previously referred to specifically, make it clear that in the absence of any express or implied permission given by Parliament in the legislation which delegates a legislative power to a person, the delegate cannot lawfully sub-delegate the delegated legislative power. A sub-delegation may occur by total abdication by the delegate of the delegated power. It may occur by a partial delegation. It may arise where the sub delegate is authorised to take action and do things that are inadequately identified or that are expressed in such a way as provide no guidance as to how the delegated functions are to be carried out.

62 In Halsbury Laws of Australia (10-2120) it is said that the broad law-making powers of the legislature to make laws for the peace, order and good government of a State may not be delegated. However, there is no constitutional impediment to the Parliament authorising a delegated law-maker to make delegated legislation regulating or prohibiting a certain activity. It is further said that in the absence of express power to do so, where the entire delegated law-making power is deputed to another decision-maker, it is exercised invalidly by that decision-maker. As an example, it is said that it is an impermissible delegation for the Governor in Council, vested with delegated law-making power to determine what goods ought to be prohibited imports, to make a regulation which leaves it entirely to the opinion of the Minister which goods ought to be prohibited as falling within a specified description. Authority for that proposition is cited as ***Owen v Turner*** (1989) 19 ALD 550 at 554 per Spender J as affirmed by ***Turner v Owen*** (1990) 21 ALD 115 by Jenkinson and French JJ.

63 In Halsbury it is also said (10-2120) that if a delegated law-maker delegates this function subject to a limitation, such as is exercised in accordance with the formula or factual criterion which is certain and objective, then the making of the delegated legislation will not be invalid. The formula in accordance with which the delegated legislation is to be made must be certain and objective in

the sense that anyone who applies the formula mechanically would reach the same conclusion without there being any element of estimation, prediction or conjecture.

64 In Halsbury's Laws of Australia subordinate legislation is discussed at 385-740 to 385-850. It is observed (385-755) that delegated legislation cannot be inconsistent with the enabling Act, (385-760) that the making of delegated legislation is governed by procedures either set out in the parent Act or an *Interpretation Act* or other Act dealing generally with delegated legislation for that jurisdiction and that in all jurisdictions in Australia delegated legislation must be published or notified in the gazette of that jurisdiction. It is also noted that delegated legislation must be tabled before Parliament before it can become law and that provision is made in all jurisdictions in Australia for Parliament to disallow delegated legislation. As counsel for the Objector submitted, no such procedure and scrutiny resulting from those procedures can apply to an approval given by the Director-General under reg 42B (n).

65 In Halsbury (385-810) the power of the courts to determine validity of delegated legislation is considered. It is said, that in exercising the power of judicial review, courts have a role in ensuring the power to exercise pursuant to a legislative grant are properly exercised by the person or body to whom that power has been granted. It is said that when a matter is brought before it, a court must construe the terms of the delegated legislation in which Parliament conferred the power to make delegation, must ascertain the scope and legal effect of an impugned delegated legislation and must determine whether the delegated legislation, having that ascertained scope and legal effect, is within the ambit of the power so granted. It is said in that context, "… *until a court decides otherwise delegated legislation must be presumed to be valid".* In support of that final comment reference is made, inter alia, to the case of McEldowney v Forde [1971] AC 632 at 655 per Lord Pearson HL where, the Court said that the presumption of regularity applies and the regulation is assumed prima facie to be intra vires. Reference is then made in Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 1) (1991) 32 FCR 219. In that case Hill and Heerey JJ refer to a passage from the judgment of Lord Morris of Borth-y-Gest (365) in Hoffman-La Roche & Co v Secretary of State for Trade & Industry [1975] AC 295 where his Lordship said:

> "*Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed. It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings.*"

66 The authors in Halsbury go on to say that a court has power to strike down delegated legislation in much the same way as statutes can be struck down if they are made in excess of constitutional power. It is said that the relief that can be granted includes a declaratory judgment that the delegated legislation is *ultra vires* and may also be associated with injunctive relief.

67 As to grounds for challenging delegated legislation, Halsbury then canvasses (385-820 to 385-850) grounds for challenging delegated legislation. Those grounds include a failure to comply with conditions precedent set out in the enabling Act to the making of the delegated legislation, inconsistency with the enabling statute, unreasonableness, uncertainty, repugnancy to the general law, repugnancy to some other statute. It is said (385-835) that a recurring theme emerging from decisions of the courts is that the test of validity is whether the delegated legislation is such that it must reasonably have been adopted as a means of attaining the ends for which the power was granted.

68 Concerning the provisions of reg 42B (n) itself, it is my opinion that the regulation is expressed in terms that are far too broad in their effect, in the sense of what they empower the Director-General to do, to enable the delegated function to be described simply as an appropriate administrative facilitative function or a machinery function and to enable it to be characterised as not a legislative function. It is readily apparent that if the Director-General is able to approve of purposes for which a miscellaneous licence may be granted, limited, arguably, only by, perhaps, the general context in which the regulation is to be interpreted, including the *ejusdem generis* rule applied in the context of paragraphs 42B(a) – (m). There will be no need for a person who seeks a licence for a purpose which does not fall within the specified purposes (a) to (m) to endeavour to have the Governor prescribe by regulation and for Parliament to scrutinise and approve a new purpose within which the activities sought to be undertaken will fall.

69 Such a procedure would be generally cumbersome compared to the relatively far more efficient procedure of going straight to the Director-General. Mere administrative and commercial expediency, however, cannot support or justify, of themselves, the characterisation of the nature of the delegation as administrative rather than legislative. There must be something in the enabling legislation that gives rise to a conclusion that the sub-delegation of a legislative power is permitted. In my opinion, there is nothing in ss 91 and 162 of the Act, or in any other part of the Act, which does that. That is so even though it can quite properly be said that it would be very difficult for the Governor to sufficiently prescribe, either by category or by precise description, all purposes for which a miscellaneous licence may need be granted.

70 The general scheme of the Act is that s 91 says that a miscellaneous licence may be granted for prescribed purposes. Pursuant to the *Interpretation Act 1984* (WA), "prescribed" means occurring in a written law and includes anything prescribed by subsidiary legislation made under a written law. Section 162 of the Act says that the Governor may make regulations such as are “contemplated” by the Act or as he “deems necessary or expedient for purposes of the Act” and, further, that such regulations may confer a discretionary authority on a prescribed person or body. In my opinion, the Governor has gone beyond any delegatory power given to him by s 162 of the Act. Section 162 delegates a

legislative power to the Governor. If the Governor were to delete or amend any of paras (a) – (m) then, on a literal reading of para (n), the Director-General could subsequently approve a purpose that was precisely the same as that which the Governor had removed. Such an outcome is not what could have been "contemplated" by the Act and it could not be said to be necessary or expedient for purposes of the Act or to achieve something that is. It demonstrates, however, that the power given to the Director-General in para 42 B (n) is legislative in character.

71 In my opinion, reg 42B (n) purports to enable the Director-General to do everything that the Governor is empowered to do by ss 91 and 162 of the Act. The qualifying or limiting words "… *purpose directly connected with mining operations* …" which appear in reg 42B(n), in my opinion, do nothing more than reflect the limitation that appears in subs 91(6) of the Act, namely that no miscellaneous licence may be granted for a purpose that is not connected with a mining operation. I consider, from a reading of ss 91 and 162 together, that any purpose that is prescribed by the Governor must also be a purpose that is capable of having a connection with mining operations and, further, that it must be a purpose which is consistent with the Act generally, with s 91 in particular and with the general policy that emerges from the Act and the Regulations. That is what is "contemplated" by the Act for purposes of subs 162(1).

72 I consider that it would be inconsistent with the provisions of subs 91 for the Governor to prescribe a purpose that could not be characterised properly as one that is directly connected with mining operations. In that context it appears that what the Governor has purported to do in reg 42B (n) is to empower the Director-General, subject only to a qualification or restriction which is all ready contained by inference in the Act, to approve any purpose for which a miscellaneous licence may be granted and that means that the power of the Director-General to approve is as wide as is the power of the Governor to prescribe a purpose. In my opinion that cannot, for the purposes of subs 162(1) of the Act, be said to be a regulation such as is "contemplated" by Act.

73 Subsection 162(1) of the Act also empowers the Governor to make such regulations "… *as he deems necessary or expedient for the purposes of this Act* …". That, however, does not confer upon the Governor a power of sub-delegation of any legislative function

that is vested in the Governor under the Act. What is permissible as being necessary or expedient is necessarily confined to necessity and expediency which is not inconsistent with the provisions of the Act from which the power to delegate is derived. In the case of miscellaneous licences, Parliament has scrutinised and approved, in paras 42B (a) to (m), specifically the purposes for which a miscellaneous licence may be granted. In subs 91(6) Parliament declared that a miscellaneous licence could be granted for purposes that were connected with mining operations and that the Governor, not the Director-General, was to determine and then prescribe specifically the types or categories of activities that may constitute a purpose allowed under s 91. The means that Parliament has chosen of prescribing such purposes is by regulation. It is nowhere contemplated in either s 91 or s 162 or in any other part of the Act that the Governor will have the power to create another means whereby such purposes may be determined, yet that is precisely what reg 42B (n) purports to do.

The Powers of a Warden Acting Administratively in Respect of *Ultra Vires* Legislation

74 Acting administratively in open Court a warden has no jurisdiction or power to make a declaration that is binding at large that a regulation is invalid, or that an administrative act performed in accordance with the provisions of a regulation that a warden considers to be invalid is itself invalid because the regulation that says that the act may be performed is *ultra vires*.

75 I was referred by counsel for the Applicants to Douglas and Jones's "Administrative Law, 4th ed, where (334) the authors have said:

> "… *the exclusion of inferior courts from the field of judicial review is achieved simply by the non-conferral of an administrative law jurisdiction. In the absence of legislation expressly depriving them of the power to inquire into the validity of administrative acts, inferior courts may, however, be able to examine the validity of an administrative act if this were to be relevant to a matter before the court: indeed, in the criminal jurisdiction they may well need to do so in order to determine such matters as whether evidence is admissible. If collateral attack gave rise to a complex administrative law issue, the matter*

> *might, on the application of a party or at the instance of a magistrate or judge, be removed to the Supreme Court*".

76 Since hearing submissions of the parties I have become aware through my own research of the decision of Parker J in ***Pennings v Selby***, unreported; SCt of WA; Library No 970201;11 April 1997. In that case his Honour was called upon to consider, *inter alia*, whether a magistrate exercising the jurisdiction of the Court of Petty Sessions had the power to determine the validity of a statutory instrument upon which the complaint then before the magistrate was based. His Honour said (40):

> "*While it may be … that the advancing complexity of the law in this area makes it undesirable for cases of this type to be decided other than by a superior court, nevertheless, I am not able to accept that in this State it is not within the jurisdiction of Courts of Petty Sessions to do so in an appropriate case. It should be remembered that in a prosecution founded upon subordinate legislation, the magistrate is not called upon to declare for the world at large the validity of the legislation which founds the prosecution. The relevant issue which must be considered is whether it has been established at a required standard that there has been a breach of the law as alleged in the complaint. In the case of a prosecution founded on subordinate legislation or a statutory instrument, this involves proof of the existence of the legislation or instrument. That necessarily involves proof of its validity. This process of proof will normally be assisted or achieved by statutory or other presumptions, but nevertheless the underlying requirement is for proof. It is for the magistrate to determine whether that has been proved; that determination does not involve a declaration of validity or invalidity. It appears to me that this is within the jurisdiction conferred on stipendiary magistrates by ss 15, 20, 29 and 33(1) of the Justices Act 1902. Thus, I am unable to accept that decisions such as* ***Bugg*** *and* ***Wicks****, or for that matter the* ***Hinton Demolitions*** *decision, preclude magistrates sitting in Courts of Petty Sessions in this State from considering the validity of subordinate legislation or of a statutory instrument, at least in a situation such as the present where the statutory*

> *instrument is legislative in character and its validity is necessary to an element of the offence which is charged.*
>
> *In case I have not made the position clear enough, it is not suggested that in every prosecution founded on subordinate legislation or some statutory instrument it is necessary for the prosecution to lead evidence to establish the validity of that legislation or instrument, including evidence as to compliance with any conditions and preliminary steps precedent which are required for its making. Section 43(3) of the Interpretation Act and the common law presumption of regularity will normally be sufficient, at least in the absence of evidence to the contrary, to establish validity.*"

77 Two initial points of distinction should be observed between ***Pennings*** case and the matter that is now before me. The first of those is that the Magistrate in ***Pennings*** case was sitting as a court and in a judicial and not an administrative capacity. The Warden in hearing an application for the grant of a miscellaneous licence acts administratively and is not sitting as a court. The second distinction is that in the matter now before me there is no issue as to the existence of the legislation, in this case, reg 42B(n), or as to whether or not it's creation and coming into force (subject to the *ultra vires* issue) was other than according to correct procedure. There is no relevant issue involving proof of its validity that is based upon anything other than the argument that reg 42B (n) is invalid because it is *ultra vires*. Although the Objector submitted that the letter that was signed by the Director of Mineral Titles (exhibit 8) in which he advised that the Director-General pursuant to reg 42B (n) had approved as a purpose under that regulation, the purpose for which the Applicants now seek the grant of the miscellaneous licence, that submission was not based on any evidence that was contradictory of or inconsistent with the contents of the letter. It was, in essence, a submission that the letter and its contents should be given no, or very little, weight and was not sufficient to prove that the Director-General had approved the specific purpose. I had little hesitation in concluding that in the circumstances, particularly in the absence of any contrary evidence, the approval of the Director-General had been given to the proposed purpose.

78 . The decision of Parker J in ***Pennings*** went on appeal - ***Selby v Pennings***, unreported; FCt SCt of WA; Library No 980480; 26 August 1998. In the course of the appeal it was argued that it was not open to the Magistrate who conducted the initial hearing to consider a collateral challenge to the validity of a notice issued by the Minister pursuant to a provision of the *CALM Act*. The Defendant in those proceedings had alleged that the notice was *ultra vires* the power given to the Minister by that Act. The members of the Full Court gave consideration to the common law presumption of regularity insofar as it applied to subsidiary legislation, including statutory instruments, and also gave consideration to the provisions of s 43(3) of the *Interpretation Act* whereby statutory effect is given, in the terms expressed by that section, to the common law presumption.

79 Ipp J commented (15) that there seems to be little difference between the common law presumption and the statutory rule. He said that both seemed to apply only to matters of form rather than of substance and that:

> "*Essentially, the presumption is that the formal requirements of judicial or administrative acts which are in good substance have been met. … I shall … assume that, generally speaking, the presumption may be applicable to the substantive question concerning the validity of the notice.*"

80 His Honour then went on to discuss the application of the presumption of regularity, both at common law and pursuant to statute, and, in particular, discussed the matter of what may constitute sufficient evidence to result in the presumption not having application. Of particular importance is the context in which his Honour was making those comments. The context was one, not where it was being asserted by one of the parties that there was no power to issue any notice but one where it was accepted that there was a valid grant of the power to make such notices. The issue of validity arose because of the notice revealing a difference between what it purported to do and a condition precedent to the issuing of the notice. The condition precedent was in the form of a recommendation as to what should be done. The relevant recommendation, on its face, differed from what the notice purported to do. It was argued that, therefore, the presumption of regularity did not apply, that the prosecutor was required to prove

that the notice had been made in accordance with the conditions precedent and the enabling statute and that there had not been sufficient proof of the due making and therefore the validity of the notice placed before the Court as would enable the Court to conclude beyond a reasonable doubt that the notice was a valid exercise of the power given to the Minister under the enabling Act. As Ipp J said (24):

81 "*As the presumption was rebutted, the complainant failed to discharge the onus of proving the validity of the notice. Accordingly I … restore the order of the learned Magistrate upholding the no case submission.*"

82 In ***Selby's*** case Ipp J said (27), after giving consideration to a number of English decisions and to the decision of Malcolm CJ in ***Re Fiver Pty Ltd; Ex parte The Cabaret Owners Association of Western Australia Inc***, unreported; FCt SCt of WA; Library No 8001; 21 December 1989:

> "*Nothing in the principles so expressed excludes a collateral challenge to subordinate legislation. This is made abundantly clear in* ***Boddington v British Transport Police****. It has long been the law in this State;* ***Obea Pty Ltd v Savell*** *…; see also* ***Re Lawrence; Ex parte Goldbar Holdings Pty Ltd*** *(1994) 11 WAR 549 at 560. There are sound reasons of policy for this. They are expressed in the speeches of Lord Irvine and Lord Steyn in* ***Boddington v British Transport Police****. I would merely note in particular the following remarks of Lord Steyn at 663 to 664:*
>
> > *'That decision [Bugg v Director of Public Prosecutions] contemplates that, despite the invalidity of a by-law and the fact that consistently with Reg v Wicks … such invalidity may in a given case afford a defence to a charge, a Magistrates Court may not rule on the defence. Instead the Magistrates may convict a defendant under the by-law and convict and punish him. That is an unacceptable consequence in a democracy based on the rule of law …'.*

> *… I have to say the consequences of **Bugg's** case are too austere and indeed too authoritarian to be compatible with the traditions of the common law …*
>
> *There is no good reason why a defendant in a criminal case should be precluded from arguing that a by-law is invalid where that could afford him with a defence. Sometimes his challenge may be defeated by special statutory provisions … The defence may fail because the relevant statutory provisions are held to be directory rather than mandatory. It may be held that substantial compliance is sufficient. But, if an issue as to the procedural validity of a by-law is raised, the trial Court must rule on it."'*

83 Owen J agreed with the reasons of Ipp J. Wallwork J also agreed that the case of ***Boddington v British Public Transport*** (1998) 2 WLR 639 had application and that invalidity of subsidiary legislation could be properly raised as a defence in Courts of Petty Sessions and dealt with and ruled upon by a Magistrate. Owen J said (6) that the practical effect of the submission that the validity of subordinate legislation could not be challenged collaterally in a prosecution before a Court of Petty Sessions was that where a Defendant in a prosecution wished to challenge the validity of subordinate legislation on which a charge is based the defence is left with two alternatives:

> "*First, the defendant could allow the prosecution to take its course and, if convicted, rely on the appellate court to take into account the issue of invalidity, being an issue that was not before the Magistrate. This raises its own problems and would not be attractive, especially if the penalties included a term of imprisonment … Secondly, the defendant could take out proceedings for declaratory relief or for a prerogative writ in this Court and seek a stay of the prosecution until the superior court proceedings had been completed.*
>
> *In my opinion the reasoning of Lord Steyn in **Boddington** … is compelling and I respectfully adopt it. The common law has … developed numerous rules to avoid or discourage multiplicity of proceedings. This is a matter of high public policy. … There is also the public interest in*

> *preserving for members of the community ready and affordable access to the Courts. Anything that increases costs and delay (and splitting the proceedings in the way suggested has that potential) has public policy ramifications.*
>
> *It is true that challenges to the validity of subordinate legislation can raise complex issues which would justify the attention of a judge of a superior court. It is true also that challenges of this type will often have ramifications far beyond the interest of the immediate parties to the prosecution. On the other hand, in the modern age Magistrates are all legally qualified and are appointed on criteria that seeks to assess competence and suitability for the tasks that they are expected to perform. … Weighing up all of the competing public policy considerations, I think there is good reason to follow the course adopted in* ***Boddington*** *…*".

84 A Warden sitting in open court determining an application for the grant of a miscellaneous licence, in which the Warden has the power to grant or refuse, is an administrative proceeding. The Warden must, however, act in a "judicial manner".

85 In ***Optus Networks v Stonnington City Council*** (1996) 135 ALR 711 it was held that the desirability in general of treating acts of Parliament and delegated legislation as valid, when the question of validity arises in interlocutory proceedings, is even greater when the body is not a court but an administrative tribunal.

86 It is of importance to note that the cases to which reference is made in ***Pennings v Selby*** and in the appeal case of ***Selby v Pennings*** dealt with prosecutions of various matters in inferior courts as distinct from an administrative tribunal of the type conducted by the Warden sitting in open court. I am of the opinion, however, that the distinction does not mean that the principles that have been considered and applied by the single Judge and by the Full Court in the ***Selby*** and ***Pennings*** cases cannot or should not be applied to administrative proceedings conducted by a Mining Warden under the *Mining Act*. None of the inferior courts that were the subject of the decisions relied upon by the single Judge or by the Full Court had any jurisdiction that gave to them any powers of judicial review. None of them had any jurisdiction which gave to

them any powers in the nature of the remedies available upon prerogative writ or by way of binding declaration in respect of the legislation or statutory instrument that was the subject of those cases. In effect, none of those inferior courts had any power to make a determination that affected, in the sense of being binding, anyone other than the immediate parties to the proceedings.

87 The jurisdiction and powers of the Warden sitting in open court are similarly restrictive. In the case of a warden hearing an application for the grant of a miscellaneous licence (and a prospecting licence) under the *Mining Act*, a warden has power to finally determine the application by grant or refusal. The grant of a miscellaneous licence is a matter which has the effect that the holder of the underlying tenement will not have the same physical ability and legal capacity to exercise the rights that attach to the grant of the underlying tenement in the sense that the holder of the underlying tenement, after grant of the miscellaneous licence, must pay due regard to the physical activities of and to the legal rights of the holder of the miscellaneous licence. The miscellaneous licence, of course, should have only been granted in circumstances where it would not injuriously affect the rights of the holder of the underlying tenement or hinder or obstruct that holder in the execution of any rights that attach to the grant of the underlying tenement (***Re Roberts*** at 554).

88 In that sense, the grant of a miscellaneous licence can have the effect of diminishing the otherwise unimpeded rights of the underlying tenement holder. The point I make is that there is the potential for the holder of the underlying tenement to be adversely (although it should not be injuriously) affected by the grant of a miscellaneous licence and that, in my opinion, is something that may properly be taken into account in deciding whether or not it is appropriate that the Warden hearing an application for the grant of a miscellaneous licence has the power to consider and rule upon and what is, in effect, a collateral attack on the validity of delegated legislation or of a statutory instrument.

89 I consider that the comments by Owen J in ***Selby*** at pages 6 to 7 which I have previously set out herein have equal application to proceedings before a Warden sitting in open court where there is the potential for one party to be adversely affected by the grant of the licence that is sought and where the alternative to the Warden not ruling upon and acting upon the Warden's ruling in respect of an

issue concerning the invalidity of delegated legislation has the potential to result in multiplicity of proceedings, in significant additional legal costs being incurred, in there being an outcome that is based upon a regulation that is patently invalid, being presumed and taken to be *intra vires*, and where there is no need, as in this case, for there to be a determination made of factual issues as to whether or not procedural steps have been taken and conditions precedent have been complied with in the making of the challenged subsidiary legislation.

90 I am not aware of any specific judicial precedent concerning a matter of this nature. I am of the opinion that it would be unfair and improper of me to simply say that I consider, without reservation, that I should, in practice, simply put that aside my conclusion that reg 42B (n) is invalid and grant the miscellaneous licence on the basis that a purpose, albeit without any lawful basis, has been approved pursuant to an *ultra vires* regulation and to go ahead and grant the tenement. To put it simply, if Parliament, when passing the Act, had wanted to give to the Director-General the power to prescribe, by way of regulation or otherwise, purposes for which a miscellaneous licence may be granted, it would have been an extremely simple thing to achieve by expressly saying so.

91 For all of the above reasons miscellaneous licence application 45/116 is refused.