AMPLA

Inaugural
Warden's Court Dinner

The Hon Wayne Martin
Chief Justice of Western Australia

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I would like to commence this evening by acknowledging the traditional owners of these lands, the Nyoongar people, and paying my respects to their Elders, past and present.

It is a great honour to have been asked to address this dinner held to acknowledge the gathering of all the mining wardens who sit in the Wardens' Courts in various locations around our State. Our State comprises more than one-third of the continent, but, of course, the contribution made by our mining industry to the wealth of the nation is much greater than that geographic portion would suggest. Given the importance of the wardens to the regulation of the mining industry, and given the importance of the mining industry to the wealth and prosperity of not only the inhabitants of this State, but the entire nation, it is, I think, impossible to overstate the importance of the work done by the wardens throughout Western Australia. And, of course, often that work is required to be done in difficult circumstances - due either to the inadequacy of the court facilities available, the unavailability of reference and research materials, or the sheer pressure of caseload, which often produces the result that Wardens' Court proceedings go well into the night.

My researches have revealed the origin of the expression in the old French word *wardant* which means "keeping". So the function of a warden generally is to keep or maintain something. That's why we have church wardens, college wardens, wardens of ports and so on. And so the function of a mining warden is to maintain, or keep in order, a minefield - and I'm sure on many occasions wardens must feel like they are walking through a minefield when trying to resolve cases.

The office of mining warden is an office which has its origins in antiquity - as the very name suggests. Now that we have entered a new millennium, I think it is time to review that role, and ask whether the current structure of the office, and in particular the functions and responsibilities that are reposed in the office-holder, are consistent with contemporary legal structures, and perhaps more importantly, contemporary business practices.

Administrative v Judicial Functions

One of the curious, perhaps unique aspects of the office of warden is that it combines a wide variety of administrative and judicial functions and responsibilities in one office. This would, of course, be impossible if the office of warden was created under Commonwealth law, because the Commonwealth constitution has been found to imply a rigid separation of functions of the kind propounded by Montesquieu - that is, between the legislative, the executive and the judicial. And in the office of warden, we have an exceptional, perhaps unique, merging of executive and judicial functions in a way which would be quite impossible under Commonwealth law.

One of the more unusual aspects of that merger of functions, is the limitation of the powers of the warden, in many areas - notably, in relation to the grant of mining tenements, to the making of a recommendation to the Minister. The classic distinction between a judicial officer and an administrative official is that judicial officers ordinarily make binding and enforceable determinations of right. It is no part of the judicial function to make a recommendation to an administrative official - even a member of the executive as senior as a

Minister. And it seems to me that there are arguably significant flaws in this structure.

The first and most obvious is the potential for the diminution in the standing and respect of the judiciary as a result of a recommendation being overridden by the executive branch of government. Under our basic structures of government, the executive and the judiciary are fundamentally independent of each other - both with their roles and responsibilities and neither subservient to the other. The executive is responsible for the appointment of the judiciary, and for the provision of the resources necessary for the judiciary to undertake their function. But the judiciary has the right and, indeed, the duty to determine the lawfulness of executive action. When the judiciary perform that important constitutional function, we don't send a report to the executive branch of government saying that we think they should do one thing, or another thing. What we do is to make binding and enforceable orders which bind the executive government.

This structure, and the independence of the judiciary from subservience to the executive is no mere technicality. It is fundamental to the rule of law and to the checks and balances which have enabled our system of government to survive and provide political and administrative stability. In that important context, a limitation which prevents a judicial officer from doing anything more than make a recommendation to a member of the executive is anomalous and has the capacity to undermine and weaken the important fundamental structures to which I have referred.

The second problem arising from the combination of a diverse range of functions in one office-holder is the masses of litigation which it has

produced focusing on technicality and form rather than substance. There are many examples of this kind of litigation - the decisions published by the Full Court and the Court of Appeal over the last 30 years or so reveal a torrent of litigation directed at technicality, and the triumph of form over substance. Important appeals in cases involving compensation for personal injury or serious criminal cases have probably been delayed while well-paid lawyers have asked three and sometimes more Judges to determine just how many angels are dancing on the head of a pin, when viewed through the opaque glass of the *Mining Act*.

A good example of this is the Gardner series of cases. In the first, in 1999 (*Re Calder SM; Ex parte Gardner* [1999] WASCA 28), I successfully persuaded the Full Court that the *Mining Act* clearly distinguished between a warden sitting as a "Wardens Court", and a warden "sitting in open court". Now it has to be said that the distinction between a Warden's Court and a warden sitting in open court may not have been obvious to the average Meekatharra prospector, but it was able to be identified by three Judges of the Supreme Court. Mr Gardner did not take the loss well, and 2 years later attempted to relitigate the same issue before a court comprising five Judges (*Re Malley SM; Ex parte Gardner* [2001] WASCA 29). Four of the five members of the court thought his attempt to re-open its earlier decision was an abuse of process, and he was soundly admonished. The fifth member of the court used more charitable language, but would nevertheless have dismissed Mr Gardner's case.

I think we must question whether litigation of this kind is in the best interests of the community, and in particular, in the best interests of the regulation of an industry which is as important to this State and our

nation as the mining industry. I struggle to see how it can possibly be in the public interest for the development of our mineral resources to turn upon such technicalities. Presumably that is why the legislature has retained the ultimate power of grant in the executive. But if that is so, one wonders why we need judicial intervention in the process at all - why isn't the process left entirely to the executive, with appropriate mechanisms for judicial review in the event of illegality? That is a topic to which I will return.

The lack of an appeal

Another extraordinary, and perhaps unique feature of the functions imposed upon a warden is that there is no right of appeal from decisions made by a warden in respect of some of the most important functions given to a warden under the Act, including functions relating to applications for mining tenements and applications for forfeiture of mining tenements. The existence of a right of appeal is now regarded as an almost axiomatic aspect of the judicial function. Given the value and importance of the decisions made by wardens in respect of the regulation of the mining industry in this State, it is an extraordinary aspect of that jurisdiction, that there is no right of appeal from it. And, of course, we all know that litigation is a bit like water under pressure in an old hose - if you plug one leaky hole, the pressure is such that the water will find another way out. And in the case of decisions of the wardens, the other way out is, of course, judicial review in the form of prerogative writs, which as I have already observed, has marked the mining jurisprudence of our most senior court in this State for many years now.

But the requirement that the prerogative writs be used to challenge decisions of the wardens has magnified the propensity for complexity,

legal technicality, and the likelihood of form triumphing over substance. Judicial review via the prerogative writs does not involve review of the warden's decision on the merits - but rather, a search for technical error which has taken the warden outside the jurisdiction conferred upon by the *Mining Act*. In a number of respects, it is a quite inferior form of review to that provided by appeal, yet it is the only form of review available in respect of decisions that are made in relation to some of the most valuable assets in our State.

And it is a form of review that is beset with some antiquated and overly-technical legal rules. One example is the requirement that an error of law appear "on the face of the record" before the writ of *certiorari* can be granted - see *Craig v South Australia* (1995) 184 CLR 163. And the "face of the record" is given a quite restrictive interpretation, so that an error of law which does not appear "on the face of the record", will not be found to have taken the warden outside jurisdiction, and will not vitiate his or her decision. So we have the prospect of a court upholding a decision made in error of law if the error isn't "on the face of the record" - an outcome which must baffle the business community.

And the confusion which exists in relation to the precise function being performed by a warden, magnifies the complexity and technicality of judicial review via the prerogative writs. That is because, in *Craig v South Australia*, the High Court determined that the ambit of jurisdiction is significantly affected by the characterisation of the function being performed. So, the High Court held that an inferior administrative tribunal (such as the warden sitting administratively) will not ordinarily be considered to have jurisdiction to err in law, with the result that any error of law will take it outside jurisdiction. However, the High Court

also held that an inferior court (such as the warden performing a judicial function) will ordinarily be construed as having jurisdiction to determine questions of law, even erroneously, so that an error of law will not ordinarily take such an inferior court outside jurisdiction. Of course, the High Court was significantly influenced in this decision by the observation that rights of appeal are almost invariably conferred in relation to the decisions of inferior courts. I say "almost" invariably, because, as I have mentioned, there is no right of appeal from the most important decisions of a warden, with the result that if the warden's function is construed as a judicial function, the ambit of judicial review is significantly narrowed.

History and Geography

Two subjects we all studied at school, history and geography, are, of course, very relevant to the current structure of the Wardens' Court. In the gold rush which characterised the latter part of the 19th century in this State, goldfields were found in remote locations, and transport and communication were much more difficult than they are today. So, in that context, it is not at all surprising that the legislature created a structure whereby the miners and prospectors of Coolgardie, or Mt Magnet had ready and immediate access to a warden who was located in their goldfield.

But the world today is very different. Many of the holders of mining tenements in the remote parts of our State do not reside there. Virtually all miners and prospectors have access to modern forms of communication which enable them to lodge documents with a central registry, wherever in the world they might happen to be at any given time. It is, I think, time to revisit the administrative and judicial

structures relating to the regulation of our most important industry having regard to the dramatic change in circumstances since those structures were erected in the late 19th century.

A possible way forward

In my view, it's time to consider a comprehensive review of the structures pertaining to the regulation of the mining industry in this State. In particular, it is time to bring them into line with our contemporary constitutional framework, and to distinguish between those functions which are administrative in nature, and those functions which are judicial in nature. That distinction has been drawn in relation to the structures that have been erected in virtually every other area of regulation under State law, and as a legal requirement under Commonwealth law.

If the relevant function is administrative in nature - such as, for example, making a recommendation to a senior member of the executive such as the Minister, it should be performed by an administrative official, not by a judicial official. If it is desired to give parties to the proceedings a right to be heard, and a transparent process, there is no reason why that could not be done through an administrative tribunal. And we now have an umbrella administrative tribunal which embraces a wide variety of jurisdictions and which has the capacity, where appropriate, to sit in regional towns - namely, the State Administrative Tribunal, but with a Perth-based registry.

So, in relation to functions which are properly characterised as administrative, it would seem to me to be appropriate to determine which of those functions should be performed by an official of the Minister's department, and which might be appropriately performed by an

administrative tribunal such as the SAT, or be the subject of an appeal from an official to SAT. Those functions could then be allocated accordingly, and taken away from the wardens. That would include all functions which are limited to merely making recommendations to the executive branch of government.

That would not mean that persons aggrieved by the performance of those functions would be denied a legal remedy. On the contrary, in the case of decisions made either originally or on appeal by SAT, there would be an appeal, with leave, for error of law. In the case of decisions made by an official, the remedies would be pretty much as they are at the moment - that is, via the mechanisms for judicial review, although there is change in the wind in relation to those mechanisms which I will mention shortly.

For those functions which are properly characterised as judicial - such as, for example, the civil disputes between parties that are determined by wardens, or plaints for forfeiture, they should, of course, be retained within the court structure. Whether those determinations should be performed regionally, or centrally, is another issue, but there would not appear to be any reason why the parties should not be given the option of having their case conducted in Perth, if they choose, or if the Court directs.

Nor can I see any reason why the ordinary court structure, which allocates jurisdiction by reference to, in the case of civil disputes, the value of the dispute, or, in the case of criminal disputes, the seriousness of the offence alleged, should not be applied to jurisdiction arising under the *Mining Act*. It seems to me to be somewhat anomalous that a judicial determination in relation to an asset which might be more valuable than

any litigation currently pending in the Supreme Court of Western Australia, should be made summarily in a Wardens' Court, rather than in the Supreme Court, with all its attendant processes and procedures.

So, in relation to judicial functions that require to be performed under the *Mining Act*, I would have thought it possible to integrate them within the existing judicial structure so that, they are performed by the most relevant court, having regard to the value of the subject matter or the seriousness of any offence alleged.

The Judicial Review Bill

As I have mentioned, there is change in the wind in relation to the mechanisms for the judicial review of administrative decisions in this State. That change derives from a report of the Law Reform Commission of Western Australia delivered in 2002 (Judicial Review of Administrative Decisions - Report No 95). Although I was no longer chairman of the Commission at the time that report was released, I was significantly involved in the preparation of the report and its recommendations.

In a nutshell, the report recommends that the provisions of the Commonwealth legislation relating to judicial review - namely, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) - should be adopted in this State. The drafting of legislation to implement that report is well advanced, and it is hoped that it will be introduced next year. However, I would be testing your patience at this time of the evening if I was to go on at any length about the changes which this will make to the extent of the review available in respect of the decisions of wardens. In a nutshell, it will simplify both the procedure applicable to such reviews,

and the substantive law to be applied by the court. However, one of the vital issues that will have to be considered when the legislation is prepared, is whether it applies only to decisions of an administrative character - which is the standard approach both at Commonwealth level and in those other States which have adopted similar legislation. If that approach is taken, then the vexed question of the precise characterisation of the nature of the function being performed by a warden will be perpetuated under the new regime for review.

So, to put the matter shortly, I do not, myself, think that the reforms that are to take place in respect of the judicial review of administrative decisions provides any solution to the complexity, technicality, and legal humbug which has bedeviled the review of wardens' decisions for many, many years. In my respectful opinion, the way to address those issues is to fundamentally restructure the functions performed by wardens, and to bring them into line with our basic constitutional structures, in the way I have suggested.