

Package 2 – Explanatory Document – Warden’s Court

Mining Act
Establishment and Powers of the Court – s. 64, 65
Senior Warden – s. 6
Mining Register – s. 15AA
Jurisdiction – s. 9AA, 14C, 15AD, 15AF, 24(4), 27, 30AB, 56O, 58A, 61, 66A, 67, 70, 70HA, 73G, 73I, 73J, 73L, 80
Warden’s Court Rules – s. 66

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1. Establishment and Powers of the Court

The establishment and powers of the court as amended by the Statutes Amendment (Mineral Resources) Act 2019

The Mining Act establishes and confers essential judicial, as well as administrative, functions on the Warden's Court under Part 10. These functions and the warden's powers are limited to those expressed in the Mining Act.

A warden is a magistrate nominated by the Attorney-General to exercise the jurisdiction and powers of a warden (subsection 6(1)). Any warden may exercise the jurisdiction of the Warden's Court (subsection 64(2)). The Warden's Court may sit at times and places determined by the warden (subsection 64(3)).

The powers of a warden of the Warden's Court include such powers and authorities consistent with the Magistrates Court of South Australia, and those powers can be limited or expanded by the regulations (s. 65). Summons may also be issued on behalf of the Court by the Warden or any other officer authorised by the rules of the Court, ensuring the court can function as efficiently as possible.

By conferring all the power and authorities under the *Magistrates Court Act 1991 (MC Act)*, the Warden's Court may, on the application of a party to proceedings or on its own initiative, issue a summons requiring a person to appear before the Court at a specified time and place to give evidence or to produce evidentiary material (or both) (s. 20 of MC Act). If a person fails to comply with a summons, the Warden's Court may issue a warrant to have the person arrested and brought before the Court (s. 20(3) of MC Act). A Warden may compel a person to give evidence, and if that person refuses that person will be held in contempt (s. 21 of MC Act). A Warden or an officer of the Court may enter and inspect property, and any person hindering will be held in contempt (s. 22 of MC Act). A Warden can call on witnesses in prison (s. 23 of MC Act). A Warden can issue a restraining order preventing or restricting dealing with property (s. 26 of MC Act). A Warden can appoint a mediator and refer a matter for mediation (s. 27 of MC Act) or may refer a case for a trial by an arbitrator (s. 28 of MC Act). A Warden may refer any question arising in an action for investigation and report by an expert in the relevant field (s. 29 of MC Act).

The Warden's Court may issue an injunction (subsection 65(2)). The Warden's Court is entitled to use the warden's knowledge of the industry generally. The warden may make use of knowledge of such matters without proof (*Carr v Simnovec* (1980); *Pasinok v Merrill* (1992)).

An appeal against a judgment or order of the Warden's Court lies to the ERD Court (subsection 65(3)). The Director or the Mining Registrar may appeal against a judgment or order of the Warden's Court even if not a party to the original proceedings (subsection 65(3a)). An appeal must be lodged within one month of the publication of the judgment or order (subsection 65(3b)). An appeal from the Warden's Court should conform as nearly as practicable to the practice and procedure for an appeal under the *Magistrates Court Act 1991* (subsection 65(4)). There is a further right of appeal from the ERD Court to the Full Court of the Supreme Court of South Australia (*Environment, Resources and Development Court Act 1993* subsection 30(1)(e)).

2. Senior Warden

Senior Warden as amended by Statutes Amendment (Mineral Resources) Act 2019

While the Warden's Court has always had a Senior Warden, their appointment has been informal. The *Statutes Amendment (Mineral Resources) Act 2019* formalises the appointment of a Senior Warden by including it in the Act as a statutory position appointed by the Attorney-General (s. 6). The Senior Warden is the principal judicial officer of the Warden's Court and is responsible for the administration of the Court. It is the responsibility of the Senior Warden to make the Warden's Court Rules.



3. Mining Register

Mining Register as amended by the Statutes Amendment (Mineral Resources) Act 2019

Section 15AA of the *Statutes Amendment (Mineral Resources) Act 2019* establishes the updated Mining Register and expands the scope of the Register. The new register will recognise a broader range of dealings and Warden's Court proceedings information and decisions.

The Mining Register will record the commencement and completion of Warden's Court matters and decisions, determinations and orders of the Warden's Court. As this information is not managed by the Department, section 15AA(8) places an obligation on the Warden's Court Registrar to furnish to the Mining Registrar the necessary information to be published on the register.

4. Warden's Court Jurisdiction and Rules

Warden's Court jurisdiction and rules as amended by the Statute Amendment (Mineral Resources) Act 2019

The jurisdiction of the Warden's Court must be exercised in accordance with the specific powers under the Mining Act. Subject to the nature of the application, the jurisdiction under the Mining Act may be the Supreme Court, Environment and Resource Development (ERD) Court and Warden's Court, and in some cases the Land and Valuations Court. The Mining Act, in parts, refers to applications to an 'appropriate court', which is defined to include the Supreme Court, ERD Court and Warden's Court. A claim over \$250,000 is outside the jurisdiction of the Warden's Court and needs to be heard by either the ERD Court or the Supreme Court.

The Warden's Court may determine all actions concerning any right claimed in, under or in relation to any mining tenement or purported mining tenement, and may exercise any other jurisdiction invested by regulation (s. 67(1)-(2)). The Warden's Court must make determinations in a just manner which includes the power to protect and enforce equitable rights (s. 67(1)).

A case of unusual difficulty or importance in the Warden's Court may be removed to the ERD Court by order of either court (subsection 66A(1)). In such a situation, the ERD Court may exercise, in addition to its ordinary jurisdiction and powers, any of the powers of the Warden's Court in relation to the removed case (subsection 66A(2)).

The ERD Court has only the jurisdiction conferred upon it by statute. If a matter is referred to the ERD Court under s 66A, the ERD Court would still only have the powers of the Warden's Court in relation to the matter.

The Senior Warden may make rules regarding the practice and procedure of the Warden's Court (subsection 66(1) and *Warden's Court Rules 2016*). Under the Magistrates Court Act 1991, the rules of the Magistrates Court may be made by the Chief Magistrate, the Deputy Chief Magistrate and any two or more other Magistrates. Similarly, under the Supreme Court Act 1935, the rules of the Supreme Court may be made under this Act by the judge upon whom the jurisdiction of the Court has been conferred to regulate the practice and procedure of the Court.

In addition to the general jurisdiction discussed above, the Warden's Court has jurisdiction to consider the following matters:

Warden's Court – Exempt Land

If the tenement holder or the owner of land is unable to come to an agreement on access to exempt land, the tenement holder or the owner can apply to the court (s. 9AA(7) and 9AA(8a)). The parties can apply to the Warden's Court, Environment, Resources and Development (ERD) Court or the Supreme Court (s. 6). An application to the Supreme Court can only be made with the permission of the court (s. 9AA(14a)). To be heard by the Supreme Court, the applicant would require consent



from the respondent(s) or would need to demonstrate sufficient grounds to be heard by the Supreme Court, and this would include demonstrating to the court why the Warden's Court or the ERD Court were not appropriate jurisdictions to hear the application.

The tenement holder can apply to the court if:

- A) a notice has been served by either the tenement holder or the owner of land;
- B) the tenement holder has provided the owner of land with the information provided by the regulations; and
- C) reasonable attempts have been made to enter into an agreement (s. 9AA(8)).

Whether reasonable attempts have been made will be dependent on whether the owner of land served the initial notice or the tenement holder. If the owner of land served the initial notice, the matters set out in the notice will qualify any attempts by the tenement holder (s. 9AA(8)(c)(ii)). For example, if the owner of land were to notify the tenement holder that there is no amount of compensation or conditions of entry that would satisfy the owner to waive, then it would be reasonable to make no attempts or minimal attempts. If the tenement holder served the notice, the tenement holder would need to demonstrate to the court reasonable attempt to negotiate an agreement in good faith prior to applying to the court (s. 9AA(8)(c)(i)).

The owner of land can apply to the court if:

- a) the tenement holder has made an application for a mining lease, retention lease or miscellaneous purpose licence and the public consultation period on the application has expired; and
- b) a notice has been served by the owner of the land (s. 9AA(8a)).

The court can make an order on the definition of exempt land and can order that the exemption is waived. In making an order to waive an exemption, the Warden's court must be satisfied that any adverse effects of the proposed operations can be addressed by appropriate conditions, and if so can order the payment of compensation and impose conditions (s. 9AA(9)). The Warden's court can make an array of other orders or directions as set out in the Mining Act and the court. The Mining Act limits the Warden's court's ability to make a cost order by only allowing the court to make an order of costs against the owner of land if the owner has obstructed or unnecessarily delayed the proceedings or has failed to attend, or failed to comply with a rule, order or direction of the court (s. 9AA(10)).

Warden's Court – Warrant

Authorised officers under the Act can enter, search, inspect and examine any premises, land, or vehicle in connection with any operations or activities regulated by the Act and, where necessary break into or open a part of, or anything in, the premises, land or vehicle subject to obtaining a warrant from a magistrate, warden or justice (s. 14C). Authorised officers can seize and retain anything that may be evidence of non-compliance.

To obtain a warrant, the Warden's Court must be satisfied that breaking into or opening a part of, or anything in a premise, land or vehicle is reasonable in the circumstances. An application for a warrant can be made personally or by telephone and must be made following any procedures prescribed by the regulations. Regulation 8 of the draft Mining Regulations prescribes the process for obtaining a warrant.

Warden's Court – Mortgages and Caveats

Part 2A establishes a framework for the registration, effect, withdrawal and lapse of caveats and mortgages on the Mining Register to protect interests in mining tenements.



The Warden's Court has jurisdiction to determine the lapse or removal of mortgages and caveats and can make various other orders.

In the case of caveats, the Warden's Court has the power to order that a transfer, mortgage or surrender be registered despite the caveat. While the Court may order that a transfer, mortgage or surrender be registered despite the caveat, the Court's order does not negate the processes under the Act to apply for or the Minister's or Mining Registrars (as applicable) discretion to reject a transfer, mortgage or surrender. The Court's order in this circumstance will not force the Minister or Registrar to register a transfer, mortgage or surrender when he/she would not ordinarily do so, rather, such an order will allow the Minister or Registrar to register a transfer, mortgage or surrender where the caveat may have prevented the registration.

While the matters the Warden can consider when considering an order to register a transfer, mortgage or surrender are not explicit, it is likely the Warden would consider the nature of the caveatable interest and agreement which gives rise to that interest, and whether that agreement contemplates or validly forbids the registration of the proposed transfer, mortgage or surrender.

The ultimate arbiter of caveats and mortgages under the Act is the Court. A Warden has the power to:

- in the case of caveats:
 - o declare what is or isn't a caveatable interest;
 - o cause a caveat to lapse;
 - o allow a transfer, mortgage or surrender despite a caveat forbidding such registrations; and
 - o order a caveator pay compensation for loss or damage caused by an invalid caveat.
- In the case of mortgages:
 - o declare a mortgage as defective, invalid or unenforceable;
 - o order a transfer despite a mortgage;
 - o order a full or partial discharge of a mortgage; or
 - o order that a mortgagee pays compensation for any loss suffered because of the registration of a mortgage.

Any person can seek an order or declaration of the Warden's Court, as long as that person has an interest in a tenement subject to that caveat or mortgage, or has an interest directly affected by that caveat or mortgage. Interest in this context would include a contractual, equitable or proprietary interest in a tenement or a contractual, equitable or proprietary interest affected by a caveat or mortgage.

A mortgage or caveat registered on a mineral tenement will not operate to prevent or forbid forfeiture applications; however, a mortgage or caveat may prevent the Minister from transferring the tenement without an order of the Warden's court ordering the lapsing of the mortgage (15AC(11)) or caveat (s. 15AE(11)), or order of the court authorising the transfer despite the mortgage (15AC(7)(d)). Failure to get an order of the court relating to the mortgage or caveat at the time of forfeiture will cause difficulty for the Minister and the applicant. This issue arises as the Warden can recommend that a tenement be forfeited to the Crown, but it is up to the Minister to transfer the tenement to the applicant.

While the Minister should not be prevented from transferring a forfeited tenement, transferring the tenement subject to the mortgage does not make sense. Without a court order or the agreement of the incoming tenement holder, it's not clear how the mortgage could be binding on the new tenement holder (doctrine of privity). Therefore, it makes no sense for the mortgage to remain on the register, but the Minister has no power to remove it without a court order or consent of the mortgagee. There may be circumstances where a caveat could remain to protect an interest despite a transfer; however, this would need to be considered. Consequently, to ensure the Court considers the effect of a



mortgage or caveat on a forfeiture application, the warden's court form and rules will make a note of this interaction to ensure it's addressed by the Court, and applicants should consider these issues when making a forfeiture application.

Warden's Court - Restriction of claims

Where a person has failed to comply with a direction, the Warden's Court may order that that person cannot establish any further mineral claims (s. 70HA). This applies to mineral claims, as the Minister approves or refuses other tenement applications. The Mining Registrar must not register a mineral claim if to do so would be inconsistent with an order of the Warden's Court, and if the registration of a mineral claim is subsequently inconsistent with the terms of an order of the Warden's Court, then the registration must be cancelled (s. 24(4)).

Warden's Court – Authority to establish a successive mineral claim

Where a mineral claim lapses or is surrendered or forfeited, no claim covering any of the areas of that previous claim shall, without the authority of the Minister or the Warden's Court, be made by, or on behalf of, the person who held the previous claim within 2 years of its lapse, surrender, cancellation or forfeiture (s. 27).

Warden's Court – Compensation for excise of land for public purposes

The Minister may place a notice in the Government Gazette to excise (i.e. remove) land from an exploration licence for a public purpose. Any land that is excised will not become available as open ground at a later date. The tenement holder may apply to the Court for compensation for the money expended by the tenement holder for the relevant excised land.

Warden's Court – Rectification of boundary

The Mining Registrar can vary the boundary of a tenement, move or replace the pegs used to identify a tenement or take other actions to rectify the boundary. An act of the registrar is only authorised with the consent of the tenement holder or by a determination of the Warden's Court.

Warden's Court – Notices of entry and operations

The Mining Act, as amended by the *Statutes Amendment (Mineral Resources) Act 2019*, introduces a regime for notifying owners of land of proposed operations during the exploration stage of operations. Section 58A includes three notices:

1. Notice of entry (s. 58A(1));
2. Notice of advanced exploration operations (s. 58A(2)); and
3. Notice of intention to apply for a mining lease, retention lease or miscellaneous purpose licence (s. 58A(3)).

An owner of land with exclusive right to possession or a pastoral lessee has the right to object to a notice served under section 58A within 3 months of service in an appropriate court (Warden's, ERD or Supreme Court) (s. 58A(9)). If the court receives a notice of objection, the Court must send a copy of that notice to the tenement holder (or prospective tenement holder) (s. 58A(10)).



Rule 14 and 15 of the *Warden's Court Rules 2016* currently specified that a notice of objection must include the full particulars of the objections, and have annexed to it, a copy of the notice served under section 58A and a supporting affidavit as to the relevant facts.

The court must be satisfied that operations on the land could result in substantial hardship or substantial damage to the land in order to hear an application for objection (s. 58A(12)). In hearing an objection, the court may:

- a) Determine that the land, or a particular part of the land, should not be used for the purposes of the proposed authorised operations (s. 58A(12)(a));
- b) Determine conditions on which operations may be carried out on the land with least detriment to the interests of the owner and least damage to the land (s. 58A(12)(b)); and
- c) Determine an amount of compensation payable (s. 61(3)).

The court may, if the court thinks fit, postpone the hearing of an objection to entry by a person who has given notice of intention to apply for a mining lease, retention lease or miscellaneous purpose licence until after the application has been made (s. 58A(11)). It is reasonable that a court would postpone such a hearing until the details of the proposed operations are made available as to determine whether the land should be used for the proposed operations or what conditions to impose (if any).

A person who contravenes or fails to comply with an objection determination of the court is guilty of an offence with a maximum penalty of \$150,000 (s. 58A(13)).

Warden's Court - Compensation

An owner of any land on which authorised operations are carried out is entitled to receive compensation for any economic loss, hardship and inconvenience suffered by him in consequence of operations. Compensation can be determined by agreement between the owner of land and the tenement holder, or by an order of the court.

In determining the compensation payable, the court will consider the following matters:

- a) any damage caused to the land by the person carrying out the operations; and
- b) any loss of productivity or profits as a result of the operations; and
- c) any other relevant matters.

The compensation may include an additional component to cover reasonable costs reasonably incurred by an owner of land in connection with any negotiation or dispute related to—

- a) the tenement holder gaining access to the land; and
- b) the activities to be carried out on the land; and
- c) the compensation to be paid under section 61.

Warden's Court – Forfeiture

The Warden's court may hear an application for forfeiture and recommend to the Minister that the tenement be forfeited. The Court may recommend that the Minister forfeit the tenement if satisfied that:

- a) there is a breach of the Act or Regulations; or
- b) there is a breach of a term or condition of the tenement; or
- c) there is a breach of a PEPR; or
- d) there is undue damage to the environment as a result of authorised operations; or



- e) there is a failure to carry out activities associated with holding the relevant type of tenement within a reasonable time or to a reasonable extent.

While (a) to (d) above are self-explanatory, (e) was included to capture operations that sit disingenuously in care and maintenance, or where a tenement is granted, and the tenement holder fails to apply for a PEPR or commence operations in an expedient manner.

The Court must also be satisfied that one of the above occurrences is of sufficient gravity to justify the forfeiture of the tenement. This threshold test was retained from the existing regime to rely on the established common law commentary on what is considered to be sufficient gravity (*De Blaquiere v Reid* (1980); *Wells v Simnovec* (1998); *Sickerdick v B & M Property Enterprises Pty Ltd (in Liq)* (2003); *Boral Resources (SA) Ltd v Matthews* (2006)).

Where the Warden's Court has recommended forfeiture, the Minister *may* forfeit the tenement to the Crown, and the applicant is entitled to the transfer of the tenement for the balance of its term. The Minister is not obligated to accept the Warden's recommendation. However, where the Minister does accept the Warden's recommendation, the right to the transfer of the tenement does not arise in any circumstances prescribed by the regulations and the right expires at the end of a period prescribed by the Regulations. Regulation 56 of the draft Mining Regulations prescribes that a right to the transfer of a mineral tenement does not arise unless and until:

- an application is made in a manner and form determined by the Minister;
- that application is furnished to the Minister within 14 days of the date of the order; and
- the application is consented to by the Minister.

To be an applicant to apply to the court for forfeiture of a tenement, the applicant must meet the necessary requirements set out in the Regulations.

Warden's Court - Merits review

Appeals on merit are, for the most part, heard in the Environment, Resources and Development Court for various decisions under the Mining Act, with the exception of Part 11B – Private Mines. Decisions of the Director of Mines with respect to private mines may be appealed in the Warden's Court. These decisions include:

- requiring an alteration to a draft Mine Operations Plan (s. 73G);
- referring a draft Mine Operations Plan back to the submitter to have further regard to the matters raised in the report on public consultation (s. 73G);
- issuing of a compliance order to secure compliance with a Mine Operations Plan or the general duty (s. 73I);
- issuing of a rectification order to take specific action to rectify damage to the environment (s. 73J); and
- issuing of an emergency order to address urgently necessary breaches or undue damage to the environment (s. 73KA).

Such an appeal may claim, for example, that there was no factual basis for the making of the direction, or that the direction goes beyond what is reasonably necessary to remedy the breach or anticipated breach. An application for merits review must be made to the Warden's Court within 28 days of receiving the order or from the date of the request.



Warden’s Court - Conditions under which land may be simultaneously subject to more than one tenement

The Mining Act prohibits land from being the subject of simultaneous tenements unless certain conditions are met (s. 80). Where land is already the subject of a mineral tenement, a further tenement may be granted subject to the requirement of section 80, including, the requirement to obtain the approval of the holder of that tenement, or the approval of the Warden’s Court. If approval is obtained, the Minister may grant the tenement in respect of any portion of the land comprised in the prior tenement, and the rights conferred by the respective tenements are modified according to the agreement of the parties or the order of the Warden’s Court as the case may require. Therefore, simultaneous tenement may occur but only in a way that ensures that they can both co-exist with some modification of the respective rights of each tenement holder.

Where the consent of the prior tenement holder cannot be obtained, it is necessary to obtain the approval of the Wardens Court. The Warden’s Court cannot, however, approve overlapping tenements unless it is satisfied that the rights of the holder of the prior tenement will not be materially diminished by the grant of such approval.