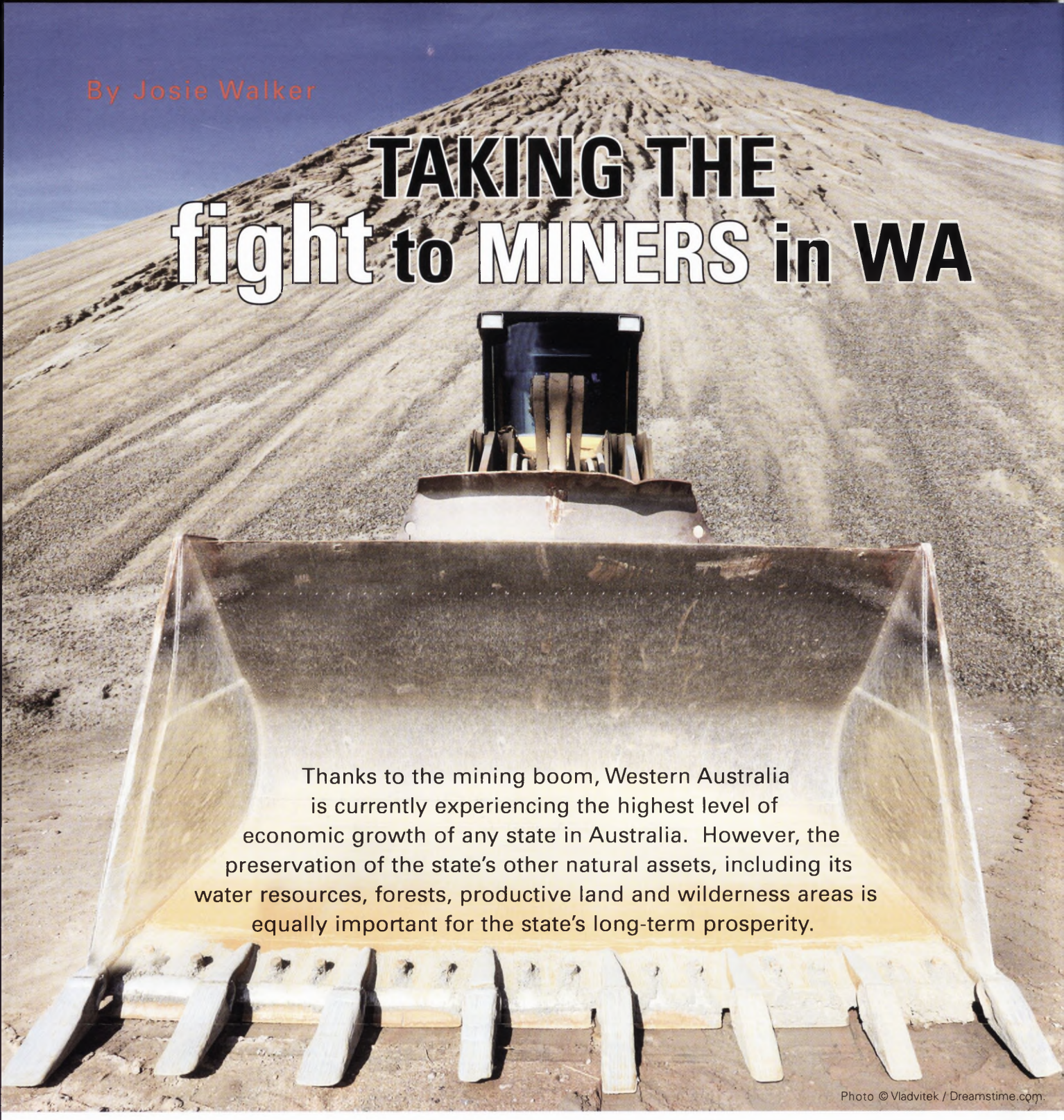
By Josie Walker

TAKING THE fight to MINERS in WA



Thanks to the mining boom, Western Australia is currently experiencing the highest level of economic growth of any state in Australia. However, the preservation of the state's other natural assets, including its water resources, forests, productive land and wilderness areas is equally important for the state's long-term prosperity.

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There are strong arguments for keeping mining out of some areas where the environmental risks are likely to outweigh the benefits, as the WA government recently acknowledged with its decision to terminate all coal exploration tenements and coal mining leases in the Margaret River region. This article examines avenues for objecting to mining development under the *Mining Act* 1978 (WA) (the Mining Act) and the *Environmental Protection Act* 1986 (WA) (the EP Act) and looks at some recent encouraging wins for objectors.

PRIVATE LANDOWNERS AND PASTORAL LEASEHOLDERS

In many rural communities across Australia, farmers have been at the forefront of the campaign to prevent mining encroaching on rural land and communities. The extent to which private landowners are able to say 'no' to mining activity on their land is an important factor in preventing mining from gaining a foothold in agricultural areas against the wishes of residents.

Private landowners in Western Australia, unlike

landowners in most other states, generally have the right to veto the grant of any mining titles over the surface of their land. Mining tenements (including prospecting licences, exploration licences and mining leases) cannot be granted over the surface of an allotment of private land smaller than 2,000 square metres, or within 200 metres of house, yard, plantation, or 'land under cultivation' without the owner's consent. 'Land under cultivation' is broadly defined to include land used for grazing.[1] In practice, almost all residential, industrial and private rural land is likely to fall within at least one of these categories.

Unfortunately, this right of veto does not apply to exploration for unconventional gas resources, which is an emerging issue affecting Western Australian farming communities, especially in the mid-west. Exploration for coal seam gas, tight gas and shale gas is subject to a different tenement regime under the *Petroleum and Geothermal Energy Resources Act* 1967 (WA) which provides fewer rights to private landowners.

Mining tenements can be granted over private land without the owner's consent if the tenement is limited to the area more than 30 metres below the surface of the land. Landowners have every reason to be concerned about the grant of sub-surface rights leading to the eventual commencement of mining in their neighbourhood, since sub-surface rights may later be converted to include surface rights with the consent of one or more landowners.[2] Access to sub-surface resources may also be gained via neighbouring Crown land, such as a road reserve.

Sub-surface tenement applications are typically not specifically notified to private landowners, although they are notified to the local government authority, and notices are published in the *West Australian* newspaper.[3] Thus, many landowners will be unaware of sub-surface tenements granted in relation to their land. A private landowner who does find out about lodgement of a sub-surface tenement application over his or her land may lodge an objection, which is dealt with in the same way as an objection by any member of the public (see 'Third-party objectors', below).

In late 2011, a group of landowners with small acreages near Margaret River learned through the local paper that an application for sub-surface exploration rights had been lodged in relation to their land. Over 60 objections were lodged to a single exploration licence application. This led to the applicant deciding to withdraw its licence application over the affected area.

The impact of the private landowner's veto is reduced by the fact that only 7 per cent of land in Western Australia is private land. A much larger portion of the state's land, 36 per cent, is held in the form of pastoral leases. Pastoral leaseholders and mortgagees of pastoral land must be notified of the lodgement of a mining tenement application over their land, and may lodge an objection, but there is no guarantee that their objection will be upheld.[4]

OBJECTIONS BY TRADITIONAL OWNERS

A large proportion of the land area of Western Australia is also subject to unresolved native title claims. The grant of a mining tenement has the potential to extinguish native title rights, therefore the tenement applicant must follow the future acts provisions of the *Native Title Act* 1993 (Cth) and must either reach agreement with the native title claimants, or obtain a determination from the Native Title Tribunal before the tenement may be granted. This process is additional to, and occurs separately from, the hearing of the tenement application in the Mining Warden's Court.

However, traditional owners are not limited to raising their concerns through native title processes. Traditional owners, like other members of the public, can lodge an objection in the Mining Warden's Court and can raise the cultural, spiritual and social impacts on their country as a reason why a mining tenement should be refused, even if the claim group as a whole has consented to the same exploration or mining proposal under the *Native Title Act* 1993 (Cth).[5]

THIRD-PARTY OBJECTORS TO MINING TENEMENTS

A person does not need to have an interest in land to become an objector in the Mining Warden's Court. Any person may lodge an objection to an application for an exploration licence or mining lease.[6] If an objection is lodged, the Mining Warden is obliged to hold a hearing in relation to the application, although she or he has discretion to decide the extent to which each objector will be heard and the issues that will be addressed at the hearing. The Mining Warden then makes a recommendation to the Minister for Mines, >>

who makes the final decision on whether or not to grant the tenement.[7]

Would-be objectors should be aware that by lodging an objection they are becoming involved as a party in court proceedings, which can be demanding on the objector's time and resources, especially for those who do not have access to legal representation or legal advice. The usual order is that each party bears its own costs. However, the Warden does have discretion to order an objector to pay another party's legal costs if the objector has acted frivolously or vexatiously or caused undue delay in the proceedings.[8]

The Supreme Court of Western Australia first ruled that public interest factors could be considered by the Mining Warden in *Re Warden French: Ex parte Serpentine-Jarrahdale Ratepayers and Residents Association*.[9] In that case, the Association had objected as a third party to the grant of a mining lease on the grounds of environmental impacts. The Supreme Court held by majority that objections of a public interest nature could be heard by the Mining Warden in relation to the grant of a mining tenement. Aspects of the Mining Act which supported this finding included the fact that there was no explicit limitation on who could object or the possible grounds of objection; the requirement to notify tenement applications to the general public; and the power of the minister under s111A of the Mining Act to terminate or refuse a tenement application on public interest grounds (discussed further below).

The correctness of *Re Warden French* was reconsidered and affirmed unanimously by the Supreme Court four years later in *Re Warden Calder; ex parte Cable Sands*.[10] In this case, the applicant argued that it could not have been the intention of the legislature that the Mining Warden should usurp the role of the Environmental Protection Authority (EPA) in assessing the impacts of significant proposals under the EP Act. The Supreme Court held that, although the EP Act included a 'sophisticated' regime for assessing proposals, the Warden nevertheless had a role to play in considering objections based upon environmental or other public interest considerations.[11] His Honour, Steytler J, went on to say:

> '(T)he warden does not have to embark upon a full-scale investigation into environmental or public policy matters merely because an objection in that respect has been made. She or he may, for example, be satisfied that sufficient protection would be obtained by the application of the provisions of the *Environmental Protection Act*. In that event the warden may do no more than make a recommendation as to the implementation of measures provided for by that Act.'[12]

In *Baxter v Serpentine-Jarrahdale Ratepayers and Residents Association*,[13] Warden Calder expressed the view that, as the EP Act was the primary statute governing the environment, the Warden should play a limited role in addressing environmental objections, and should generally recommend approval unless the land was of such environmental significance that mining of the land would not be acceptable under any conditions, and subject to the minister being satisfied that 'all relevant environmental matters have been properly investigated'.

Reliance on the EP Act to safeguard the environment from the impacts of mining is problematic where the EPA decides not to assess the proposal, or the proposal has not even been referred to the EPA at the time that the Mining Warden's recommendations are made (see further, below, under 'Environmental assessment of exploration and mining proposals').

In the recent decision of *Darling Range South Pty Ltd v Ferrell*,[14] the fact that there had been no environmental assessment of the proponent's bauxite exploration program prior to the hearing in the Mining Warden's Court was a major factor leading the Warden to recommend that the subject exploration licences should be refused.

In that case, three objections by members of the public were lodged to three sub-surface exploration licence applications near Bridgetown. The land over which the licences were sought was partly private farmland and partly state forest. The objectors argued that exploration and mining in the area would cause serious impacts, including the spread of dieback disease in state forests, damage to productive agricultural land, pollution of groundwater, and damage to existing industries such as tourism and horticulture. The objectors did not tender any expert evidence to support their case, but rather voiced their concerns as long-term residents and members of the local community. The applicant, on the other hand, argued that any adverse impacts would be mitigated by the standard conditions normally imposed on exploration licences by the Department of Mines and Petroleum.

Warden Wilson held that the objectors' lay evidence was sufficient to raise the possibility of significant environmental and social impacts. It is important to note that the applicant had not tendered any expert evidence of the environmental acceptability of the proposal; therefore, the objectors' lay evidence was essentially uncontradicted. Warden Wilson held that it was necessary to consider not only the potential direct impacts of exploration, but also the potential impacts of mining, since the grant of an exploration licence created the expectation that a mining lease would eventually be granted if the exploration program was successful. Warden Wilson gave little weight to the standard licence conditions as a mitigating factor, because he found that these would control only the direct physical impacts of exploration and would not address the broader social and environment impacts that might eventually be caused by mining.[15]

Based on the above, the Warden recommended that the Minister for Mines should refuse to grant the exploration licences because there had been no proper investigation of the effects that the proposal would have upon all aspects of the environment. Alternatively, should the minister be minded to grant the licences, the Warden recommended that each application should be referred to the EPA for environmental assessment under the EP Act, accompanied by a copy of the Warden's reasons.[16]

ENVIRONMENTAL ASSESSMENT OF EXPLORATION AND MINING PROPOSALS

The process for environmental assessment of significant proposals under the EP Act is complex, and beyond the

scope of this article. However, a few aspects of the process of relevance to mineral exploration and mining proposals are highlighted below.

A mining proposal that is likely to have a significant effect upon the environment may be referred for assessment by the EPA. The proposal may be referred by the proponent, another department with decision-making responsibilities in relation to the proposal, or a member of the public.[17] An important exception to this rule is that under s6(1a) of the Mining Act, where an application for a mining lease is not accompanied by a mining proposal, only the proponent can refer the proposal to the EPA.[18] This gives the proponent the option of deferring environmental assessment of the mining proposal until after the mining lease is granted.

The EPA may decide to assess the proposal based on the referral information only; it may require the proponent to go through a public assessment process; or it may decide that no assessment is required.[19] A decision that no assessment is required may be appealed to the Minister for Environment.[20]

A program of mineral exploration in a sensitive environment may warrant assessment as a significant proposal in its own right. There is nothing to stop members of the public referring an exploration proposal to the EPA for assessment, although unfortunately it is fairly rare at the present time for the EPA to order public assessment of an exploration proposal.

Nor will every mining proposal be assessed by the EPA. A Memorandum of Understanding (MOU) between the EPA and the Department (which is publicly available on the Department's website) indicates what types of mining proposals should be referred. These are mostly larger-scale proposals and proposals near environmentally sensitive features of the landscape. The list is not exclusive, and the Department or members of the public may choose to refer projects which they believe are environmentally significant even if they do not fall within the categories listed in the MOU.

If the EPA decides that a proposal should be publicly assessed, the proponent is required to prepare an environmental assessment report, which will then be subject to a public comment period.[21] The EPA then writes a report and recommendations on whether or not the proposal is suitable for implementation. The Minister for Environment makes the final decision on whether or not the proposal may be implemented.[22]

Once the EPA has decided that a proposal should be assessed, other decision-makers cannot grant related approvals for the proposal (including the grant of a mining lease) unless and until the Minister for Environment decides that the project may be implemented.[23]

TERMINATION OR REFUSAL OF TENEMENT APPLICATIONS BY THE MINISTER FOR MINES

Under s111A of the Mining Act, the Minister for Mines also has the power to terminate or refuse an application for a mining tenement at any time prior to grant if the minister is satisfied 'on reasonable grounds in the public interest' that the land that is the subject of the tenement application should not be disturbed or the application should be refused. It is to be expected that this section will be used only in exceptional circumstances, where policy considerations favour shutting down mining proposals conclusively at an early stage, rather than allowing the application process to follow the usual course.

The Margaret River region in the South-West of Western Australia is famous as a wine-growing region and iconic tourist destination. When the Vasse Coal Project was proposed for a site only 15kms from the township of Margaret River, this caused widespread concern throughout the Western Australian community that the character of the area might be irrevocably changed. Rather than wait for the proponent to refer the proposal, objectors took the initiative and referred the Vasse Coal Project to the EPA for assessment under the EP Act, seeking an early-stage ruling on the proposal.

In March 2011, the EPA reported that the proposal was unlikely to be environmentally acceptable, irrespective of any safeguards and management measures that might be used to mitigate the impacts. The principal reason given by the EPA for this finding was that there were likely to be significant impacts on two important aquifers, and on significant environmental values, including social and economic values, supported by these aquifers.

The same environmental concerns prompted the Minister for Mines to take the unusual step in July 2012 of terminating all pending exploration licences targeting coal in the Margaret River region under s111A. This sent a strong signal that coal development in this region is unlikely to be supported or approved by the current government.

Section 111A orders are likely to remain unusual, with most applications for mining tenements being considered on their merits through the Mining Warden's court. However, the Margaret River example shows that a s111A order is not politically out of the question where there is widespread public opposition to opening up new areas to mining development. Such orders may be sought in the future in other areas where mining is not compatible with existing industries, the social fabric of communities or wilderness values. ■

Notes: **1** *Mining Act* 1978 (WA), s29(2), s8 (all statute references below are to the same Act unless otherwise stated). **2** Section 29(2), s29(5). **3** Section 33(1), s33(1a), *Mining Regulations 1991,* r64 (all regulations referred to below are the same regulations unless otherwise stated). **4** Section 58(4), s59(1), s74(3). **5** *JidiJidi Aboriginal Corporation v Sandfire Resources NL* [2012] WAMW 5 at 11. **6** Section 59(1), s75(1). **7** Section 59, s75. **8** Regulation 165. **9** (1994) 11WAR 315. **10** (1998) 20 WAR 343 at [363]. **11** *Ibid.* **12** At [364], [365]. **13** (Unreported, Perth Warden's Court, 8 July 1999). **14** [2012] WAMW 12. **15** *Ibid,* [129]-[146]. **16** *Ibid,* [147]-[149]. **17** EP Act, s37B, s38. **18** Section 6(1a). **19** EP Act, s39A, s40(2). **20** EP Act, s100(1)(a). **21** EP Act, s40(2). **22** EP Act, s44, s45. **23** EP Act, s41.

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