

## DEALINGS WITH MINING TITLES UNDER THE *MINING ACT 1978* (WA): PART 1 – REQUIREMENTS OF FORM, CONSENT AND REGISTRATION

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### 1. INTRODUCTION

The rights to deal in resources titles, eg to assign or mortgage, are amongst the fundamental property rights attaching to resources titles. Under the various statutory regimes governing resources in Australia, three types of provisions commonly affect the rights to deal in resource titles: provisions relating to

- (1) the requirements of form for dealing with resource titles,
- (2) governmental control of dealings, and
- (3) the registration of titles and interests in titles.

Often, the operation of these three types of provisions is inter-related, approval of a dealing in the requisite form being a pre-condition of the effective registration of the new titleholder or interest in the title. The reference to "dealings with mining titles under the *Mining Act 1978*" (the title to this article) can, therefore, be taken to include all three types of provisions relating to dealings.

The significance of the dealings provisions to the mineral resources industry can be understood when one sees the high volume of registration actions performed in any one year.<sup>1</sup> Understanding the effect of them has been a constant source of interest for natural resources lawyers, as is evidenced by the list of publications relating to the topic.<sup>2</sup>

Despite a relatively long history of these sorts of provisions, there was still strong discontent with the operation of the *Mining Act* dealings provisions in 1989 when the Western Australian branch of the Australian Mining and Petroleum Law Association ("AMPLA (WA)") asked Alex Gardner to review

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<sup>1</sup> According to the 2003/2004 Annual Report of the Western Australian Department of Industry and Resources, p 15, for the period 1 July 2003 to 30 June 2004 1724 mining tenements were granted (covering 6 031 499 ha) with 15 967 tenements in force as at 30 June 2004 (covering 26 316 825 ha). There appear to be no figures reported for the number of dealings in the same period, but one would assume that there are many.

<sup>2</sup> See A Gardner, "Security of Title", [1990] AMPLA Yearbook 284-313, fn 3; and J Kelly, "Comment on Security of Title", [1990] AMPLA Yearbook 314; G J Heath, "A Commentary on Security of Title", [1990] AMPLA Yearbook 322; "Reform of the Registration Provisions of the Mining Act 1978(WA)", (1992) 11(3) AMPLA Bull 115; R S Granang, "When is a Mining Royalty a Caveatable Interest in Western Australia", (1994) 13(1) AMPLA Bull 17; M Gerus & A Ellis, "Equitable Interests in Mining Tenements – Resulting and Constructive Trusts – Rebuttable Presumption – s.119 Mining Act 1978 (WA) and s.34 Property Law Act 1969 (WA)", (2000) 19 AMPLJ 115; T Warman, "Transfers of, and Dealings in, Titles Under the Petroleum (Submerged Lands) Act 1967 (Cth) Within Western Australian Adjacent Area", (2000) 19 AMPLJ 54; K Domansky, "Dealings and Registration", (2001) 20 AMPLJ 36; M Gerus & D Allison, "Intention to Create Legal Relations – Memorandum of Understanding, Mining Act, section 119", (2002) 21 AMPLJ 140; R Bartlett, "Mining Act Amendment Bill 2004(WA)", (2004) 23(3) ARELJ 234.

the relevant law as the foundation for recommending reforms to the State Government.<sup>3</sup> The resultant AMPLA (WA) recommendations had the objectives of making the law simpler and more certain by:<sup>4</sup>

- (1) basing the registration system on provisions in the statute rather than the regulations,
- (2) simplifying the requirements of governmental consent for dealings,
- (3) simplifying the requirements for registration of interests in mining titles,
- (4) strengthening the caveat system for the protection of non-registrable interests in tenements.

The first enactment of the legislative reforms in the *Mining Amendment Act 1996 (WA)* unfortunately contained a number of deficiencies where Parliamentary Counsel had either rejected or misunderstood the submissions of AMPLA in the drafting consultation. When AMPLA (WA) drew these deficiencies to the attention of the Government, the proclamation of the amendments was postponed. It was not until the enactment of the *Mining Amendment Act 2004 (WA)* that the deficient amendments were themselves amended. Both sets of amendments and the supporting *Mining Amendment Regulations (No. 2) 2005* were due to come into effect on 30 March 2005,<sup>5</sup> but have been indefinitely post-poned until an accidental omission from the *Mining Amendment Act 2004* can be remedied by the enactment of the *Mining Amendment Bill 2005*, which is still un-enacted in October 2005.

The aim of this article (Parts 1 and 2) is to review the operation of the *Mining Act* dealings provisions in order to understand their legal effect both before and after the current reforms.<sup>6</sup> The article also explains developments in the judicial interpretation of the provisions and the effect of the reforms on those judicial views.

In order to conduct this review, we will, in Part 1:

- give a general comparative description of how the systems of dealings and registration function under resources legislation and Torrens legislation;
- review briefly the types of issues that arise from the operation of resources dealings systems in respect of governmental control and security of title; and
- analyse the legal operation of the reformed provisions governing the requirements of form, governmental consent to and registration of dealings.

In Part 2, to be published in the next issue of this journal, we will:

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<sup>3</sup> That review led to the presentation of conference papers at the 1990 AMPLA National and WA conferences: A Gardner, "Security of Title", [1990] AMPLA Yearbook 284-313 and A Gardner, "Reform of the Registration Provisions of the Mining Act 1978 (WA)", presented at the AMPLA (WA) annual conference in November 1990.

<sup>4</sup> Report and Recommendations by AMPLA (WA Branch): "Reform of the Registration Provisions of the Mining Act 1978 (WA)", (1992) 11(3) AMPLA Bull 115.

<sup>5</sup> The date of operation was declared in *Government Gazette of WA*, 14 January 2005, 164, and revoked in *Government Gazette of WA*, 24 Mar 2005 p.1001.

<sup>6</sup> In essence, this article is a revised version of the articles referred to in n.3. The original articles examined the dealings provisions of the Petroleum legislation. However, since then Tim Warman has discussed those provisions at length in "Transfers of, and Dealings In, Titles Under the *Petroleum (Submerged Lands) Act (Cth)* Within the Western Australian Adjacent Area" (2000) 19 AMPLJ 54. To avoid repetition, these Petroleum legislation provisions will not be discussed here except where a legal comparison is relevant to understanding the *Mining Act* provisions.

- analyse the legal operation of the reformed provisions governing the effect of registration of mining titles and the lodgement of caveats to protect interests in them.

We summarise at the end of each Part the legal operation of the reformed dealings provisions discussed in that Part in relation to the key issues identified in section 2.

## 2. REGISTRATION SYSTEMS IN GENERAL

It is sometimes suggested that resources legislation should aim to provide a system of registration similar to the Torrens system. This is not to say that the Torrens system is free from problems; there are many, as the continual flow of Torrens title cases through the courts shows. Rather, the basis of the suggestion is that the Torrens system provides security of title and relative efficiency of functioning, which are desirable features for resources registration systems. Any evaluation of this suggestion must rest on an analysis of the purposes and features of the two systems. We give a very general outline of the purposes and principal features of the Torrens system to serve as a comparative model for measuring the legal effect of the *Mining Act* dealings provisions, both before and after the reforms.

### 2.1 Purposes of Registration

Registration of resources titles and interests in them usually serves two purposes pertinent to dealings:

- (1) a record for government of the parties who have interests in the tenements and with whom the government will need to deal in exercising its controls over resources development, and
- (2) a public record of title to and interests in the tenements for the private parties who may wish to acquire or otherwise deal with the tenements.<sup>7</sup>

On the other hand, registration of titles and interests in Torrens land has generally served only the second of these purposes; a public record for parties who may wish to deal with the land, which ensures certainty of land titles and facilitates relatively efficient land dealings. These differing purposes explain the existence of some of the differences between the system of resource titles registration and the Torrens land registration system. It is no doubt because of the economic importance of the mineral and petroleum resources that the parliaments of Australia have seen fit to confer on governments controls over the exploitation of these resources that are generally not exercised in respect of ordinary land.<sup>8</sup> These controls have frequently required governmental consent to any dealing with a resource title and included the registration of interests held from the registered

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<sup>7</sup> See discussion of the purposes of the registration system by D. Ipp and D. Maloney, "Dealing with Interests in Petroleum Tenements", (1983) 57 *Australian Law Journal* 518-519. A Thompson, in his article "Legal Aspects of Petroleum Tenement Management in Western Australia", (1987) 6 *AMPLA Bull* 17 at 25, says that there are three objects for registration systems: (i) to exercise control over the disposition and exercise of rights to explore for and produce petroleum owned by the Crown, (ii) to provide security and certainty of title, and (iii) to raise revenue through registration fees. Another purpose, suggested by our referee, may be to inform the public and interested parties of the persons who hold rights in respect of the State's resources.

<sup>8</sup> The Western Australian Department of Mines states that the exploitation of mineral and petroleum resources plays a major role in the economy of the State and that the exploration and development of these resources are to be undertaken in an organizational framework controlled and directed by Government on the basis of multiple land use: see Annual Report 1988-89 16. This philosophy underlies the legislative controls.

title holder. Consider, for example, a typical farmin transaction which is fully and successfully executed. Prior to the current reforms, the following steps would have been followed:

- (1) The farmin agreement would have been signed, stamped, and lodged for approval of the dealing (not required in all cases) and registration. In some cases, the farmee may have also lodged a caveat.
- (2) Upon completion of the earning obligations, the parties would have executed a transfer which would have been stamped, and lodged for approval (again, not required in all cases) and registration to make the farmee a registered holder of the title.

Compare this resources model with the Torrens system. Contracts relating to the sale or lease of Torrens title land may be protected by caveat but would not need to be approved and cannot be registered. Rather, the transaction is effected by the registration of another instrument of transfer or lease which must be in a prescribed form. The difference between the two systems can be expressed simply: the resources legislation requires registration and (in many cases) approval of both the contract and the conveyance, whilst the Torrens system requires only registration of the conveyance. The Torrens system also generally forbids the registration of equitable interests in land, although these may still be enforced by a court exercising its equitable jurisdiction. The effect of the reforms is to make the *Mining Act* system more similar to the Torrens system by repealing, in most cases, the requirement to obtain approval and registration of the farmin agreement.

In respect of other types of transactions affecting resources tenements, the position under the pre-reform provisions may have been more analogous with the Torrens system. For example, the requirements of registration would seem comparable in respect of

- (1) mortgages under both systems,
- (2) subleases of mining leases and leases of general land, and
- (3) royalties from minerals production and restrictive covenants in respect of ordinary land.

There are some anomalies in the characterization of the interests created upon registration of these dealings in the Torrens system. For example, restrictive covenants are the creature of equity, yet it is generally accepted now that they may be registered but given no greater operation than they would have in the general law.<sup>9</sup> Similarly, options to renew or purchase in a Torrens registered lease, which create only equitable interests, are nevertheless afforded the full protection of the indefeasibility provisions.<sup>10</sup> However, after the *Mining Act* reforms neither subleases of mining leases nor royalties from minerals production can be registered. Thus, although the scope of interests registrable under pre-reform provisions of the *Mining Act* was wider than that under the Torrens system, the scope of registrable interests under the post-reform provisions of the *Mining Act* may be narrower. Also, as will be seen, the protection given by registration under the *Mining Act* is less than that afforded by the Torrens system.

## 2.2 Principal Features of the Torrens System

The aim here is to outline the principal features of the Torrens system to provide a model for evaluating the effect of the *Mining Act* registration system. These features include both the objectives

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<sup>9</sup> See D Whalan, *The Torrens System in Australia*, Law Book Co. 1982, 110-111.

<sup>10</sup> *Ibid.* 114.

and the mechanisms for achieving them.<sup>11</sup>

- (1) It is a register of title to and interests in land based on the units of land concerned, rather than a system of registration of instruments indexed according to the names of persons claiming interests in land. The original Crown grantee obtains a registered title.<sup>12</sup>
- (2) The system aims to give greater security and certainty of title to the registered proprietor; the register and certificate of title being, in the absence of fraud, conclusive of the registered proprietor's title.<sup>13</sup>
- (3) The system gives the bona fide purchaser for value who becomes a registered proprietor a title free of all claims or interests except those notified on the register.<sup>14</sup> All that a person dealing with a registered proprietor need do is search the register; he need not check how that person became the registered proprietor nor, in the absence of fraud, would he be bound by notice of unregistered claims.<sup>15</sup>
- (4) No instrument of transfer or mortgage can pass any estate or interest in land or create any charge until it is registered.<sup>16</sup> This does not stop a court in exercise its equitable powers giving a decree for specific performance against the registered proprietor to enforce a contract he made which lies behind the formal instrument of transfer or mortgage.<sup>17</sup>
- (5) There may be unregistered equitable interests which will affect the beneficial interest of the registered proprietor; arising either by a trust, a contract enforceable *inter partes*, or by the right of a person who has been defrauded by the registered proprietor. A *bona fide* purchaser for value will take free of these interests unless they are protected by a caveat which forbids the registration of any dealing with title except subject to the equitable interest claimed.

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<sup>11</sup> *Ibid.* ch.2.

<sup>12</sup> *Ibid.* 47. See, eg., ss.18 & 81A *Transfer of Land Act* 1893 (WA).

<sup>13</sup> Per Barwick CJ in *Breskvar v Wall* (1971) 126 CLR 376, 385-386.

<sup>14</sup> The authors acknowledge that there are diverging views on the question whether “volunteers” – those who fail to provide consideration – obtain indefeasible title upon registration. In our view, the correct position was that adopted by Owen J in *Conlan v Registrar of Titles* (2001) 24 WAR 299 at 337 where his Honour commented, *obiter dicta*: “In my view the doctrine of indefeasibility can apply to the holder of a registered interest where the proprietor has become registered through a voluntary transaction”; cf. *King v Smail* [1958] VR 273 and *Rasmussen v Rasmussen* [1995] 1 VR 613. However, for the purposes of this article, the authors will continue to use terminology traditionally adopted by resources legislation, namely “a bona fide purchaser for value”.

<sup>15</sup> Section 134 *Transfer of Land Act* 1893 (WA)

<sup>16</sup> Section 58 *Transfer of Land Act* 1893 (WA)

<sup>17</sup> There are a long line of cases to this effect. The equitable principle is explained by Brennan J in *Corin v Patton*, (1990) 64 ALJR 256, 265. “Although a proposed transferee of land has no legal estate or interest in the land to be transferred prior to registration of the transfer, he may acquire an equitable estate or interest “by reason of some fact or circumstance which a court of equity regards as binding the legal owner in conscience to hold the property upon trust for the [transferee]”: per Kitto J in *Olsson v Dyson* (1968) 120 CLR 365 at 375; Section 41, “in denying effect to an instrument until registration, does not touch whatever rights are behind it”: *Barry v Heider* (1914) 19 CLR 197 per Isaacs J at 216. It is for this reason that a purchaser under a contract of sale of land under the Real Property Act has an equitable estate or interest in the land corresponding with the protection which equity gives to rights acquired under the contract: *Bahr v Nicolay [No.2]* (1987) 164 CLR 604 & *Chan v Cresdon Pty Ltd* (1989) 64 ALJR 111. The source of that estate or interest is the contract, not the transfer.” For a recent discussion of the nature of this equitable interest, see *Tanwar Enterprises Pty Ltd v Joeseeph Cauchi & Ors* [2003] HCA 57 at [53]; 77 ALJR 1853.

- (6) Instruments affecting the same title (eg. mortgages) take priority as between each other according to the time of registration.<sup>18</sup>
- (7) The State guarantees the interest of the registered proprietor against the loss of his registered interest or title arising from fraud, the registration of another person as proprietor or any error or misdescription in any certificate of title or in any entry or memorandum in the Register.<sup>19</sup>

The comparative value of the Torrens system lies in its general aim of giving an indefeasible title. At certain points in this article, direct comparison will be made between specific provisions of the Torrens legislation and the *Mining Act* to show how the latter avoids providing for a complete legal indefeasibility of title. Any comparison beyond that would require a much fuller analysis of the Torrens system and its many problems.

### 3. THE ISSUES

Over the years there have been a number of issues arising from the legislation governing registration of and dealings with resource titles. At the practical level, these issues arise from the fact that parties often act on their dealings before the full array of legal requirements for approval and registration have been complied with. An important practical question then is how does a party protect its interest before all the legal requirements are satisfied? Further, even when it does satisfy those requirements, how secure is its title? At the legal level, these issues include:

- (1) what are the requirements of form for dealing with title?
- (2) what is the effect of failing to obtain consent to or registration of a dealing or instrument creating or affecting an interest in a tenement; i.e. can equitable interests be created and enforced before approval and / or registration, and can contractual obligations arise before approval and / or registration?
- (3) what is the effect of registration as the title holder; ie. is there indefeasibility of registered title?
- (4) what is the effect of registration of dealings and instruments other than a transfer of title?
- (5) how is competition between interests (both registered and unregistered) in tenements resolved?
- (6) do the equitable principles of part performance and constructive trust operate in relation to the registration systems?

The answers proffered to these difficult issues have varied in relation to the legislation governing the dealings in question. Even in relation to the same or similar legislation, there have been differing opinions, both judicial and non-judicial. A summary of the various views taken on these issues is given in the article by Gardner, "Security of Title".<sup>20</sup> For the purposes of this article, it suffices to comment on these issues in the context of reviewing the operation of the provisions of the *Mining Act 1978 (WA)*.

There is, however, one preliminary issue that we need to address: the practical difference between having a proprietary and a contractual interest in a mining title. From the practical point of view,

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<sup>18</sup> D Whalan, op. cit. n.9, 287; s.53 *Transfer of Land Act 1893 (WA)*.

<sup>19</sup> Section 201 *Transfer of Land Act 1893 (WA)*.

<sup>20</sup> [1990] AMPLA Yearbook<sub>284</sub> at 289-293.

particularly in the context of remedies, there is a significant difference between having a proprietary interest in a mining tenement as opposed to only a contractual right. The difference is that contractual rights can only be enforced against the grantor of that right whereas proprietary interests are enforceable against “the whole of the world”.<sup>21</sup>

Traditionally, the equitable remedies of injunction and specific performance could lie only to protect a proprietary interest in the subject of a contract, but this requirement has been eroded. Indeed, contemporary judicial opinion acknowledges the existence of an equitable proprietary interest in the subject of a contract only to the extent that “the ‘interest’ of the purchaser is commensurate with the availability of specific performance”.<sup>22</sup> If damages are an inadequate remedy, a contractual right will suffice to support the grant of an injunction to prevent a threatened breach of a contract, whether or not the contract conferred a proprietary interest on the applicant.<sup>23</sup> Similarly, where damages are inadequate,<sup>24</sup> an applicant could also seek the remedy of specific performance to compel the defaulting party to carry out its contractual obligations. Contracts for the sale of an interest in land (such as mining tenements)<sup>25</sup> have always been regarded as the proper subject for specific performance<sup>26</sup> but, again, there may be competing equitable principles that apply to deny that remedy to a purchaser of an interest in land.<sup>27</sup>

The result would differ in a situation where the defaulting party transferred its interest to a third party and was no longer in a position to carry out its contractual obligations. An applicant with a mere contractual right would not be able to obtain the remedy of specific performance against the third party and would only be entitled to damages.<sup>28</sup> On the other hand, an applicant with a proprietary interest in the tenement would have a claim against the third party to enforce its interest in the tenement; for example, the payment of a royalty or the exercise of rights to exploit the minerals and receive their profits. This may be more secure and advantageous than an order for damages against the defaulting party to the contract.<sup>29</sup>

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<sup>21</sup> R Chambers, *An Introduction to Property Law in Australia*, LBC, 2001,8; AG Thompson, “Characterisation of Legal, Equitable and Non-Working Interests”, paper delivered at a seminar on “Interests in Mining Tenements”, jointly sponsored by AMPLA and The Law Society of WA, June 1987,8.

<sup>22</sup> *Tanwar Enterprises Pty Ltd v Joeseeph Cauchi & Ors* [2003] HCA 57 at [53]; 77 ALJR 1853. The Hon Justice R P Meagher, “Sir Frederick Jordan’s Footnote” (1999) 15 *Journal of Contract Law* 1.

<sup>23</sup> *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] VR 386 as discussed by J. D. Heydon, P. L. Laughlan, *Cases and Materials on Equity and Trusts*, 6<sup>th</sup> ed’n, Butterworths 2002, 965.

<sup>24</sup> *Dougan v Ley* (1946) 71 CLR 142, per Dixon J at 150. The principle for the award of damages in contract is that “that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”: Mason CJ and Dawson J in *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, quoting Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365. These damages will include justifiable expenses and net profit: per Mason CJ and Dawson J at 81.

<sup>25</sup> The question whether a mining tenement is an interest in land is considered at section 3.4.1 below.

<sup>26</sup> *Dougan v Ley* (1946) 71 CLR 142, per Dixon J at 150. *Pianta v National Finance & Trustees Ltd* (1964) 180 CLR 156, per Barwick CJ at 151.

<sup>27</sup> *Tanwar Enterprises Pty Ltd v Joeseeph Cauchi & Ors* [2003] HCA 57; 77 ALJR 1853.

<sup>28</sup> R. Meagher, D Heydon & M Leeming, *Equity: Doctrines and Remedies* (4th edn 2002) 693-695.

<sup>29</sup> *Dalecoast Pty Ltd v Guardian International Pty Ltd* [2003] WASCA 142 per Murray J at [102]-[107], denying a remedy of an account of profits for a breach of contract. One of the cases there cited is *Attorney-General v Blake* [2001] 1 AC 268, [2000] 4 All ER 385, where an account of profits was awarded.

#### 4. PROVISIONS OF THE MINING ACT 1978 (WA)

The current provisions of the *Mining Act 1978* (WA) and the developments in judicial interpretation

of the relevant provisions will now be reviewed to analyse their effect on the issues identified above. It is of particular interest in this section to consider what security of title may be obtained pending satisfaction of the requirements of form for dealings, governmental consents to dealings and registration of dealings.

##### 4.1 Provisions Establishing the Register

The legislative reforms to the *Mining Act* have provided for the registration system to be established under the statute rather than the regulations and have, therefore, eliminated the susceptibility of these provisions to a challenge of being *ultra vires*.<sup>30</sup> The significance of this reform is evident when one considers the great impact the registration system has on the rights and duties of title holders and parties dealing with them.

The Director General of Mines has the responsibility of causing the register to be compiled and maintained, and has the discretion to determine in what form that is to be done.<sup>31</sup> The particulars to be entered in the register relating to mining tenements and applications for mining tenements are prescribed by a new regulation.<sup>32</sup> In the case of an application for a mining tenement, the register is to contain the particulars shown on the prescribed form of application and to show whether the application was approved, refused or withdrawn.<sup>33</sup> If the application was approved the register is required to include the terms and conditions of that approval.<sup>34</sup>

In relation to a mining tenement, the register is to contain particulars relating to:

- all rental payments and moneys expended or deemed to be expended in mining on or in connection with mining on the tenement;
- exemptions from the expenditure conditions;
- any dealings and other instruments affecting the tenement that are required to be entered in the register under the Act;
- the name of the registered holder and the number of shares held by him or her;
- the surrender, forfeiture or other cancellation of the tenement;<sup>35</sup> and
- such other particulars as the Director General of Mines considers necessary to be contained in the register.<sup>36</sup>

As before, though now based on statute, any person may on payment of the prescribed fee obtain a copy of an entry in the register.<sup>37</sup> However, the new regulations have maintained the previous requirement that a person seeking a copy of a “dealing or other instrument” must obtain the written consent of the registered holder or the applicant or, if such consent is not forthcoming within 30

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<sup>30</sup> Section 103F(1) Mining Act 1978 (WA)

<sup>31</sup> Section 103F(1) and (3) Mining Act 1978 (WA).

<sup>32</sup> Regulation 84C *Mining Regulations* 1981 (WA), as amended in 2005.

<sup>33</sup> Reg 84C(a).

<sup>34</sup> *Ibid.*

<sup>35</sup> Reg 84C(b) *Mining Regulations* 1981 (WA).

<sup>36</sup> Reg 84C(c) *Mining Regulations* 1981 (WA).

<sup>37</sup> Section 103F(4)(a).



days, with the approval of the Minister.<sup>38</sup> Although “instrument” is not defined, the 1996 amendments now define “dealing” in narrow terms as a transfer or mortgage of a legal interest in a mining tenement, as discussed below.

## 4.2 Root of Title

It is suggested that the starting point for a system of indefeasible registered title is that the root of title should lie in registration of the instrument of title and not in the grant of title. This starting point is not adopted in the *Mining Act*. The test for determining the root of title is to see when the rights in relation to the tenement, either for the purposes of working the tenement or dealing with the title, may be exercised.

In general, the rights under the tenements may be exercised from the time of grant.<sup>39</sup> Neither the commencement of the terms of these titles nor the exercise of the rights under them is expressed to be dependent on the registration of the title. Clearly, the policy of the Act is to make grant the root of title.<sup>40</sup>

The *Mining Act* does not specify a process for registering the titles after grant. It provides only that the “holder of a mining tenement granted pursuant to this Act shall be entitled to receive an instrument of licence or lease ...”.<sup>41</sup> The grant of a tenement application is recorded in register,<sup>42</sup> presumably as a matter of course.

## 4.3 Definition of “Dealings”

Resources legislation, and many writers on the subject of resources registration systems, have used the word “dealing” without defining it. To assist in definition, the types of commercial transactions which may be conducted in relation to mining tenements can be listed as follows:

- outright sale
- farm out/in agreement
- mortgage or charge or some other form of security or notice of discharge of such security
- option to purchase
- royalty
- free carried interest
- sub-lease
- licence or tribute agreement

“Dealing” could be strictly defined as any **transaction** between the registered holder and one or more other parties which has the effect of conferring on the other party or parties a claim to a legal or equitable interest in the title. So defined, the concept of dealing would include a transfer, mortgage

<sup>38</sup> Reg. 84D(2). The “previous requirement” was stated in former regulation 106(2).

<sup>39</sup> *Mining Act* ss.41(5), 61 and 79 (on notification of grant).

<sup>40</sup> See, for example, Burt C.J. in *Crocker Consolidated Pty Ltd v. Wille* [1988] WAR 187, 191 and Murray J in *Sorna Pty Ltd v Flint* (2000) 21 WAR 563 at 571 where his Honour commented that “...it is clear that title to the ground the subject of a mining tenement is rooted in the grant made in accordance with the statutory procedures”.

<sup>41</sup> *Mining Act* s.116(1).

<sup>42</sup> Mining Regulations 1981, reg.84C, inserted in 2005, replacing a similar regulation 106, which was repealed.

or assignment which creates or transfers proprietary interests but may not include transactions which create only contractual obligations in respect of a tenement. The concept should be expanded to include those transactions which "affect" a tenement.<sup>43</sup>

This concept of dealing can be distinguished from two other concepts:

- (i) "contracts" which are the agreements to carry out the dealings, and
- (ii) "instruments" which are the documents that witness or give legal expression to the contracts or dealings.

It is a matter of great significance whether the provisions controlling dealings focus on the instrument or the dealing, as is illustrated by the case of *Swan Resources Ltd v Southern Pacific Hotel Corporation Energy Pty Ltd*.<sup>44</sup> In that case, the Supreme Court of Western Australia (Burt CJ and Kennedy J, Wickham J dissenting) denied that an instrument could, pending approval and registration under the *Petroleum Act 1967* (WA), have any force to create an obligation not to deal with the permit to the detriment of the equitable interest of the assignee in the permit. The court held that there was no obligation the breach of which could be restrained by an injunction. In so holding, the majority denied that the statutory provision identifying the persons who could apply for approval gave any recognition that the instrument had some effect *inter partes* before approval and registration. The majority rejected the analysis of Wickham J (dissenting) that the provision did not "strike down, or in some way postpone, contractual obligations of a personal nature evidenced by the instrument ...".

Detailed analysis of this case by Ipp and Maloney has emphasized the distinction between legislative provisions which address the force of an "instrument" as distinct from the force of a "dealing".<sup>45</sup> Statutes which strike down instruments, not dealings, invalidate the contract which the instrument effects as well as the dealing or transaction to be carried out pursuant to the contract. On the other hand, statutes which strike down dealings instead of instruments leave the contract valid to create obligations between the parties.

The relevant provisions of the *Petroleum Act 1967* (WA) did, prior to amendments in 1990, focus on the instrument. The 1990 amendments<sup>46</sup> altered those provisions to focus on the transaction or dealing.<sup>47</sup> By contrast, the former (pre-1996 / 2004 amendment) provisions of the *Mining Act* and *Regulations* treated the concept of dealing to mean both the transaction and the instrument.<sup>48</sup> For example, the former Mining Regulations referred variously to:

- (a) "every deed, contract or other instrument relating to the title to or transfer of any mining tenement ...",<sup>49</sup> and
- (b) "dealings".<sup>50</sup>

<sup>43</sup> G. Ryan, "Petroleum Royalties" [1985] AMPLA Yearbook 359.

<sup>44</sup> [1983] WAR 39.

<sup>45</sup> D. Ipp & D. Maloney, *op. cit.* n.7, 513-514.

<sup>46</sup> *Acts Amendment (Petroleum) Act 1990* (WA) ss.58 & 203.

<sup>47</sup> *Petroleum (Submerged Lands) Act* s.81; *Petroleum Act* s.75.

<sup>48</sup> See especially Mining Regulation 110, as it was in 2004.

<sup>49</sup> Mining Regulation 103, as it was in 2004.

<sup>50</sup> Mining Regulations 1981 (WA) reg.110 & 106(1)(f), as they were in 2004.

It is suggested that the use of the word "dealing" in former reg.110 meant an instrument or document effecting a transaction as well as the dealing itself. It also contemplated the whole of array of dealings described above.

By contrast, the 1996 / 2004 amendments to the *Mining Act* have defined the term "dealing" in s.8 to mean "a transfer or a mortgage of a legal interest in a mining tenement." Whilst this definition confines the scope of the transactions indicated by the term, it is submitted that it refers to the transactions in question rather than the instrument.

For the purposes of this article, we will continue to use the word "dealings" in the extended traditional sense unless otherwise indicated. What we will see is that the Act now contains provisions that operate on dealings (as broadly defined) and on the new narrow statutory definition of dealings.

#### 4.4 Requirements of Form for Dealings

The requirements of form relating to dealings in mining tenements are set out in s.119(2) of the *Mining Act*, which provides that:

A legal or equitable interest in or affecting a mining tenement is not capable of being created, assigned, affected or dealt with, whether directly or indirectly, except by an instrument in writing signed by the person creating, assigning or otherwise dealing with the interest.

The operation of this provision has been discussed in a number of cases, most recently by the Full Court of the Supreme Court of Western Australia in *Sorna Pty Ltd v Flint & Anor*.<sup>51</sup> Whilst the decision has authoritatively declared the law on certain aspects of the section, we submit that in other respects the views of the Court are open to question. There are three issues that arise here.

- (1) What is the general effect of s.119(2) on oral contracts that purport to deal with interests in mining tenements?
- (2) Do the provisions of s.34 *Property Law Act* and s.4 *Statute of Frauds*, which operate in relation to the creation of interests in land and the enforcement of contracts relating to land, operate in respect of mining tenements under the *Mining Act*?
- (3) Can an equitable interest in a mining tenement ever arise by operation of law in the absence of a transaction by instrument in writing?

##### 4.4.1. The General Effect of s 119(2) on Oral Contracts

Section 119(2) prevents legal or equitable interests in mining tenements under the *Mining Act* being created, assigned, affected or dealt with except by an instrument in writing.<sup>52</sup> Accordingly, an oral contract alone cannot create or assign a proprietary interest in a tenement and, therefore, could not be specifically enforced so as to compel a transfer of a legal or an equitable interest in the tenement. In a sense, the statutory requirement of writing bars the equitable remedy for the oral contract. However,

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<sup>51</sup> (2000) 21 WAR 563.

<sup>52</sup> *Sorna Pty Ltd v Flint & Anor* (2000) 21 WAR 563, per Ipp J at 567 and per Murray J at 573.

the provision does not invalidate an oral contract, which could still give rise to personal rights that could be enforced by way of an action for damages.<sup>53</sup>

However, this leaves the question of whether other statutory provisions governing writing requirements for dealing with interests in land may impact on the enforcement of oral contracts for dealings with mining tenements. It is arguable that a mining tenement is an interest in land,<sup>54</sup> so do the statutory requirements of writing for dealing with interests in land operate in respect of mining tenements?

#### 4.4.2. Operation of s 34 Property Law Act and s .4 Statute of Frauds

In *Sorna Pty Ltd v Flint & Anor*, the plaintiff, Flint, sought to overcome the operation of s.119(2) by arguing that *Property Law Act* s.34, especially s.34(2),<sup>55</sup> nevertheless supported an argument that an oral agreement could give rise to a resulting, implied or constructive trust.

The case concerned a joint venture between Flint and Del Fante. The parties were involved in a “predatory arrangement” by which Flint, Del Fante and another sought to identify mining tenements held by third parties who had not complied with the prescribed expenditure conditions and plait them for forfeiture.<sup>56</sup> To protect his own tenements from retaliatory plait for forfeiture, Flint made

<sup>53</sup> *Sorna Pty Ltd v Flint & Anor* (2000) 21 WAR 563, per Ipp J at 567 and per Murray J at 573. See also *Terrex Resources NL v Magnet Petroleum Pty Ltd & Others* (1988) 1 WAR 144 per Kennedy J at 162 in relation to s.80 of the Petroleum (Submerged Lands) Act 1967, quoted by both Ipp and Murray JJ in *Sorna*.

<sup>54</sup> The question whether resources tenements are interests in land has been discussed by M Crommelin, “Petroleum (Submerged Lands) Act: The Nature and Security of Offshore Titles” (1979-80) AMPLA Yearbook 135, C J Carr (WA), D. Simmons (SA), G. Clarke (NT), T. Johnston (Vic), S. Milthorpe (NSW), J. Young (Qld), B. Crawford (Tas.), and M. Boud (Offshore) in (1982) 4 AMPLA Yearbook; and A G Thompson, “Characterisation of legal, equitable and non-working interests”, paper given in a seminar titled “Interests in Mining Tenements”, jointly sponsored by the Law Society of WA and AMPLA in 1987. M Hunt, *Mining Law in Western Australia*, 3<sup>rd</sup> ed’n, Federation Press, 2001, at 75 points out that despite the fact that under the *Mining Act* 1904 (WA) (now repealed) the tenement equivalent to a prospecting licence was held to be a bare licence (*Bowen v Stratigraphic Explorations Pty Ltd* [1971] WAR 119), a prospecting licence “would seem to be more than a bare licence because it confers not only a right of entry for prospecting purposes but also a right to extract and remove a quantity of ore...” Hunt does not discuss this issue in relation to exploration licences, but a stronger argument applies in relation to that tenement. The author also concludes at 118-119 that a mining lease under the *Mining Act* 1978 (WA) is a true common law lease and therefore is an interest in land: see A Gardner, “Exclusive Possession and the Legal Character of a Mining Lease under the *Mining Act* 1978 (WA)” (1989) 8 AMPLA Bull 115-120. See also *Grimes Holdings Pty Ltd v Sceghi*, Supreme Court of WA, unreported judgment of White J, delivered 20 August 1993.

<sup>55</sup> The *Property Law Act* s.34 provides that:

“(1) Subject to the provisions of this Act with respect to the creation of interest in land by parol -

- (a) No interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
- (b) A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
- (c) A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.”

<sup>56</sup> A successful applicant for forfeiture gains a priority right to apply for a tenement over the same area of land: *Mining Act* 1978 s.100.

an oral agreement with Del Fante by which he would fund the latter to use a company, Sorna Pty Ltd, to acquire and hold the tenements on trust for Flint. Del Fante was to provide tenement management services through a business he operated. Interestingly, Sorna denied the existence of the oral contract but conceded that it held an 80 per cent equitable interest in the tenements on trust for Flint. Sorna maintained that it was the beneficial owner of the remaining 20 per cent of the beneficial interest in the tenements. Flint sought a declaration that Sorna held 100 per cent of the tenements on trust either on the basis of an express oral trust or on the basis of a resulting or constructive trust. Flint argued that *Property Law Act* s.34 applied to mining tenements or that s.119(2) should be construed as being subject to the operation of resulting, implied or constructive trusts in the same way as s.34(1) was expressly subject to such trusts by s.34(2).

The Court rejected Flint's arguments and held that no legal or equitable interest could be created in a mining tenement without an instrument in writing.<sup>57</sup> Ipp and Murray JJ, Templeman J agreeing, held that the operation of s.34 of the *Property Law Act* in relation to mining tenements had been displaced by the later and more specific provisions of s.119(2) of the *Mining Act*. Ipp J concluded:

... the section [s 119(2)] prevents the creation of the express trust orally agreed upon by the parties. It also prevents the creation of any equitable interest being created by construing a trust".<sup>58</sup>

Murray J similarly concluded:

Section 34 *Property Law Act* may certainly have the effect that by resulting, implied or constructive trust a parol interest in the land or the interest therein conferred by the grant of the mining tenement may be created, but that is because of the express terms of ss 34(2) and 119(2) of the *Mining Act* contains no qualification such as a s 34(2) of the *Property Law Act*. In my opinion, s.119(2) is a later and particular provision governing the form by which both legal and equitable interests in or affecting mining tenements may be created or dealt with.<sup>59</sup>

In other words, the Court concluded that, because s.119(2) of the *Mining Act* is not subject to a provision like s.34(2) of the *Property Law Act*, no equitable interest in a mining tenement could arise by operation of law from an oral agreement purporting to declare a trust of or sell an interest in a mining tenement. The outcome of the Court's decision was explained this way by Murray J.

It follows in my opinion that in accordance with the plain wording of the subsection an oral agreement having the effect of purporting to create an equitable interest in a mining tenement by way of implied or resulting trust or a constructive trust arising from the common intention of the parties will not be legally effective.<sup>60</sup>

We will return to this question below.

In *Sorna v Flint* the Supreme Court saw no need to consider the application of s.4 *Statute of Frauds* to dealings in mining tenements.<sup>61</sup> That question was considered by Mr Justice D A Ipp and Mr A N

<sup>57</sup> per Ipp J at 567; per Murray J at 572; per Templeman J at 578

<sup>58</sup> (2000) 21 WAR 563, per Ipp J at 567.

<sup>59</sup> (2000) 21 WAR 563 at 572.

<sup>60</sup> (2000) 21 WAR 563 at 572.

<sup>61</sup> *Statute of Frauds* s.4, continued by the *Law Reform (Statute of Frauds) Act* 1962 (WA) s.2, is to the effect that:

Siopis in an article that addressed the formalities relating to contracts for the sale of land.<sup>62</sup> The learned authors distinguished between the effects of the s.34(1)(a) *Property Law Act* and s.4 *Statute of Frauds*. They argued, as Justice Ipp held in *Sorna v Flint*,<sup>63</sup> that s.34(1)(a) is concerned only with assurances or conveyances of interests in land, not with agreements for such;<sup>64</sup> but that agreements for the sale of land can only be enforced if they meet the less rigorous requirement of writing in s.4 *Statute of Frauds*.<sup>65</sup> If s.119(2) excludes the operation of s.34 *Property Law Act*, it is arguable that s.119(2) operates in the same way as s.34; namely, on the assurance or conveyance of interests rather than on agreements for the assignment of an interest. If that is so and mining tenements can be characterised as interests in land, it is arguable that oral agreements for assignment of interests in mining tenements, which survive the operation of s.119(2), can only be enforced if there is some written memorandum that satisfies s.4 *Statute of Frauds*.

#### 4.4.3. Equitable Interests arising by Operation of Law: Exceptions to the Writing Requirements of s.119(2) and s.4 Statute of Frauds

Although the general proposition is that no interest in a mining tenement may be created or assigned without an instrument in writing, it is submitted that there are some exceptions whereby equitable interests may arise by operation of law even though there is no express provision to that effect qualifying s.119(2). In this respect, we disagree with the apparent conclusions of Ipp and Murray J in *Sorna v Flint* referred to above. Indeed, in the article by Ipp and Siopis noted above, the learned authors suggested that the purchaser of a mining tenement under an executory contract for sale obtains an equitable interest in the tenement by way of operation of law and constructive trust, just as a purchaser of land does by virtue of s.34(2) *Property Law Act*.<sup>66</sup> The learned authors give another example of such an equitable interest arising by operation of law where a constructive trust is imposed as a result of an oral contract that is coupled with sufficient acts of part performance.<sup>67</sup> In our submission, these suggestions are correct. However, after the decision in *Sorna v Flint*, determining when such equitable interests will arise seems unduly precarious. We will discuss four situations in which we believe equitable interests can arise by operation of law despite the lack of a written instrument:

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“No action shall be brought ... to charge any person ... upon any contract or sale of land, tenements or hereditaments, or any interest in or concerning them; ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.”

<sup>62</sup> “Formalities Relating to Contracts for the Sale of Land Revisited”, (1989) 19 UWA Law Review 301.

<sup>63</sup> (2000) 21 WAR 563, per Ipp J at 566.

<sup>64</sup> Moreover, Ipp J went on to hold that s.34(1)(a) could not apply to executory contracts relating to interests in mining tenements and was thus irrelevant to the circumstances obtaining in *Sorna v Flint*: (2000) 21 WAR 563, per Ipp J at 567. One may assume that the Court would equally have held that s.34(1)(b), a provision more applicable to the facts of this case, would not apply to mining tenements either. See also *Marist Brothers Community Inc v Harvey Shire* (1994) 14 WAR 69 per Pidgeon and Seaman JJ, *Abjornson v Urban Newspapers Ltd* [1989] WAR 191 per Kennedy J.

<sup>65</sup> “Formalities Relating to Contracts for the Sale of Land Revisited”, (1989) 19 UWA Law Review 301 at 314. The writing requirement under s.34(1)(a) and s.4 *Statute of Frauds* differs in that the first requires that the interest in land be created or disposed of in writing whilst the latter requires only that the transaction be evidenced in writing, perhaps by an instrument executed after the agreement creating the interest: see eg. *Abjornson v Urban Newspapers Pty Ltd* [1989] WAR 191.

<sup>66</sup> Ipp and Siopis, “Formalities Relating to Contracts for the Sale of Land Revisited”, (1989) 19 UWA Law Review 301 at 316-317.

<sup>67</sup> The operation of the doctrine of part performance in relation to executory contracts was discussed Ipp and Siopis, “Formalities Relating to Contracts for the Sale of Land Revisited” (1989) 19 UWA Law Review 301 at 314.

- (1) by contribution to the costs of acquiring and holding property leading to that being held on resulting trust;
- (2) by constructive trust in situations of part performance;
- (3) by constructive trust for breach of fiduciary duty; and
- (4) by estoppel.

In *Sorna v Flint*, Murray J considered, in the alternative, Flint's argument that the oral agreement and payment of monies to Sorna to acquire and hold the tenements gave rise to a resulting trust that could not be defeated by s.119(2). The crucial part of Flint's argument was that his contribution of funds to acquire and hold the tenements gave rise to a resulting trust as to a 100 per cent interest in the tenements, not just the 80 per cent conceded by Sorna. Murray J held that, on the facts established before the Warden's Court, the Warden made no error in concluding that Flint had not met the onus of proof to support the presumption of a resulting trust beyond the extent admitted by Sorna. With respect, we agree with this reasoning of Murray J and contrast it with the passage quoted above to the effect that the respondents' claim arose from an implied or resulting trust based on the common intention of both parties, such as may be established by the terms of an oral agreement. The point is that evidence of an oral agreement would not, of itself, establish a resulting trust; however, evidence of the contributions to the acquisition and holding of the property would.<sup>68</sup> Consider, for example, what the Court would have decided in *Sorna v Flint* if Sorna had not admitted that it held the tenements on trust for Flint as to 80 per cent. One hopes that the Court would not have decided that the lack of express provision in the *Mining Act* for trusts arising by operation of law would have entirely defeated Flint's claim.

The second situation of constructive trust arising in situations of oral agreements and part performance is similar. This doctrine dates back to the case of *Dillwyn v Llewelyn*<sup>69</sup> where a signed memorandum was insufficient to ensure that the agreement would be specifically enforced. The verbal agreement alone could not be binding because of the lack of memorandum in writing signed by the person to be charged, but it became binding by virtue of subsequent part performance. Thus, the doctrine of part performance may be applied to support an order for specific performance even where the requirements of writing under the *Statute of Frauds* provisions render a contract unenforceable.<sup>70</sup> The doctrine of part performance is also recognized as an exception to the writing requirements of s.34 *Property Law Act* (WA) by s.36. Interestingly, this argument appears not to have been raised in *Sorna v Flint*.

The third situation is where a constructive trust may be imposed to confer an interest in a title on a person where there has been some breach of fiduciary duty,<sup>71</sup> notwithstanding that the requirements of form have not been satisfied to create any interest in that title. This may be regarded as a situation

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<sup>68</sup> Flint's argument is well supported by *Calverley v Green* (1984) 155 CLR 242, cited by Murray J. In *Calverley v Green* (1984) 155 CLR 242 at 266, Deane J enunciated two equitable presumptions the operation of which causes resulting trust to arise: the first presumption operates "...where a person pays the purchase price of property and causes it to be transferred to another or to another and himself jointly, the property is presumed to be held by the transferee or transferees on trust for the person who provided the purchase money. The second can properly be seen as complementary of the first. It is: where two or more persons advance the purchase price of property in differing shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it."

<sup>69</sup> (1862) 45 ER 1285.

<sup>70</sup> R. Meagher, D Heydon & M Leeming, op. cit. n.28, 682 - 691.

<sup>71</sup> *Hamilton v Golden Fortune Mining NL*, Perth Warden's Court, 3 July 1988, 19. See also *Surveys & Mining Limited v Morrison* (1969) 62 Qld R 420 and *International Corona Resources Ltd. v Lac Minerals Ltd.*, 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574.

where the Court imposes a constructive trust regardless of the actual or presumed agreement or intention of the parties.

The fourth situation is where the equitable doctrine of estoppel is said to give rise to an equitable interest in a mining tenement. *Amethyst Gold v Robin McDowell*<sup>72</sup> provides an example of such an equitable interest being created. In that case, Amethyst relied to its detriment on an assumption encouraged by McDowell that the mining lease (“the Daffodil”) would be transferred to it. Amethyst contributed to the expenses associated with the mining operations on the Daffodil and the Warden’s Court held that it would have been unconscionable for McDowell to suddenly depart from the assumption and transfer the Daffodil to Woods. The Warden ordered the registered title holder to transfer the tenement in accordance with the assumption, even though the writing requirement in s.119(2) had not been satisfied.

In summary, equitable interests created by operation of law should not be denied except by clear statutory words. The absence of express provisions like ss.34(2) and 36 *Property Law Act* in relation to s.119(2) should not be seen as a legislative declaration that such interests are not permitted. Even so, the Parliament could endorse this proposition by enacting in s.119 a provision similar to s.34(2).

A final point regarding the execution of written instruments concerns the authority of an agent to execute the instrument. It is often commented that the *Mining Act* does not authorise an agent to execute the instrument. However, it is suggested that Mining Regulation 108 providing for the appointment of an attorney should be a sufficient mechanism for a person to authorise an agent to act in relation to a dealing.<sup>73</sup>

#### 4.5 Requirements of Consent for Dealings

The basic means by which parliament imposes governmental control on dealings in titles is to require ministerial approval for dealings with the title. The terms of these provisions apply to dealings with title and not to dealings with the shares of a company (a separate legal entity) which holds the title, even though the contract may confer rights to conduct operations on the tenement.<sup>74</sup> The *Mining Act* uses two types of statutory provisions imposing requirements for consent:

- (1) stipulations that instruments of title contain conditions requiring consent, and
- (2) direct statements in the Act requiring consent.

The failure to obtain consent under these different provisions gives rise to important and different consequences.

##### 4.5.1. Conditions of titles relating to dealings

The *Mining Act*, as amended by the 1996 Amendment Act, and *Mining Regulations*, as amended in 2005, stipulate that ministerial consent to transfers or mortgages of a legal interest shall be a

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<sup>72</sup> (2000) 19 AMPLJ 9.

<sup>73</sup> See M Boud, “Dealings with both Registrable and Unregistered Interests”, paper presented at seminar on “Interest in Mining Tenements”, jointly sponsored by Law Society of WA and AMPLA, 1987, 4.

<sup>74</sup> *Conlan Management Pty Ltd v Pownall, Ladyman, Jackadder Holdings Pty Ltd and Golden Circle Nominees Pty Ltd*, Supreme Court of WA, unreported judgment of Anderson J, delivered 4 June 1992; noted in (1992) 11 AMPLA Bulletin 109.



condition of the tenement for Mining Leases, Retention Licences, General Purpose Leases and Miscellaneous Licences.<sup>75</sup> There are two points to make about these new provisions.

First, the scope of the new consent requirements is narrower than the previous provisions because they will not capture the creation of equitable interests in the tenements or tenement access arrangements that do not deal with the legal title.

Secondly, in *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd*, the Full Court of the Supreme Court of Western Australia considered the consequences of not obtaining consent to a transaction dealing with a Mining Lease. Counsel for the respondent submitted that contravention of the condition provisions should result in the transaction being void. Ipp J, with whom Pigeon J agreed, rejected this submission and considered that the failure to comply with a condition of the title to obtain ministerial consent will result only in a breach of the Mining Lease condition, which would, according to s.82(1)(g), render the title holder subject to the forfeiture of title.<sup>76</sup> It would not, however, prevent the person taking under the executed mortgage or transfer from obtaining an equitable interest that would found an action for specific performance of all measures necessary to obtain ministerial consent.

#### 4.5.2. Statutory requirements of consent

Under the *Mining Act* s.64(1)(b), there is an express statutory prohibition on dealings (as defined in s.8) or other transactions *affecting* the interest in an Exploration Licence without prior written consent of the Minister during the first year of the term. There are no other statutory requirements of consent in the *Mining Act*. Two points should also be made about this provision.

First, in the 1996 amendments the Parliament did not see fit to confine the ambit of the requirement of consent in relation to Exploration Licences as it did in relation to other mining tenements.<sup>77</sup> The use of the term “affecting” extends the operation of the requirement to include transactions creating equitable interests in Exploration Licences. This reflects the government’s desire to exert greater control on entities interested in Exploration Licences.

Secondly, by contrast with the failure to comply with a tenement condition requiring consent, the consequence of the failure to comply with a statutory requirement of consent is that the dealing will be void because it is made in breach of the statute; i.e. it will not be effective to create or transfer a proprietary interest in the title. This does not preclude the agreement or instrument still having some contractual (as distinct from proprietary) effect between the parties pending approval and / or registration.

This view is supported by the analysis of the consent requirement in s.64(1)(b) by the Full Court in *Anaconda*.<sup>78</sup> The respondent argued that failure to comply with a statutory prohibition should render the agreement illegal and void. The Court held that no consent was required as the agreement conferred rights that were purely personal and no interest in or affecting the lease was transferred by the agreement. Nevertheless, the majority considered that not complying with the statutory

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<sup>75</sup> *Mining Act* 1978 (WA) ss.70H(1)(e) and 82(1)(d) and Mining Regulations 1981 (WA) regs.36(c) & 41(c).

<sup>76</sup> (2000) 22 WAR 101 at 130. M W Hunt, *Mining Law In Western Australia*, 3<sup>rd</sup> ed’n, Federation Press, 2001, at 109; *Massart v. Blight* (1951) 82 CLR 423, 440. See also *Edwards v Biddle*, unreported decision of Coolgardie Warden’s Court, delivered 4 May 1988, and noted in (1988) 7 AMPLA Bulletin 155.

<sup>77</sup> See section 4.5.1.

<sup>78</sup> (2000) 22 WAR 101 at 129-130.

prohibition would not render the agreement illegal. Rather, the purpose of s.64(1)(b) is not to confer a proprietary interest in the title without the Minister's consent.

It is suggested that the party seeking to enforce the agreement could rely on an instrument of mortgage or transfer to create either an express or implied covenant to use all reasonable efforts to obtain approval (and registration) of the transaction. The covenant would be capable of specific performance and would support an injunction to restrain another transaction with a third party to the detriment of the interest claimed.<sup>79</sup>

#### 4.6 Registration Requirements under the *Mining Act 1978*

Prior to the legislative amendments of 1996 and 2004, the requirement of registration was found in reg.110(3) which provided that

[n]o dealings shall be effectual to pass any estate or interest in a mining tenement or in any way charge or encumber a mining tenement until registered...

Despite the ambiguous use of the word "dealings", on its plain reading the regulation aimed to prevent the conferring of any legal or equitable interest without registration of the instrument recording the dealing. It was suggested that reg.110 would not prevent the instrument having a contractual effect before registration.<sup>80</sup> Furthermore, until 2002, the scheme of the legislation was interpreted as permitting the creation of unregistered equitable interests by the execution of an instrument in writing.<sup>81</sup> Essentially, it was said that the registration system should be interpreted in the same manner as Torrens legislation which permits the creation of equitable interests enforceable against the registered proprietor who created them.<sup>82</sup> It was argued that the Act recognized unregistered equitable interests in s.116(2) (which refers to "any unregistered trust or interest") and ss.121 and 122 (which provide for a system of caveats).<sup>83</sup> Also, former reg.103 appeared to recognize unregistered equitable interests by giving priority to registered over unregistered instruments.

In 2002, reg.110(3) was considered by the Supreme Court in *Finesky Holdings Pty Ltd v Minister for Transport (WA)*.<sup>84</sup> The case concerned a sub-lease agreement between Finesky and Alcoa which was executed on 9<sup>th</sup> December 1996. The Minister for Mines gave his consent to the transaction on 10<sup>th</sup> December 1996 but the sub-lease was not registered until 20<sup>th</sup> January 1997. During that time, WA Limestone (with the authority of the Minister for Transport) removed limestone from the area which Finesky had purported to lease. Finesky brought an action against the Minister for Transport contending that, despite the words of reg.110(3), it had acquired an interest prior to the registration

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<sup>79</sup> Cf. D. Maloney, "Recent Changes to the Petroleum (Sub merged Lands) Act Regarding Dealings and Transfers" [1986] *AMPLA Yearbook* 300, 306-307, and see Deane and Dawson JJ. in *Stern v McArthur* (1988) 165 CLR 489, 522-524, on the interest the party may have in the title and the remedy available.

<sup>80</sup> C. Carr, "Problems in Creation, Transfer and Registration of Legal and Equitable Interests in Mining and Petroleum Concessions in Western Australia with Recommendations for Legislative Reform", (1982) 4 *AMPLA Journal* 433, 437-438.

<sup>81</sup> There were conflicting opinions on the interpretation of this aspect of the Act: C. Carr, *op. cit.* 437-438 and *Knezevich v Mihalj* unreported judgment of Rowland J, Supreme Court (WA), 23 Nov. 1984, and *Edwards v Biddle*, unreported decision of Coolgardie Warden's Court, delivered 4 May 1988, and noted in (1988) 7 *AMPLA Bulletin* 155.

<sup>82</sup> D Whalan, *op. cit.*, n.11.

<sup>83</sup> See Part 2 of this article, sections 2.2 and 2.6 to 2.8 in (2006) 25 ARELJ.

<sup>84</sup> (2002) 26 WAR 368.

of the sub-lease and that the encroachment by WA Limestone had caused it to suffer loss and damage.

Counsel for Finesky argued that reg.110(3) ought to have been read down in the way in which the High Court read down s.41(1) of the *Real Property Act 1900* (NSW) in *Barry v Heider*.<sup>85</sup> That provision is couched in very similar terms to reg.110(3):

No dealing, until registered ... shall be effectual to pass any estate or interest in any land under the provisions of this Act ....

In that case, the High Court held that the terms of s.41(1) did not prevent an equitable interest from being created by an unregistered transfer instrument. The Court relied, among other things, on the provisions establishing the system of caveats to recognise that unregistered instruments may create enforceable interests despite non-compliance with the requirement of registration.<sup>86</sup>

In *Finesky*, Steytler J, with whom Wallwork and Parker JJ agreed, refused to read down reg.110(3) in the same way. His Honour commented as follows:

Torrens legislation, which effects a scheme of title by registration, has, as one of its objectives, the prevention of the registration of equitable interests (although they may be protected by way of caveats), but the *Mining Act* and *Mining Regulations*, which merely require the registration of title, manifest no such intention.<sup>87</sup>

His Honour read reg.110(3) strictly so as not to permit interests to be created or transferred without prior registration. The Court rejected the earlier judicial interpretation permitting the creation of unregistered equitable interests in a mining tenement by the execution of an instrument in writing. Section 119(2) was not interpreted to mean that a legal or equitable interest may be created once the requirement of form is complied with, but rather as 'facilitating' the registration of equitable instruments.<sup>88</sup> The Court also decided that the existence of provisions which provide for lodgement of caveats by persons claiming to have an interest in a tenement did not require reg.110 to be read down. Steytler J commented as follows:

Section 121 gives to a person 'claiming' any interest in a mining tenement a right to lodge a caveat. The existence of a right of that kind in respect of a *claimed* interest is not, in my opinion, inconsistent with a requirement that all 'dealings' affecting the tenement must be lodged for registration and that no 'dealings' shall be effectual to pass any estate or interest in the tenement ...<sup>89</sup>

Despite the arguable correctness of *Finesky*, the decision will not affect directly the operation of the registration scheme in the light of the legislative amendments of 1996 and 2004. The amendments have confined the requirement of registration to legal interests in a mining tenement and strengthened the caveat system for the protection of unregistered equitable interests. The new requirement of registration in s.103C applies only to:

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<sup>85</sup> (1914) 19 CLR 197.

<sup>86</sup> *Barry v Heider* (1914) 19 CLR 197, Griffith CJ at 207.

<sup>87</sup> (2002) 26 WAR 368 at 378.

<sup>88</sup> per Steytler at 378.

<sup>89</sup> per Steytler at 378.

- (a) a dealing (defined now in s.8 as a transfer or mortgage of a legal interest in a mining tenement);
- (b) a discharge of a legal mortgage of a mining tenement;
- (c) a withdrawal of an application for a mining tenement; and
- (d) a surrender under s.26A, 65 and 95.

Moreover, s.103C(8) provides that

[a] dealing does not pass any *legal* estate or interest in a mining tenement or in any way charge or encumber a mining tenement until it is registered ...<sup>90</sup>

The 1996 and 2004 amendments mean that one of the objectives of the *Mining Act* registration system is also to prevent registration of equitable interests. It should now be interpreted in the same manner as Torrens legislation, which permits the creation of equitable interests enforceable against the registered proprietor who created them without the need for their registration.<sup>91</sup> The only protection afforded to equitable interests is that offered by the system of caveats (discussed below).

Lastly, the amendments have brought the registration requirement from the regulations from under the regulations into the Act. This eliminates the possibility of the provision being challenged as ultra vires.<sup>92</sup>

## 5. SUMMARY OF PRINCIPAL PROPOSITIONS AND REFORMS

Our aim here is to assess the significance of the legislative amendments to the *Mining Act* by summarising the effect of the amended Act's provisions on the issues identified in section 3 and discussed in this Part; namely, the requirements of form for dealings, and the effect of transactions pending receipt of governmental consent and / or registration. We also summarise the operation of the doctrines of part performance and constructive trust for protecting an interest in a tenement pending completion of these requirements.

### (1) Requirements of form for dealings

- The *Mining Act* has defined the concept of a 'dealing' to be a transfer or a mortgage of a legal interest in a mining tenement. Whilst this definition narrows the scope of transactions caught by the concept, the requirements of form also extend to transactions which purport to create or assign an equitable interest in a mining tenement.
- The Act requires a written instrument for a legal or equitable interest to be created, assigned, affected or dealt with.
- This provision does not invalidate oral agreements which could still have contractual force and could be enforced if it is evidenced in a written memorandum that complies with s.4 of Statute of Frauds.

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<sup>90</sup> Emphasis added. The word "legal" was inserted by s.103 *Mining Amendment Act* 2004, amending s.15 of the *Mining Amendment Act* 1996. Whilst the amendment helps reverse the effect of *Finesky*, it was drafted in response to the submission of the Australian Mining and Petroleum Law Association that it would make the operation of unregistered equitable interests clearer on the language of the statute.

<sup>91</sup> *Supra* n.17.

<sup>92</sup> C J Carr, "Problems in Creation, Transfer and Registration of Legal and Equitable Interests in Mining and Petroleum Concessions in Western Australia with Recommendations for Legislative Reform", (1982) 4 *AMPLA Journal* 433 at 437.

- As an exception to the writing requirement, an equitable interest could be created by operation of the law despite the lack of an instrument in writing. This could arise in situations of resulting trusts, constructive trusts and by the doctrine of estoppel.

**(2) Effect of transactions pending consent and/or registration**

- With the exception of the controls on Exploration Licences in the first year, the *Mining Act* approval requirements are only conditions of the tenement, and do not operate to invalidate a transaction creating an interest in the tenement. Further, these approval requirements relate only to transfers or mortgages of a legal interest in a tenement and will not apply to transactions that create equitable interests, like farmin agreements or proprietary royalties. Although there is no longer a need to register an agreement, it will still be necessary to produce it if it evidences a transaction creating an equitable interest in the tenement.
- The Mining Act provisions requiring registration now focus on the transactions creating or conferring a legal interest in the tenement. Despite the judicial comment to the contrary with respect to the pre-amendment provisions, the amended provisions of the Act should be interpreted as recognising the creation of unregistered equitable interests enforceable against the registered holder of the title in the same way as under the Torrens legislation. The *Mining Act* would also leave intact contractual obligations of parties pending registration.

**(3) Part performance and constructive trusts**

To return to that important practical issue noted earlier: how can a party protect its interest in a tenement before all the legal requirements are satisfied? In particular, can a party enforce contractual obligations by obtaining specific performance or damages for the breach of them? The following preliminary views of the preferable approach to this question are offered.

- Under the *Mining Act*, where there is an instrument of transfer or mortgage executed, a party could rely on this instrument to create an express or implied covenant to use all reasonable efforts to obtain approval and registration of the transaction. This covenant would be capable of specific performance and would support an injunction to restrain another transaction with a third party to the detriment of the interest claimed by the first party. As the Act also permits written instruments to create unregistered equitable interests, the remedy of specific performance is even more certain.
- What is the case where there is only an oral agreement and no written instrument? The contractual obligations created by an oral agreement could be enforced by way of an action for damages unless the agreement relates to a tenement which can be characterised as an interest in land, in which case the requirements of form of s.4 *Statute of Frauds* would have to be complied with. The doctrine of part performance could apply to found an order of specific performance provided that there was not available one of the general grounds of defence to such an order, in which case damages would be available.<sup>93</sup>

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<sup>93</sup> Meagher, Haydon & Leeming, op. cit. n.28, pp.662 – 682.