

## THE REGISTRATION AND CAVEAT SYSTEMS UNDER THE MINING ACT 1978 (WA): A TORRENS CLONE?

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*The Mining Amendment Act 1996 (WA) effected significant changes to the registration and caveat provisions of the Mining Act 1978 (WA). It has been suggested that these amendments may have resulted in the reformed registration and caveat systems resembling the Torrens system of land registration more closely than was previously the case. If this is so, Torrens principles and precedent would provide valuable guidance in the interpretation of the amended registration and caveat provisions of the Mining Act. This paper considers the veracity of the claim and concludes that the effect of registration under the Mining Act is quite different from that under the Torrens system. The cornerstone of the Torrens system is the notion of indefeasibility. The courts have repeatedly emphasised the need to protect the integrity of the Torrens system by protecting the notion of indefeasibility where possible. By contrast, there is very limited indefeasibility protecting a registered interest under the Mining Act.*

### INTRODUCTION

After several years of delay and much industry and parliamentary debate, the *Mining Amendment Act 1996 (WA)*<sup>1</sup> (the Amendment Act) came into effect on 10 February 2006.<sup>2</sup> The Amendment Act effected significant changes to many aspects of the *Mining Act 1978 (WA)* (the Act).<sup>3</sup> A number of these amendments relate to the registration of instruments<sup>4</sup> and caveats.<sup>5</sup>

A Gardner and M Jorek<sup>6</sup> have suggested that the amendments to the registration system under the Act may have resulted in this reformed registration system resembling the Torrens system of land registration<sup>7</sup> more closely than was previously the case. Indeed they remark that '[t]here may be greater recourse now to the legal learning on the Torrens system to inform the interpretation of the

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<sup>1</sup> As amended by the *Mining Amendment Act 2004 (WA)* (the 2004 Amendment Act).

<sup>2</sup> Despite comprehensive recommendations directed at reforming the dealing provisions of the Mining Act 1978 (WA) having been made by the Western Australian branch of the Australian Mining and Petroleum Law Association in 1992, a number of the recommendations were 'either rejected or misunderstood' by the Parliamentary Counsel resulting in deficiencies in the *Mining Amendment Act 1996 (WA)* (the Amendment Act). The proclamation of the Amendment Act was accordingly delayed until after these deficiencies were rectified in 2004 by the enactment of the 2004 Amendment Act. See A Gardner and M Jorek, 'Dealings with Mining Titles under the Mining Act 1978 (WA): Part 1 – Requirements of Form, Consent and Registration' (2005) 24 ARELJ 342 at 342-343.

<sup>3</sup> Unless otherwise indicated, a reference to 'the Act' is a reference to the *Mining Act 1978 (WA)* as amended by the Amendment Act.

<sup>4</sup> The statutory provisions dealing with the registration of instruments and the register are found in Pt IVA of the Act.

<sup>5</sup> The statutory provisions dealing with caveats are found in Pt VI of the Act.

<sup>6</sup> A Gardner and M Jorek, 'Dealings with Mining Titles under the Mining Act 1978 (WA): Part 2 – The Effect of Registration and Caveats' (2006) 25 ARELJ 41 at 49-50.

<sup>7</sup> In Western Australia the Torrens system of land registration is embodied in the *Transfer of Land Act 1893 (WA)* (TLA).

*Mining Act* registration system<sup>8</sup>. Is this correct? Are the two registration systems so similar that the substantial body of case law and commentary that has developed over the past 150 years in relation to the Torrens system can be relied on to guide the interpretation of the Act? If this is indeed the case the mining industry would no doubt sigh a collective sigh of relief given the current uncertainty and confusion concerning the registration and caveat systems under the Act, particularly as regards the difficult issues of resolving priority disputes, the place of unregistered and equitable interests and the effect of caveats under the Act. This uncertainty is exacerbated by the courts having had little opportunity to tackle these vexed issues. If, however, there is no significant similarity between the registration and caveat systems under the Torrens legislation and under the Act, we are left with few tools with which to deal with these difficult issues.

In this paper the veracity of the claim that there is a resemblance between the registration and caveat systems under the Torrens system and under the Act will be considered. In Part 1, the purpose and effect of registration under both the Torrens system and the Act will be compared and contrasted. In particular, the degree of protection (or indefeasibility) conferred under each system will be examined. Part 2 will deal with the purpose and effect of the caveat system under the Torrens system and the Act. Finally, Part 3 will tackle the particularly troublesome issue of resolving priority disputes between competing interests in mining tenements under the Act. The priority resolution rules applicable to mining disputes will be contrasted with those applied under the Torrens system in an effort to clarify the extent to which reliance can be placed on Torrens authorities.

## **PART 1: THE PURPOSE AND EFFECT OF REGISTRATION UNDER THE TORRENS SYSTEM AND UNDER THE MINING ACT**

### **1.1 The Purpose of Registration**

The value and efficacy of any system of registration of dealings in land or, indeed mining tenements, is best assessed by examining the extent to which the objectives of that system are achieved.

### **1.2 The Purpose of Registration under the Torrens system**

The Torrens system of land registration was introduced principally to address the defects in the 'old system' of conveyancing and the *Registration of Deeds Act 1856* (WA) (RODA). Under both the 'old system' and RODA the validity of an estate or interest in land was dependent upon the validity of the initial Crown grant and each intervening dealing involving that estate or interest. Under RODA this was the position even in the case of a registered interest holder. This dependency of title meant that a person wanting to acquire or take an estate or interest in land was required to search the chain of title relevant to that piece of land to ensure that the person with whom they were dealing in fact had valid title to that land and that they were lawfully permitted to deal with it. If the proposed transferor had no valid title it followed that they were unable to pass a valid estate or interest.<sup>9</sup> The process of verifying a transferor's title was a long, costly and complex exercise often requiring the services of lawyers well versed in the legalese often found in the deeds and instruments making up the chain of title.

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<sup>8</sup> See A Gardner and M Jorek op cit n 6, at 49-50.

<sup>9</sup> Under the principle *nemo dat quod non habet*.

The notion of dependency of title was further complicated by the fact that even an exhaustive and thorough search of the chain of title carried out by an expert in such matters might not have revealed any defects in the chain of title<sup>10</sup> and, further, might not have disclosed all existing interests and encumbrances over the title in question.<sup>11</sup> Consequently any person wishing to acquire an estate or interest in land could never be quite sure that they were getting what they bargained for. The ‘old system’ and RODA simply did not and could not ensure security or certainty of title.

It was in the face of these significant problems that the Torrens system of land registration was introduced into all Australian jurisdictions. The purpose of introducing this system was to provide a simple, expeditious and inexpensive conveyancing system that provided those wanting to deal in land with the necessary security and certainty of title by dispensing with the notion of dependency of title.<sup>12</sup>

Although there are undoubtedly some problems inherent in the Torrens system, it has largely achieved these objectives and is regarded widely as an effective and reliable conveyancing system.

### **1.3 The Purpose of Registration under the Mining Act**

The purpose of introducing a system of registration of mining tenements into resources legislation is generally regarded as being twofold:

- (a) to provide a means by which the Government can exercise control over the exploitation of Crown resources of crucial economic importance to the state;<sup>13</sup> and
- (b) to establish a publicly available record of title to and interests in mining tenements. As explained by D Ipp and D Maloney ‘[t]he Register is intended to be a reliable public memorial as to the identity of persons entitled to prospect for and recover [minerals] and the nature and limits of their respective rights and obligations’.<sup>14</sup> In this regard the purpose of the registration system under the Act echoes the purpose of the Torrens legislation; it is intended to provide a certain and secure means of verifying the ownership and status of a mining tenement.

The efficacy of the registration system under the Act will be assessed by reference to the extent to which these objectives are achieved.

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<sup>10</sup> Eg, a deed in the chain purporting to transfer title may be void by reason of forgery or incapacity. Such a void deed is ineffective to pass title under the general law hence breaking the chain of good title.

<sup>11</sup> Eg, a deed creating a legal mortgage over the land may have been removed from the chain of title or inadvertently destroyed. A search of the chain of title would not reveal the missing mortgage which would nonetheless remain a legal encumbrance over the land.

<sup>12</sup> For further detailed discussion on the Torrens system, see A Bradbrook, S MacCallum and A Moore, *Australian Real Property Law* (3rd ed, Thomson, Lawbook Co, 2002) at [4.01]- [4.08].

<sup>13</sup> The other, and it is submitted, more effective means of governmental control lies in the requirement of ministerial consent for dealings involving mining tenements. See A Gardner and M Jorek, *op cit* n 2, at 357-359 for further discussion on the consent requirements in the Act.

<sup>14</sup> D Ipp and D Maloney, ‘Dealing with Interests in Petroleum Tenements’ (1983) 57 ALJ 513 at 520.

#### 1.4 The Effect of Registration under the Torrens system

The Torrens system is not a system of registration of title as was the ‘old system’; rather it is a system of title by registration.<sup>15</sup> Under the Torrens legislation, in the absence of fraud, title is acquired by the act of registration itself regardless of any invalidity or defect in the instrument registered, in the process or dealings leading up to registration or in the title of the registered proprietor from whom the interest is acquired. Registration cures all defects and renders the title of the non-fraudulent registered proprietor indefeasible. Despite some initial judicial flirtation with the notion of deferred indefeasibility<sup>16</sup> it is now incontrovertible that registration under Torrens legislation immediately confers on a non-fraudulent registered proprietor an unassailable and indefeasible title<sup>17</sup> immune from adverse claims other than those specifically excepted.<sup>18</sup> As a result, the Certificate of Title issued on registration is conclusive proof that the person named as proprietor is the holder of such estate or interest.<sup>19</sup>

While there are both express and implied exceptions to the indefeasibility of title enjoyed by a registered proprietor under the Torrens system, courts have generally demonstrated a commitment to protecting the integrity of the Torrens system by upholding the concept of indefeasibility.<sup>20</sup> As noted by Peter Butt:

But indefeasibility of title – at least, ‘immediate’ indefeasibility of title – is a harsh doctrine. That is the whole point. Any other approach diminishes the effectiveness of registration and compels that very investigation into the history of transactions and titles that Sir Robert Torrens was at pains to abolish. ... Public confidence in the Torrens system depends upon the rock-solid effect of registration.<sup>21</sup>

#### 1.5 The Effect of Registration under the Mining Act

In effecting major amendments to the Act under the Amendment Act, the State legislature chose to ignore recommendations by some commentators that the registration provisions of the amended mining legislation should mirror their Torrens counterpart as found in the *Transfer of Land Act*

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<sup>15</sup> *Breskvar v Wall* (1971) 126 CLR 376, per Barwick CJ at 385, *Conlan v Registrar of Titles* (2001) 24 WAR 299, per Owen J at 326.

<sup>16</sup> Under the deferred indefeasibility approach the safeguard of indefeasibility only attaches to a registered interest that is once removed from a defective or invalid dealing or instrument. See for example *Gibbs v Messer* [1981] AC 24, and *Clements v Ellis* (1934) 51 CLR 217.

<sup>17</sup> See for example *Frazer v Walker* [1967] 1 AC 569 and *Breskvar v Wall* (1971) 126 CLR 376. Exceptionally, in cases where a purchaser acquires a registered interest from a fictitious registered proprietor, the purchaser will not acquire an indefeasible title immediately on registration. Rather the protection of indefeasibility is deferred and attaches only to a subsequent dealing that is registered. See *Gibbs v Messer*, *ibid*, and P Butt ‘Fictitious Proprietors’ (1994) 68 ALJ 753.

<sup>18</sup> This concept of indefeasibility is enshrined in the core indefeasibility provisions of the Torrens statutes. In Western Australia they are found in ss 68 (the paramountcy provision), 134 (the notice provision), 199 (the ejection provision) and 202 (the protection of purchasers provision) of the TLA. In addition there are ancillary indefeasibility provisions, namely; ss 53, 58 and 63, which reinforce and affirm the concept of indefeasibility.

<sup>19</sup> Section 63 TLA.

<sup>20</sup> Eg, in *Conlan v Registrar of Titles* (2001) 24 WAR 299 at 336 Owen J commented ‘[n]onetheless, indefeasibility is at the heart of the Torrens system.... In my view it must be given the utmost respect and should be applied according to its tenor.’

<sup>21</sup> P Butt ‘Indefeasibility and Sleights of Hand’ (1992) 66 ALJ 596.

1893 (WA) (TLA).<sup>22</sup> The deliberate failure to give effect to these recommendations was most likely fuelled by the mining and resources industry which presumably wants to ensure continued compliance with procedural requirements. Absolute and immediate indefeasibility may encourage those acquiring a registrable interest in a mining tenement to circumvent procedural requirements, relying on registration to validate their otherwise invalid interest. The result of the registration provisions currently found in Pt IVA of the Act is to create, at best, a system of limited indefeasibility.

### 1.5.1 Registration of title

It is widely accepted that the registration system under the Act is one of registration of title and not a system of title by registration.<sup>23</sup> Whilst it is the act of registration that passes title to land under the Torrens legislation, ‘title to the ground the subject of a mining tenement is rooted in the grant made in accordance with the statutory procedures’.<sup>24</sup> The significance of the distinction is that valid title under the Act is dependent upon a valid grant. Not so in a Torrens context under which good, indeed indefeasible, title passes on registration regardless of the validity or otherwise of the grant. Practically this means that the notion of dependency of title that was the catalyst for the introduction of the Torrens legislation continues to operate under the Act. A registered tenement holder under the Act is still required to prove good title by tracing the tenement’s chain of title; proof of registration itself is insufficient to prove one’s title. The necessity to establish a valid grant is reinforced by s 103C(6) and (7) of the Act:

(6) Neither the Minister nor an authorised officer is concerned with the effect any instrument lodged under this section may have at law other than for the purposes of this Act.

(7) The acceptance of an instrument for registration does not give to it any priority (other than in so far as registration may be taken to be constructive notice), force, effect or validity that it would not have had if this section had not been enacted.

Section 161(2) of the Act provides: ‘In any proceedings a document purporting to be a mining tenement shall be accepted as such in the absence of evidence to the contrary.’

Registration under the Act clearly does not cure defects in the title existing prior to registration. Further, under s 161(2) the registered instrument under which the title was created is not conclusive proof of the registered tenement holder’s title. To establish the enforceability and priority of an interest in a mining tenement it is first necessary to prove a valid interest under general law principles. Any invalidating factor under the general law continues to infect the title notwithstanding registration. This clearly diminishes the efficacy of the registration system under

<sup>22</sup> Recommendation 2.7 *Report of the Inquiry into Aspects of the Mining Act (Hunt Inquiry) 1983*; 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 Bulletin 432 at 440.

<sup>23</sup> See for example *Finesky Holdings Pty Ltd v Minister for Transport* [2002] WASCA 206 per Steytler J at 216.

<sup>24</sup> *Sorna Pty Ltd v Flint & Anor* [2002] WASCA 22 per Murray J at para 37. See also *Crocker Consolidated Pty Ltd v Wille* [1988] WAR 187 per Burt CJ at 191 and *Hunter Resources Ltd v Melville* (1988) 77 ALR 8 per Mason CJ and Gaudron J at 13.

the Act by requiring a transferee to search the chain of title back to the grant in order to establish the validity of the transferor's title. The Register under the Act does not provide the security and certainty of title required of a registration system.

### **1.5.2 Registrable interests**

A further concern with the registration system under the Act is the limited categories of registrable transactions. While s 119(1) of the Act provides that a mining tenement may be sold, encumbered, transmitted, seized and sold to satisfy a judgment, or otherwise disposed of, s 103C(3) provides that: 'Only an instrument to which this section applies may be registered.'

Section 103C applies only to the following instruments:

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

A dealing is defined very narrowly in s 8(1) of the Act as '... a transfer or mortgage of a legal interest in a mining tenement'. Whilst the introduction of a definition of 'dealing' in the Act is to be welcomed as removing the uncertainty and confusion previously raised by the use of the undefined term, it follows from these provisions that many significant interests that may potentially exist in relation to a mining tenement will not be reflected on the Register. It has been suggested that the most common means of acquiring an interest in a mining tenement is under a farm in agreement<sup>25</sup> yet the Act does not require, indeed it does not permit, registration of farm in agreements. A search of the Register by a person intending to enter into a transaction in respect of a particular tenement will accordingly not be very informative. At most it will provide inconclusive proof of the title-holder of the tenement and any mortgages over that title. All other permitted registrations are in respect of interests that are no longer current. Not only will the validity of the title of the registered interest holders still need to be verified but there may be enforceable unregistered interests over the tenement of which the transferee may be unaware and which may significantly affect the interest acquired.<sup>26</sup> The Register is certainly not a comprehensive reliable public Register.<sup>27</sup>

### **1.5.3 Nature of the interest**

To be legal, an interest in a mining tenement must comply with all the formal requirements for the creation of that interest specified at law. These formal requirements relate principally to writing and, in some cases, consent and registration. Section 119(2) of the Act 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.

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<sup>25</sup> *Hunt Inquiry*, op cit n 22, at 40.

<sup>26</sup> See Part 3 for a discussion on the priority between the competing unregistered interests.

<sup>27</sup> This analysis assumes that, as under the Torrens system, caveats are not registered but rather are merely noted on the Register, an analysis supported by the terms of s103C of the Act in relation to registration.

There is a plethora of case law and commentary on this writing requirement. The consensus would seem to be that no legal or equitable interest can be created in a mining tenement without an instrument in writing<sup>28</sup> or, arguably, at least a written note or memorandum evidencing the transaction.<sup>29</sup> While an oral agreement cannot give rise to proprietary rights, it is still of contractual force and may give rise to personal rights enforceable in contract.<sup>30</sup> Critically though, nothing in the Act prevents equitable interests arising by operation of law under general equitable doctrines despite non-compliance with the writing requirements in s 119(2). Andrew Thompson observes that he ‘... [is] not aware of any statutory or interpretative principle that suggests that the doctrine [of part performance] is excluded or voided by the operation of [s 119(2)]’.<sup>31</sup> This observation would apply equally to equitable interests arising under, for example, estoppel<sup>32</sup> or under the equitable principle whereby contributions made pursuant to a failed joint venture give rise to a remedial constructive trust.<sup>33</sup> It follows that equitable interests in mining tenements arising by operation of law under equitable principles are not excluded by the Act notwithstanding the absence of a written instrument.

Section 103C(8) of the Act provides that: ‘A dealing does not pass any legal<sup>34</sup> estate or interest in a mining tenement or in any way charge or encumber a mining tenement until it is registered in accordance with this section.’

Pursuant to this section, a dealing, being a transfer or mortgage of a legal interest in a mining tenement, even if in writing, will not be legal unless and until that dealing is registered. A transfer or mortgage of a mining tenement, provided it is in writing, will remain equitable until registered. On registration that equitable interest becomes legal.<sup>35</sup> This characterisation is pivotal to the

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<sup>28</sup> *Sorna v Flint* [2002] WASCA 22 per Murray J at para 37; *Terrex Petroleum NL v Magnet Petroleum Pty Ltd* (1988) 1 WAR 144 per Kennedy J; *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101. See too K Domansky ‘Dealings and Registration’ (2001) 20 AMPLJ 36 at 40 and *Hunt Inquiry*, op cit n 22, at 41.

<sup>29</sup> Provided the note or memorandum satisfies the requirements set out in s 4 *Statute of Frauds 1667* (UK). See further in this regard Gardner and Jorek, op cit n 2, at 355.

<sup>30</sup> M Hunt *Mining Law in Western Australia* (3rd ed, Fed Press, 2001), at 198-199. For a discussion on the significance of the distinction between proprietary and personal rights see Gardner and Jorek, op cit n 2, at 348.

<sup>31</sup> A G Thompson, *Types of Interests – Characterisation of Legal, Equitable and Non-Working Interests*, a paper presented at a seminar on ‘Interests in Mining Tenements’ held jointly by The Law Society of Western Australia and AMPLA (WA Branch) in 1987.

<sup>32</sup> In *Amethyst Gold Pty Ltd v Robin John McDowell and others* (2000) 19 AMPLJ 9 the Warden recognised Amethyst as having an equitable interest in the mining lease, Amethyst having satisfied the elements of an estoppel.

<sup>33</sup> As illustrated in *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137.

<sup>34</sup> The reference to ‘legal’ in s 103(8) was a last minute insertion in the Amendment Act and was intended to deal with the controversial question of whether an unregistered written instrument could give rise to an equitable interest in the mining tenement. Under s 103C(8), it clearly can.

<sup>35</sup> Ipp and Maloney, op cit n 14, state at 518 in relation to petroleum tenements that a ‘legal interest is the interest which is conferred upon the registered holder of a petroleum tenement’. Compare *Elara Mining Ltd v St Barbara Mines Ltd & Anor* [2006] WAMW 16 in which, at para 27, Warden Calder expressed the contrary view in saying ‘...the fact of registration of a transfer is nothing more than that. By that I

resolution of priority disputes between competing interests in mining tenements discussed in Part 3 below.

#### **1.5.4 Limited indefeasibility**

Although the Act does not include a paramountcy provision conferring an immediately indefeasible title on the holder of an interest in a mining tenement, s 116(2) of the Act provides a registered interest holder a degree of protection from adverse claims. Section 116(2) has three limbs:

1. The first part of s 116(2) provides that:

Except in the case of fraud, a mining tenement granted or renewed under this Act shall not be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the grant or renewal of that tenement...

The protection afforded by this first limb of s 116(2) is very limited. In the first instance it extends protection only to tenements granted or renewed; it does not protect the transfer, assignment or creation otherwise than by way of a grant of any interest in a tenement. Further, as held by Burt CJ in *Crocker Consolidated Pty Ltd v Wille*<sup>36</sup> this provision only cures procedural defects occurring in the process leading up to the grant; it does not cure substantive defects such as lack of capacity or jurisdiction. A registered mining tenement may therefore be impeached or defeated on substantive grounds.

2. The section then continues:

[Except in the case of fraud] no person dealing with a registered holder of a mining tenement shall be required or in any way concerned to inquire into or ascertain the circumstances under which the registered holder or any previous holder was registered...

Although it has been suggested that this second limb of s 116(2) does little more than relieve a purchaser of having to search beyond the register to identify competing interests,<sup>37</sup> it is suggested that it does a great deal more than that. This provision, like its Torrens counterpart, s 134 (the notice provision) in the TLA, introduces a form of deferred indefeasibility into the registration system under the Act. Whilst registration may not cure substantive defects in the title of a transferee, the transferee's registered title will not be affected or impeached by defects in the registered transferor's title. It was this very kind of provision in the Victorian Torrens legislation that the Privy Council relied on in upholding the notion of deferred

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mean that the registration of a transfer or any other dealing cannot of itself mean that a legal estate or interest in the subject tenement passes. Section 103C(8) cannot and does not purport to give any legal effect or status to any document or conduct on the part of any person where no such legal status or effect otherwise arises from such agreement or conduct.' Although it is true that registration does not validate an otherwise invalid dealing, it is submitted that the effect of registration of an otherwise valid dealing is to convert it from an equitable interest enforceable only in equity into a legal interest enforceable at law.

<sup>36</sup> [1988] WAR 187 as cited by Rowland J in *Atkins & Anor v Minister for Mines & Ors* (1996) 15 WAR 226 at 234-235.

<sup>37</sup> Hunt, op cit n 30, at 205 as cited by Domansky, op cit n 27, at 38.



indefeasibility in *Gibbs v Messer*.<sup>38</sup> On this analysis of s 116(2) registration system under the Act affords far greater certainty and security of title than commonly thought. This limb of s 116(2) must, however, be read in the light of s 117(2) which protects existing mining tenements held under the Act from being revoked or injuriously affected by a Crown grant or conveyance of land. Although s 117 protects a registered tenement holder from subsequent grant or conveyance of the land it does not extend protection from subsequent dealings concerning that tenement.

3. Section 116(2) concludes:

[Except in the case of fraud, no person dealing with a registered holder of a mining tenement shall] be affected by notice, actual or constructive, of any unregistered trust or interest any rule of law or equity to the contrary notwithstanding, and the knowledge that any such unregistered trust or interest is in existence shall not of itself be imputed as fraud.

Under the general law, the holder of a legal interest is subject to any prior equitable interests of which that interest holder had actual or constructive notice.<sup>39</sup> The third limb of s 116(2), again like s 134TLA, effectively excises this priority rule from the mining law context. Under s 116(2) that a non-fraudulent person who deals with the registered interest holder under the Act acquires their interest free of any prior unregistered or equitable interest notwithstanding that they may have had notice of that prior unregistered interest at the time of acquiring their interest. Importantly on the issue of notice though, s 107C(7) expressly provides that registration of an instrument under the Act operates constructive notice of that *registered* interest to any person dealing or intending to deal in that tenement.

### 1.5.5 Priority

Under s 103E of the Act, priority disputes between dealings affecting the same mining tenement are resolved in favour of the dealing that was registered first. Clearly there are significant benefits in registering a registrable instrument promptly.

## PART 2: THE PURPOSE AND EFFECT OF THE CAVEAT SYSTEM UNDER THE TORRENS SYSTEM AND UNDER THE MINING ACT

### 2.1 The Purpose of the Caveat system under the Torrens system

Under the Torrens system, the lodging of a caveat is an alternative means by which an unregistered equitable interest can be protected (the other alternative, of course, being to register that interest). A caveat is also the only means of protecting unregistrable legal or equitable interests.<sup>40</sup>

It has long been accepted that caveats can only be lodged to protect proprietary interests in land.<sup>41</sup> A purely contractual or personal interest associated with land or interests in land is not caveatable.

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<sup>38</sup> Op cit n 16.

<sup>39</sup> *Pilcher v Rawlins* (1872) LR 7 Ch App 259.

<sup>40</sup> *Butler v Fairclough* (1917) 23 CLR 78 at 84 per Griffith CJ.

Whilst the lodgment of a caveat under the Act has been considered to operate as notice to all the world that the caveated interest exists,<sup>42</sup> the more recent position adopted by the High Court in this regard is reflected in the finding by Barwick CJ in *J & H Just (Holdings) Pty Ltd v Bank of New South Wales & Ors*<sup>43</sup> that ‘[t]he purpose of the caveat is not to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator’s estate or interest ...’. Although the giving of notice may not be the intended purpose of the caveat, a caveat will certainly operate to give actual notice of the caveated interest to any person who cares to inspect the Register.

Rather than operating as notice to all the world, a caveat under the Torrens legislation is accepted as operating as a statutory injunction against the Registrar prohibiting:

the Registrar, so long as the caveat is in force, from entering in the register book any transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which the caveat is lodged.<sup>44</sup>

A caveat freezes the Register and preserves the status quo until the caveator has been given the opportunity to substantiate their claim as against any dealing lodged for registration.<sup>45</sup> A caveat does not, however, validate the estate or interest claimed in the caveat. It simply protects the estate or interests claimed from extinguishment if it is substantiated. The subsequent registered proprietor takes its interest subject to the claim caveated not subject to the interest claimed in the caveat.<sup>46</sup>

## 2.2 The Purpose of the Caveat system under the Mining Act

The Act establishes a caveat system in Pt VI. Under s 122A ‘[a] person claiming an interest in a mining tenement may lodge a ... [caveat]’. Again, caveats under the Act may only be lodged to protect proprietary and not contractual rights.<sup>47</sup> It has been suggested that the purpose of the caveat system under the Act is to provide a mechanism for protecting equitable interests in mining tenements, such equitable interests not being registrable under the Act.<sup>48</sup> With respect, this observation is not correct. If a dealing<sup>49</sup> is only legal on registration,<sup>50</sup> it follows that pending registration, the interest arising under that dealing is a registrable equitable transfer or mortgage. It is submitted that the purpose of the caveat system under the Act is as for that under the Torrens system; a means of protecting unregistered and unregistrable legal and equitable interests in mining tenements.

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<sup>41</sup> Section 137 TLA permits ‘[a]ny ... person claiming an estate or interest in land [to] lodge a caveat with the Registrar ....’

<sup>42</sup> *Butler v Fairclough* (1917) 23 CLR 78 at 91 per Griffith CJ.

<sup>43</sup> (1971) 125 CLR 546.

<sup>44</sup> *Kuper & Kuper v Keywest Constructions Pty Ltd & Anor* [1990] WAR 419. See too *J & H Just (Holdings) Pty Ltd v Bank of New South Wales*, *ibid*, at 552 per Barwick CJ.

<sup>45</sup> *Butler v Fairclough* (1917) 23 CLR 78 at 84 per Griffith CJ.

<sup>46</sup> *Leros Pty Ltd v Terrara Pty Ltd & Anor* (1991) 174 CLR 407 at 420 per Mason CJ, Dawson and McHugh JJ.

<sup>47</sup> See for example *Rural & Industries Bank of WA v Hamilton & Ors* (unreported, Leonora Warden’s Court, 19 December 1989 in which Warden Roberts ordered the removal of a caveat lodged to protect non-proprietary royalty rights.

<sup>48</sup> Gardner and Jorek, *op cit* n 6, at 47.

<sup>49</sup> As defined in s 8(1) of the Act.

<sup>50</sup> See discussion at pp 190-1 above.

It is further submitted that, as under the Torrens system, the purpose of the caveat system is not to give constructive notice to all the world of the interest claimed in the caveat but rather it operates as an injunction preventing the registration of any interests inconsistently with the caveat thereby protecting the interest claimed in the caveat against subsequent registrations, if substantiated.

### **2.3 The Effect of Caveats under the Torrens system**

A caveat will remain on the Register, thereby protecting the caveated interest from being destroyed by the registration of an inconsistent interest, until it is withdrawn, it lapses or is removed. While the caveat is in place the caveator will be notified by the Registrar of the lodgment of any inconsistent instrument for registration. In Western Australia, the caveator will be required to commence proceedings within fourteen days to substantiate the interest claimed in the caveat and establish the right to maintain the caveat on the register. If the caveator fails to commence proceedings within the 14 days the caveat will lapse.<sup>51</sup> The commencement of proceedings by the caveator under s 138(2) effectively gives rise a priority dispute between the caveator's interest and the interest lodged for registration. This dispute is to be determined by the court in accordance with the priority resolution principles identified in Part 3 below. Pending the outcome of these proceedings, the Registrar is not permitted to register the instrument lodged for registration.

### **2.4 The Effect of Caveats under the Mining Act**

#### **2.4.1 Types of caveats**

The Act provides for the lodgment of three types of caveats:

- (a) an absolute caveat '... forbidding the registration of a dealing or surrender affecting the mining tenement or interest';<sup>52</sup>
- (b) a subject to claims caveat:  
... forbidding the registration of –
  - (i) a dealing affecting the mining tenement or interest unless the dealing expressly states that it is to be subject to the interest claimed by the caveator;  
or
  - (ii) a surrender affecting the mining tenement or interest.<sup>53</sup>
- (c) a consent caveat whereby the registration of a dealing or surrender affecting the mining tenement or interest is forbidden in cases where the holder of a mining tenement has entered into an agreement with another for the sale of the holder's interest in the mining tenement or any other matter connected therewith and the agreement provides for the lodgement of the caveat.<sup>54</sup>

#### **2.4.2 Duration of caveats**

A caveat under the Act will continue to protect the caveated interest against the subsequent registration of an inconsistent dealing until the caveat is withdrawn, the warden orders its

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<sup>51</sup> Section 138(2) TLA.

<sup>52</sup> Section 122A(1)(a) of the Act.

<sup>53</sup> Section 122A(1)(b) of the Act.

<sup>54</sup> Section 122A(2) of the Act.

removal,<sup>55</sup> or in the case of a consent caveat, on the expiry of the time specified in the agreement. In addition, under s 122E(1)(c) of the Act, unless the warden otherwise directs, an absolute or subject to claims caveat will lapse on the expiry of fourteen days after notification by or on behalf of the Minister of an application for registration of a dealing or surrender. It is implicit in s 122E(1)(c) that the caveator must be notified of an application for registration of a dealing or surrender. Section 122E reflects many of the provisions concerning the duration of caveats found in the Torrens statutes.<sup>56</sup> The purpose of s 122E(1)(c) is to force the caveator to commence proceedings promptly to substantiate the interest claimed in the caveat when another dealing or surrender is lodged for registration. The court will be required to determine the priority dispute between the interest claimed by the caveator and the instrument lodged for registration in accordance with the principles identified in Part 3 below. In *Sim v Nirvana Pty Ltd*<sup>57</sup> it was found that the Warden's Court has the jurisdiction under s 132(1)(b) and (f) of the Act to hear matters concerning the lodgment of a caveat, the refusal or failure of the caveator to withdraw the caveat, the removal of a caveat under s 122E(1)(a) and (b) and the consent to a registration under s 122D discussed below. There seems no reason why this jurisdiction would not extend to determining priority disputes under s 122E(1)(c).

Notwithstanding the provisions of s 122E extracted above, s 122D(1) permits the warden to consent to the registration of a dealing or surrender while the caveat is in force. By contrast to s 122D of the Act, s 139 of the TLA stipulates a blanket prohibition against the Registrar registering a dealing inconsistently with a caveat. Section 122D does not set out guidelines for determining the circumstances in which the warden is entitled or required to grant consent to a registration thereby seemingly providing the Warden with an unfettered discretion in this regard. Section 122D is a curious provision, particularly in light of s 122E. If the warden has the discretion under s 122D to consent to the registration of a dealing in the face of a caveat, what benefit does the caveat serve? It certainly doesn't guarantee protection of the interest claimed in the caveat against the subsequent registration of an inconsistent dealing as it is intended to do. At best the lodgment of a caveat would ensure that the caveator is notified under s 122E(1)(c) of the application for registration of an inconsistent dealing, thereby affording the caveator an opportunity to commence proceedings to assert their interest against that lodged for registration.

In *Sim* Warden Calder stated that:

In order to determine that the plaintiff is entitled to register the transfer it is necessary for the Warden to order that the caveat on each tenement be removed or that the transfers may be registered while the caveats remain in force (122(3)). Without the order for removal of the caveat or an order permitting registration while the caveats remain in force any declaration or order by the Warden of entitlement to register the transfer would be pointless as section 122(3) of the Act would otherwise prevent registration.<sup>58</sup>

The reference to s 122(3) in this extract is a reference to s 122D of the amended Act. This finding seems, with respect, circuitous and questionable. If notification of the application for registration of a transfer is sent to the caveator as is required under s 122E(1)(c), the caveat will automatically

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<sup>55</sup> Section 122E(1)(a), (b) and (2) of the Act.

<sup>56</sup> Eg, s 138 TLA.

<sup>57</sup> [2000] WAMW 1 at 19-20.

<sup>58</sup> *Ibid*, at 20-21.

lapse under this section after fourteen days unless the Warden orders otherwise. There is no need for the Warden to order its removal or, indeed, to consent to the registration under s 122D if the caveat has lapsed under s 122E(1)(c). Where an inconsistent dealing is lodged for registration in the face of a caveat, the ensuing priority dispute is adequately covered by s 122E(1)(c). Section 122D adds nothing to s 122E. Indeed, it confuses rather than clarifies an otherwise uncomplicated procedure. The inclusion of s 122D reflects perhaps the legislature's concern to retain ultimate government control over the State's mineral resources.

The counter-intuitive relationship between ss 122D and E(1)(c) is illustrated in *Elara Mining Ltd v St Barbara Mines Ltd & Anor*<sup>59</sup> in which Warden Calder ordered that the applicant's absolute caveat protecting its interests under a prior farm in agreement remain in force under s 122E(1)(c). The warden went on to consent to the registration of transfers of the tenements under s 122D despite the continued force of the caveat. The registration of the transfer effectively neutered any protection afforded by the caveat insofar as that registration was concerned. In reaching his decision in this case the warden opined '... it is not the role of the ... Warden or the Minister, ... to give consideration, for the purposes of ... s 122D of the Act, to any issues or disputes that are said to arise between the parties to any agreement upon which the dealing that is sought to be lodged is based. ... the Warden under s 122D [is] acting administratively.'<sup>60</sup> The applications for registration of the transfers in question had been lodged in accordance with the provisions of the Act and were correct in form. The proposed registered transferees had not been fraudulent or deceitful. The caveator had not commenced any legal or administrative proceedings relating to the registration of the transfers. Accordingly, the warden consented to their registration. It is submitted that the application by the proposed transferees for consent to the registration of the transfers under s 122D raises a priority dispute much the same as a caveator's application for the extension of a caveat under s 122E(1)(c) would. It is the function of the warden in such a case to determine the substantive dispute as to the respective priorities of the competing interests. Failure to do so results in the unsatisfactory uncertainty encountered in *Elara* of a transfer being registered in defiance of a current and valid caveat.

### **PART 3: RESOLVING PRIORITY DISPUTES UNDER THE TORRENS SYSTEM AND UNDER THE MINING ACT**

#### **3.1 Priority Disputes under the Torrens system**

##### ***3.1.1 Registered interests***

Under the Torrens statutes priority between competing instruments affecting the same estate or interest is afforded according to the time of registration of each instrument, notwithstanding the date of execution or actual or constructive notice.<sup>61</sup>

##### ***3.1.2 Registered and unregistered interests***

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<sup>59</sup> Op cit n 35.

<sup>60</sup> Op cit n 35, at para 20.

<sup>61</sup> Section 53(2) TLA.

Subject to a number of express and implied exceptions, for example fraud, a registered proprietor holds their interest ‘... subject to such encumbrances as may be notified on the registered certificate of title for the land; but absolutely free from all other encumbrances whatsoever ...’.<sup>62</sup> Accordingly, a registered interest will be indefeasible as against an unregistered interest, unless that unregistered interest constitutes an exception to that indefeasible title.

### 3.1.3 Unregistered interests

As the TLA is silent on the issue, priority disputes between competing unregistered interests in land are resolved according to the following general law principles:

1. Where both interests are equitable, if the interests are in all other respects equal and no other ground exists for preferring one interest over the other, the first in time will have priority.<sup>63</sup> In applying this rule in a Torrens context, if the subsequent interest holder did not have actual notice of the prior interest and searched the register prior to acquiring their interest, the failure of the prior interest holder to caveat their unregistered equitable interest may be considered postponing conduct requiring the subsequent interest to be preferred, if the prior equitable interest holder did not take other adequate steps to protect their interest.<sup>64</sup>
2. Where the prior interest is legal and the subsequent interest either legal or equitable, the prior legal interest will have priority unless the conduct of the prior legal interest requires that interest to be postponed to the later interest.<sup>65</sup> Although the categories of cases of postponing conduct are well-established they are not closed. The established categories are said to be based on estoppel,<sup>66</sup> the holder of the legal interest being estopped from asserting the priority of their interest which by their conduct they represented did not exist. On this analysis, the failure by the prior legal interest holder to caveat their interest might again be considered postponing conduct where the subsequent interest holder checked the register and relied on the absence of a caveated interest in acquiring their interest and the prior legal interest holder took no other steps to protect their interest.
3. Where a prior equitable interest competes with a subsequent legal interest, the later legal interest prevails provided the legal interest holder is a ‘bona fide purchaser for value’ and did not have actual, constructive or imputed notice of the prior equitable interest.<sup>67</sup> As discussed above,<sup>68</sup> the lodgment of a caveat by the prior equitable interest holder will not of itself constitute constructive notice of that interest. If the subsequent legal interest holder checked the register, however, they would have acquired actual notice of that prior caveated interest.

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<sup>62</sup> Section 68(1) TLA.

<sup>63</sup> *Rice v Rice* (1853) 2 Drew 73; 61 ER 646 at 648. For an example of the application of this general law principle in a Torrens context see *Breskvar v Wall* (1971) 126 CLR 376 at 388 per Barwick CJ.

<sup>64</sup> See *Butler v Fairclough* (1917) 23 CLR 78 at 84 per Griffith CJ; *Abigail v Lapin* [1934] AC 491; *J & H Just (Holdings) Pty Ltd v Bank of New South Wales & Ors* (1971) 125 CLR 546; *Moffett v Dillon* [1999] VSCA 31; T D Castle ‘Caveats and Priorities: the “Mere Failure to Caveat”’ (1994) 68 ALJ 143; P Butt ‘Priority Between Unregistered Torrens Title Interests’ (1999) 73 ALJ 538.

<sup>65</sup> *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 Ch D 482 at 490-494; *Walker v Linom* [1907] 2 Ch 104.

<sup>66</sup> P Butt *Land Law* (5th ed, Thomson Lawbook Co, 2006) at 689-690.

<sup>67</sup> *Pilcher v Rawlins* (1872) LR 7 Ch App 259.

<sup>68</sup> Above pp 192-3.

## 3.2 Priority Disputes under the Mining Act

### 3.2.1 Registered dealings

The Act resolves priority disputes between registered dealings (transfer and mortgages) according to the time of registration; the first registered dealing having priority.<sup>69</sup> However, as discussed above,<sup>70</sup> registration under the Act does not cure defects in the dealing. As a result, the application of this priority provision is dependent on the prior registered dealing being otherwise valid and enforceable under general law principles.

### 3.2.2 Registered and unregistered instruments

The Amendment Act introduced significant changes to the resolution of priority disputes between registered and unregistered interests in mining tenements. Unlike the Torrens system, the Act does not explicitly give a registered instruments priority over unregistered instruments.<sup>71</sup> Since under the amended Act only transfers and mortgages are registrable,<sup>72</sup> the prior controversy as to whether a dealing (then undefined) other than a transfer or mortgage created prior to but registered after another dealing would have priority is no longer an issue.<sup>73</sup>

Without an express provision dealing with disputes between registered and unregistered interests in the Act, it is necessary to have recourse to the general principles for the resolution of priority disputes involving interests in land<sup>74</sup> identified above<sup>75</sup> read with ancillary provisions in the Act in order to determine the applicable rules. On these principles:

- The registered legal interest, in the absence of postponing conduct on the part of the registered holder, has priority over any subsequent unregistered legal<sup>76</sup> or equitable interest. Further, as noted above<sup>77</sup> under s 103C(7) the subsequent interest holder will be deemed to have constructive notice of the registered interest thus reinforcing priority in favour of the registered interest.

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<sup>69</sup> Section 103E.

<sup>70</sup> Above p 189.

<sup>71</sup> Regulation 103 of the Act giving priority to interests claimed under registered instruments over interests claimed under unregistered instruments was repealed on 3 February 2006 shortly before the Mining Amendment Act came into operation. The Mining Amendment Act did not incorporate a statutory equivalent of reg 103 into the amended Act.

<sup>72</sup> Under ss 8(1) and 103C(1), (2) and (3) of the Act.

<sup>73</sup> For a discussion of this controversy see A Gardner 'Security of Title' [1990] AMPLA Yearbook 284 at 303 and Hunt, op cit n 30, at 207.

<sup>74</sup> There is some uncertainty as to whether a mining tenement is an interest in land. The overwhelming weight of authority seems to support the proposition that a mining tenement is an interest in land: *Westover Holdings Pty Ltd v BHP Billiton Minerals Pty Ltd & Ors* [2004] WAMW 12 at para 64; Thompson, op cit n 31; Hunt, op cit n 30, at 75, 98 and 118; T Warman 'Transfers of, and Dealings in, Titles under the Petroleum (Submerged Lands) Act 1967 (Cth) within the Western Australian Adjacent Area' (2000) 19 AMPLJ 54 at fn 30; Cf J Forbes and A Lang *Australian Mining & Petroleum Laws* (2nd ed, Butterworths, 1987) at 835.

<sup>75</sup> Above pp 198-9.

<sup>76</sup> Eg, a farm in agreement compliant with the formal requirements.

<sup>77</sup> Above p 193.

- As against a prior equitable interest, the third limb of s 116(2) extracted above operates to protect the registered holder from the effect of notice of the prior equitable interest. Provided the registered holder is a bona fide purchaser for value they will have priority over the prior equitable interest notwithstanding that they may have had notice of that equitable interest at the time of acquiring their now registered interest.
- The registered interest may be subject to a prior legal but unregistered interest under the general law principles.

It is evident from this analysis that a registered interest under the Act does not enjoy the same degree of protection against unregistered interest as a registered interest does under the TLA.

### 3.2.3 *Unregistered interests*

The Act being silent on disputes between unregistered interests in mining tenement, again general law principles relevant to priority disputes in land will apply. Again the application of general law principles in resolving disputes between unregistered interests may be affected by the caveat system. Although the failure to caveat a prior interest will not always result in the postponement of that interest, it may do so where the subsequent interest holder searched the register. It is therefore prudent to caveat an unregistered interest in order to ensure the preservation of any priority afforded by the 'first in time' rule. Further, in order to claim protection under a caveat, it must be lodged promptly.<sup>78</sup>

## CONCLUSION

So, does the registration system under the Act resemble that under the Torrens system? While in some respects it may, the effect of registration under the Act is quite different from that under the Torrens system. The cornerstone of the Torrens system is the notion of indefeasibility.<sup>79</sup> The courts have repeatedly emphasised the need to protect the integrity of the Torrens system by protecting the notion of indefeasibility where possible.<sup>80</sup> By contrast, there is very limited indefeasibility protecting a registered interest under the Act. It follows that the very premise of many decisions in the Torrens case law is absent under the Act.

If, as has been suggested, the purpose of the registration system under the Act is, at least partly, security and certainty of title, Pt IVA of the Act which drastically limits those instruments which can be registered inevitably leads one to question whether this purpose is achieved at all. Given that many interests, both legal and equitable, can exist off the register and that these unregistered interests can impinge on the priority of the registered interest holder, the benefits of registration for the tenement holder is questionable. Interestingly s 103C(8) which clearly recognises the continued existence of equitable interests in mining tenements was introduced with little parliamentary discussion or debate despite its potential threat to security of title in the resolution of priority disputes.<sup>81</sup> The efficacy and purpose of a registration system which does not have as its

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<sup>78</sup> Per Griffith CJ in *Butler v Fairclough* (1917) 23 CLR 78 at 92 '[t]he person who does not act promptly loses the advantage which he would have gained by promptitude'.

<sup>79</sup> Butt, op cit n 21.

<sup>80</sup> Eg, *Conlan*, op cit n 15.

<sup>81</sup> The explanatory memorandum refers simply to minor amendments to the *Mining Amendment Act 1996* and there appears to have been no debate on the amendment.



cornerstone the notion of indefeasibility must be questioned. This submission is supported by the recommendation by Michael Hunt in the *Report of the Inquiry into Aspects of the Mining Act, 1983*, in which he stated that:

The Act should contain an indefeasibility of title provision which must incorporate a clear statement that on the grant of the mining tenement, title vests in the holder and this title is not open to challenge by reason of any informality or irregularity in ...considering or granting the application ... The Commissioner of Titles should be requested to examine the provisions of the Mining Act and make recommendations for change so as to ensure the concept of indefeasibility of title is properly assured.<sup>82</sup>

The writer agrees but would add that an effective and workable registration system demands that all estates and interests in mining tenements be registrable. Only then will the mining industry have a complete and comprehensive Register guaranteeing security of title and certainty of priority. The Register should be a true record of the ownership of all interests in the mining tenement. Unless this is achieved, the Register provides very little assurance to any person wishing to take or acquire an interest in the tenement that the interest is a valid interest and that they will be getting what they bargained for. A central purpose of the registration system will not be achieved. Admittedly, the registration system does still fulfil the alternative purpose of governmental control, but not as effectively as the consent requirements which are already in place.<sup>83</sup>

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<sup>82</sup> Hunt Inquiry, op cit n 22. See too the recommendations by Carr, op cit n 22.

<sup>83</sup> See Gardner and Jorek, op cit n 2, at 357 '[t]he basic means by which parliament imposes governmental control on dealings in titles is to require ministerial approval for dealings with the title'.