

In miners we trust

By the Hon John Nader QC



Aerial view of the Tarrawonga coal mine owned by Whitehaven Coal adjacent to the Leard State Forest., February 2014. Photo: <https://www.flickr.com/photos/leardstateforest/>

The arbitrator Bridget Barker-Hudson made a sweet-sounding but serious error when she said in her interim determination in the case of *Kepeco v Shaw and Another*. 'The arbitrator must balance the rights given by the state to the land-holder concerning the surface of the land, its management and environmental sustainability, with the holder of a right also granted by the state to explore for minerals held beneath the surface, *which the state holds in trust for the people of NSW.*' (My emphasis.)

It's more than a slight error and ought to be corrected. It conceals the reality. It carries the inference that all of the minerals vested in the state while in the ground are held in trust by the state for the people. With great personal respect, that is quite misleading. It runs counter to the effect of the legislation on the matter which provides that *any mineral that*

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is lawfully mined becomes the property of the person by or on behalf of whom it is mined at the time the material from which it is recovered is severed from the land from which it is mined.

In fewer words, when a material is taken from the earth the mineral in it ceases to belong to the state.

Unlike other state owned assets, the state ownership of minerals is not trusteeship in any meaningful sense, and it is said to be so in ignorance; I do not believe it was said mischievously. The only benefit that accrues directly to the state from the mining of the ore is a credit for the royalty to be paid by the miner. The value of that royalty is minute when compared with the value of the mineral itself. I am not overlooking other significant benefits, largely

in the form of taxation, which comes indirectly.

Therefore, it is misleading to say that the people of NSW are the beneficial owners of minerals of which, immediately steps are taken by mining, the trust in their favour evaporates. In NSW the miner is the beneficiary of the only trust-like relationship that exists. While in the ground, the mineral benefits no identifiable persons – remove it from the ground and it belongs to the person who happens to have mined it.

When the mineral does acquire actual value it has been removed from the ground, when, *ipso facto*, it becomes the beneficial property of the miner.

I wish to ventilate an idea – not new, I hasten to add – that would

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obviate the need for the silly fiction I have just exposed. My idea must for now remain incomplete because, if it were to be adopted, it would have to be accompanied by difficult legislative and administrative planning to which I have given no thought. That must be the work of others. I can say, however, that the implementation of such a scheme as I suggest is feasible. My researches show that a number of like schemes are operating highly profitably in a number of countries including Norway, Malaysia, Indonesia and others. Common to them all is that the ownership of the mineral does not pass from the state until the state sells it for value: not, I emphasise, for royalties. In NSW the highly beneficial result of one of those schemes, or a variant of one of them, would enable it to be

truly said that the minerals, in the ground and after mining, are held on trust for the people. When they might be sold by the state for their value, the proceeds of sale would then be held on the same trust.

Indeed, the basic purpose of my suggestion is to alter the law so that the legal title to underground minerals will remain the permanent property of the state whether or not separated from the earth, until sold for value by the state.

The mining would have to be done in an arrangement with the state; the miner would be recompensed probably under either a 'production sharing agreement', a 'risk sharing agreement' or some like arrangement.

The minerals, continuing to be the property of the state would generally be sold by or for the

government at the best available price: that price would then, as I have said, be held on the same trust as the minerals. Minerals, surplus to immediate requirement for sale or use, continuing to be held in trust by the state, could be stockpiled.

The potential revenue from such an exercise could be vast but that would depend on the world market.

It would then be true to say that the state holds the minerals in trust for the community: the real beneficiaries of the state's trusteeship.

I foresee that an obstacle to the implementation of my scheme might be the willingness of the state to accept the risk of undertaking any large business enterprise. Is the state willing



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to take on a large commercial enterprise?

It is now a time when governments are selling their great enterprises to private owners and avoiding the undertaking of large business enterprises. But would we have the Sydney Harbour Bridge, the Snowy Mountains Scheme, or the Sydney Opera House without governments that had the courage to take risks?

... if the regime that I now propose is adopted there would have to be a mechanism to determine whether the state, through its agents, can access private land for prospecting or mining even against the will of the landholder.

But this is a special case. Mining is the nation's biggest business. Just now Australia is primarily a mining nation. Mining in Australia therefore differs from other businesses that have been converted into money by privatisation; it is a special case that warrants a rethink of current policy.

While the present regime continues, no entry to private property by a private corporation, however large, should be permitted without the consent of the landholder embodied in an arrangement with the prospector or miner. I have made my reasons for that clear, I hope.

However, if the regime that I now propose is adopted there

would have to be a mechanism to determine whether the state, through its agents, can access private land for prospecting or mining even against the will of the landholder.

A landholder would have to be fully and justly compensated in a number of respects for his or her loss caused by prospecting and mining on the land. The parliament should include guidelines for the

assessment of compensation in the legislation establishing the court which is essential to the scheme.

A new court would have to be established: a true court that would form part of the NSW judicial system. This Mining Court that I suggest could be a division of an existing court such as the Land and Environment Court or a separate court, but it must be a court in the full sense. It should be so constituted as quickly to gain the respect of the general population. It is said that you can't please everybody, but if a tribunal is seen to have integrity and competence, and if it is seen to be beyond the improper reach of special interest groups, it would gain general respect. The court

would have to publish reasons for its decisions.

A court is the only body with the required qualities, having members immune from executive or other interference. The members of the court would have security of tenure in office until a specific retirement date. It would be comprised of Australian legal practitioners who may or may not have practised in mining law. It would generally exclude legal practitioners who have been reputed activists for either miners or landholders. I mean activists in the sense we commonly use it. Compliance with the cab-rank rule by a barrister who happens to receive more work from one side than the other does not identify him or her as an activist in that sense.

A true court, exercising judicial power and instinctively committed to procedural fairness, would be necessary for the determination of disputes between the state and landholders in order to resolve questions of access for prospecting and mining and to assess compensation and other payments to landholders. I ask readers to call to mind the Industrial Commission of NSW which was a superior court of record of Supreme Court status, and the high reputation it had with both employers and unions.