REFORM OF THE REGISTRATION PROVISIONS OF THE MINING ACT 1978 (W.A,)

A REPORT AND RECOMMENDATIONS BY AMPLA (W.A. BRANCH)

In July 1989, the Committee of AMPLA (W.A. Branch) provided Alex Gardner of the University of Western Australia Law School (a member of the Committee) with final terms of reference[1] to conduct research into and draft recommendations for the reform of the registration provisions of the *Mining Act* 1978 (W.A.). The research was conducted over a period of more than one year and resulted in the presentation of papers at the 1990 National and W.A. State AMPLA Conferences. The content of those conference papers provides the legal background to this report and its recommendations. The recommendations are a set of proposals for the reform of the registration provisions of the *Mining Act* 1987-90 (W.A.) and the *Mining Regulations* 1981.

GENERAL AIMS OF THE REGISTRATION PROVISIONS

The Department of Mines Annual Report 1988-89 states that

> The need for secure title is fundamental to the successful exploration and development of mineral and petroleum resources.
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> [The pressures of work in the registration division] . . . necessitated the adoption of procedures involving minimal integrity checks which in turn resulted in mineral titles being put in jeopardy despite the holder's compliance with obligations. These output oriented procedures were modified during the year to ensure *indefeasibility of title* for applicants or tenement holders complying with the requirements of the *Mining Act*.[2]

This statement suggests that, despite the pressures that may be placed on the registration system, the Department believes that it provides indefeasible registered title. The conference papers show that the current provisions of the *Mining Act* provide only

> a limited indefeasibility of title, in the sense that a person dealing with the registered title holder can rely on the register to take a good title free of any interests that are not registered. This protection for registration of a dealing or transfer is subject to two qualifications:
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> (1) registration may be prevented by a caveat; and
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> (2) registration will not of itself validate the transaction by which that person took from the registered title holder; that transaction could still be shown as invalid and, presumably, the register rectified.[3]

It seems that this limited indefeasibility is as far as the Department can go in providing a legal guarantee of title. Amendments to the scheme should now focus on making the registration system more simple and certain. The *objectives* of reform should now be to establish a system whereby:

(1) *any person proposing to deal with the tenement* may obtain a search of a mining tenement which, without the need for any title investigation, will reveal:
   (a) whether the grant of the mining tenement has been registered and, if so registered, that the mining tenement is in full force,
   (b) each current holder of a legal interest in the mining tenement, and

1. The terms of reference are in the Appendix at 121.
2. *The Western Australia Department of Mines 1988-1989 Yearbook*, p. 25.
3. Alex Gardner, "Security of Title" [1990] *AMPLA Yearbook* 306.

(c) whether any mortgages (disclosed by registration) or equitable interests (disclosed by caveat) affect the mining tenement;

AND

(2) *a holder of an unregistered interest* in the mining tenement (e.g. under a farmin agreement or a contractual royalty) may give notice of that interest to third parties by way of lodgment of a caveat.

The recommendations contained in this report are intended to achieve these objectives.

REGISTRATION PROVISIONS TO FORM PART OF THE ACT

The Act should contain a discreet set of provisions establishing and governing the system for registration of and dealings with mining tenements. This could be achieved by creating a Pt VA of the Act to be titled "Mining Register" and comprising the current ss 103A, 116, and 119 as amended in the manner suggested here, the repeal of redundant regulations (103 and 110) and the amendment of other relevant regulations (75, 77 and 106). In addition, these sections should include a duty that the Director of the Mining Registration Division must record the date on which any action concerning the Register is taken.

These amendments should be made in conjunction with amendments proposed by the Department of Mines to authorise the use of the electronic register.

REGISTRATION AS ROOT OF TITLE

Ideally, the root of title should be the registration of the instrument of lease or licence immediately after grant so as to make the registered title the consistent point of reference for persons dealing with the tenement. This root of title could be provided for by:

(1) amending s. 116(1) to:

(a) impose on the Director, Mining Registration Division, of the Department, a duty to register the instrument immediately upon grant of the title,

(b) deem the grant of the tenement effective from the time of registration, and

(2) amending ss 45(1), 61(1) and 79 of the Act which relate to the term of the tenements to state that their terms shall commence at the time of registration.

REQUIREMENTS OF FORM FOR DEALINGS

The current provisions of s. 119(2) require a written instrument to create or deal with a legal or equitable interest in a mining tenement. These requirements of form do not invalidate oral agreements. However, there is still the question whether mining tenements are interests in land and subject to the requirements of s. 34 of the *Property Law Act* 1969 (W.A.) and s. 4 of the *Statute of Frauds* in respect of the enforcement of the oral agreements. This is too large a question to deal with here and the current requirements of form in s. 119(2) should be retained.

APPROVAL OF TRANSFERS AND DEALINGS WITH LEGAL AND EQUITABLE INTERESTS

Although in Western Australia the level of governmental control by approval of transfers and dealings is not as great as in other States, it is still necessary to refine the law on these controls. There are three particular areas of concern:

(1) Governmental control of the activities on the tenement can be maintained by retaining control only of the transfer and mortgage of legal interests, that is, the title to the tenement. The requirement of consent to the creation or transfer of equitable interests in mining tenements should be abolished.

(2) There is a need for a clear statement from the Government about the reasons for maintaining and exercising governmental controls on the transfer of title in tenements. This statement could be issued as a set of practice directions or written into the *Mining Act* as criteria to be considered by the Minister in exercising a power of consent to a transfer or mortgage. If there is extant any cause for the Minister to refuse consent to a transfer or mortgage, that cause should be registered against the legal title of the tenement. (For example, it is said that some transfers have been refused because there has been inadequate rehabilitation of the effects of mining operations.)

(3) The provisions of s. 119(3) to (9) seem to have little practical application and could therefore be repealed completely. If they are to be retained, the statutory language could be reformed to address the following issues:
   (a) in subs. (3), Western Australia is included in the definition of "country";
   (b) in subs. (4), the focus of the provision on the instrument will prevent even contractual interests arising between the parties before the instrument is approved by the Minister; and
   (c) in subs. (5), the "control through a corporation" provision needs to account for the situation where a tenement may be granted to a corporation controlled by a country at the time of grant but the Minister only later finds out.

Therefore, it is proposed that:

(1) s. 64(1) be amended to require approval only for the transfer and mortgage of legal interests in the first year of an EL (s. 64(2) could be repealed);

(2) the provisions of s. 82(1)(d) and regs 27(d), 36(c) and 41(c), relating to covenants and conditions of MLs, GPLs and MiscLs requiring ministerial approval, be amended to require approval only for transfers and legal mortgages of the whole or part of the legal interest in the tenements, but so that approval of a mortgage does not authorise the mortgagee to transfer the tenement without ministerial approval; and

(3) subss (3) to (5) of s. 119 be amended by:
   (a) adding to the end of subs. (3) the words "but does not include a reference to the State of Western Australia",
   (b) subs. (4) be amended to read:

> 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, so as to confer any beneficial interest in the mining tenement upon a country until the instrument by which the interest is created, assigned, affected or dealt with has been approved by the Minister.

   (c) subs. (5) should be amended by deleting the words "has passed to" and substituting the words "is held by", and by deleting the words "so passing" and substituting the words "being so held".

REGISTRATION OF TRANSFERS AND DEALINGS

The current registration system, providing for the registration of legal and equitable interests and for the protection of equitable interests by caveat, is unnecessarily complex. Equitable interests in mining tenements should be protected either by registration or by caveat, not by both. The general view of the AMPLA W.A. Committee is that a system of caveats would be simpler and less costly to administer. Therefore, it is proposed that the registration provisions be amended to

(1) require the registration of only transfers and mortgages of a legal interest in a tenement; and

(2) improve the caveat system to protect equitable and contractual interests in mining tenements.

The intended effect of these amendments is that legal interests would have the protection of s. 116(2) and equitable interests would have only the protection of the system of caveats and the common law rules of priorities.

REGISTRATION OF ONLY LEGAL INTERESTS

This could be achieved by the following amendments to the Act and Regulations:

(1) the repeal of the current regs 103 and 110;

(2) the insertion of statutory provisions (in s. 119)
   (a) requiring the registration of transfers and mortgages of legal interests, and
   (b) declaring that a transfer or mortgage of a legal interest is of no force until it has been registered;

(3) the insertion of statutory provisions replacing the current regs 75(f) and 77(b) and declaring that all such transfers and mortgages shall take priority according to the date and time of their *lodgment* for registration;

(4) the consequent amendment of regs 75 and 77 to provide a clear procedure for the registration of transfers and mortgages;

(5) the redrafting of s. 116(2) to provide as follows:

> Except in the case of fraud,
>
> (a) 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; and
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> (b) no person dealing with a registered holder of a mining tenement shall
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> (i) be required or in any way concerned to inquire into or ascertain the circumstances under which the registered [delete "*applicant, or*"] holder or any previous holder was registered, or to see to the application of any purchase or consideration money, or
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> (ii) 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; and

(6) the deletion from
   (a) the second line of s. 103A(1) of the words "or equitable"; and
   (b) s. 103A(4) of the words "(other than in so far as registration may be taken to be constructive notice)".

CAVEATS OF EQUITABLE AND CONTRACTUAL INTERESTS

If the caveat system is to become the only means of protecting equitable interests and other non-proprietary interests, it needs strengthening. Four issues are of particular concern.

(1) Contractual interests (for example, contractual royalties and compensation agreements) generally cannot be protected by caveat and are enforceable only against the person with whom the contract was made.
Recommendation: The definition of dealings in s. 75 of the *Petroleum Act* 1967 (W.A.) would provide a starting model for defining interests which could be protected by caveat, provided that only interests evidenced in a written document signed by all parties concerned could be caveated. Alternatively, s. 122(2) could be amended to extend the application of consent caveats to the protection of contractual royalties and other contractual interests.

(2) Section 122 does not provide an adequate system for the transfer of caveats where a new tenement is issued over the same ground.
   (a) Where a tenement is surrendered for another tenement, the caveator is given notice of the surrender but must apply to the Warden to have the caveat continued on the new tenement. The period of notice is also only 14 days.
   (b) Where a mining lease is obtained by the holder of a prospecting licence or exploration licence under s. 49 or s. 67, no caveat notice is generated by s. 122(3) and the caveat lapses upon the expiry of the exploration tenement.
   Recommendation: In these situations the caveats on a tenement which is replaced by another tenement over the same ground should be automatically transferred to the new tenement. If the applicant for the new tenement objects to the caveats on the title then a caveat notice could issue upon the application of that party. The period of caveat notice should be extended to 30 days.

(3) Although it is stated in relation to the Torrens system that the purpose of a caveat is to prevent the Registrar from registering dealings with the land until notice has been given to the caveator, the practical effect of the caveat, if it is noted on the certificate of title, is that it may operate to give notice to the world or to persons who may consider dealing with the registered proprietor of the caveator's interest. It is proposed that the *Mining Act* caveat operate to give notice of the caveator's interest. To do so, the content of the caveat must be sufficient to give notice of competing interests to persons dealing with the registered title-holder and be accessible by a search of the register for that purpose.
Recommendation: The current form of caveat seems adequate to provide notice of the nature of the interest claimed and the identity of the claimant. However, it is not clear whether a search of the register will provide a copy of the caveat. Regulation 106 governing the content of the register does not mention caveats (probably because a caveat is not taken to be registration of an interest). Clear provision should be made, either in the Act or a redrafted reg. 106, that a caveat shall be recorded on the register and that a search of the register of a tenement will include a copy of each current caveat.

(4) The extent of the protection provided by the current *Mining Act* caveat is too rigid. Section 121(1) provides that the caveat may forbid "the registration of any transfer or other instrument affecting the mining tenement or interest". The caveat operates as an absolute prohibition on the registration of an

instrument affecting the interest claimed. In effect, registration of any instrument is forbidden whilst the caveat remains in place. This is too rigid a system, requiring the defence before the Warden of the interest claimed every time any instrument is lodged for registration, including one which may not actually affect the interest claimed.

Recommendation: There should be introduced a system of "subject to claim" caveats (similar to the Torrens system) by which a caveator forbids only the registration of instruments which are not expressed to be subject to the interest claimed by the caveator. If the party lodging an instrument for registration expresses its interest to be subject to that of the caveator, no caveat notice is issued to the caveator and the registration of that instrument does not defeat the interest protected by the caveat. In effect, the caveat becomes an encumbrance on the title. It is only where the lodging party contests the interest claimed by the caveator and refuses to qualify the instrument for registration that the lodging party would seek to have the caveat removed. This would require the normal process of issuing a notice requiring the caveator to show cause why the caveat should not be removed.

THE EVIDENCE OF THE REGISTER

The value of the recommendations of this report depends to a large extent on the use of searches of the register. A search of the register should reveal information upon which parties may rely in conducting their transactions. Therefore, it is recommended that:

(1) a copy of the register produced upon a search should be officially stamped with the date and time of the search and be accepted as evidence in court of the state of the register at that time;

(2) there should be some follow-up system of searching documents which have been lodged but not registered at the time of the search;

(3) there should be a statutory obligation on the Mining Registrar to record immediately on the register and reveal on the search

  (a) all conditions applying to the tenement, including conditions imposed after the grant of the tenement, and

  (b) any breaches of those conditions which would be reason for the forfeiture of the tenement or a refusal of consent to the transfer of the tenement.

Further, s. 119, as amended by s. 88 of the *Mining Amendment Act* 1985 (now repealed), contained a number of provisions which would be useful for inclusion in any new set of registration provisions. Those provisions related to:

(1) the register as evidence in court; and

(2) power of the Supreme Court to order rectification of the register.

RESPONSE TO THE TERMS OF REFERENCE

The format of this report and structure of the recommendations do not follow the structure of the terms of reference. However, all except two of the issues have been answered either by way of explanation in the conference papers or reform recommendations in this report. The issues raised in pars numbered 1, 2, 3, 4, 5, 7, 8, 9 and 11 are either fully or partially discussed in the conference papers. The recommendations of this report endeavour to answer the problems raised by issues 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11.

The two issues not addressed are 6 and 12: the exact nature and location of the "register" contemplated by reg. 106 and the impact of technology on the registration system. These two issues are beyond the scope of the general research undertaken to produce this report. A response to these two issues would require a thorough review of the new technology being introduced by the Department of Mines, a review which is not practicable at this time. Nevertheless, in response to this report the Department of Mines may be able to present for discussion ideas which address these two issues and any interphase between the impact of technology and the recommendations made here.

APPENDIX

TERMS OF REFERENCE FOR REVIEW OF REGISTRATION PROVISIONS OF THE MINING ACT 1978-1988

There has been much debate over recent years on the uncertainties and inconsistencies in the *Mining Act* in relation to matters such as:

(1) the manner in which legal and equitable interests in mining tenements may be acquired;
(2) the necessity for obtaining Ministerial consent to the creation of such interests;
(3) the effect of not obtaining Ministerial consent;
(4) the meaning of dealings in reg. 110 and thus the need to register such documents as joint venture agreements, tribute agreements and option agreements;
(5) generally as to whether regs 103 and 110 are ultra vires the Act and as to their effect and interaction;
(6) the exact nature and location of the "register" contemplated by reg. 106;
(7) public access to the register;
(8) the need for a system of indefeasibility;
(9) the interaction between the caveat provisions of s. 121 and the so-called registration provisions in reg. 110 and elsewhere;
(10) the registration requirements for securities (whether or not in the prescribed form);
(11) whether the Minister and his Department actually require a system where "dealings" are registered for their perusal; and
(12) the impact of technology on the registration system.

By *Mining Act Amendment Act* 100 of 1985, s. 119 was to be replaced with new sections to enshrine in the Act the necessity to register instruments. However, the relevant section of Act 100/85 has not been proclaimed and by a Bill presented earlier this year, was to be repealed.

The W.A. State Branch of AMPLA considers that a review of the relevant provisions is required, leading to suggested amendments to the Act and regulations. The review should focus upon the practical difficulties encountered with the present provisions. The legal issues impacting upon these practical difficulties should be thoroughly analysed. A discussion of the advantages and disadvantages of a system of indefeasibility should be included, but AMPLA recognises that suggested amendments to simplify the registration system (whilst at the same time removing statutory-created doubts over the creation of and manner of dealing in interests) will gain greater support with the Department of Mines and those persons in or who deal with the mining industry.