COMMENT ON VICTORIAN MINES ACT

By C.R. McKenzie

I have read with interest the paper of Messrs. Jackson, Drummond and Keane in relation to the mining legislation existing in the various Australian jurisdictions. I wish to add to their comments some additional comments of my own upon the subject of the regulation by Victorian statute of mining upon land alienated from the Crown without reservation of minerals. The matter of the way in which the law allocates mineral resources has already been discussed in the paper of Messrs. Jackson, Drummond and Keane. The additional comments which I shall make upon the subject are in no way to be interpreted as the views of the Victorian Government, but are views personal to me. In my commentary I propose to refer to certain problems associated with ss.292-298 of the Mines Act 1958. In fact, some of these problems may be overcome by the use of administrative policies. For example, if land proposed to be brought under the operation of the Act is surrounded by Crown land, a person wishing to ascertain whether the private land contained minerals might be able to satisfy himself on this point by obtaining the necessary consents to enter upon that Crown land, entering upon that land and surveying that land. Again, the difficulties I see in relation to the effect of the issue of an exploration licence to a person upon another person's preferential right to a lease may be overcome by following a policy of not granting an exploration licence in that case. It is, however, a matter of concern that the resolution of these problems should be left to administrative policies and should not appear on the face of the legislation. I should add that where in my commentary I refer to "minerals" I do not use the term to include coal. The coal is, in many jurisdictions, dealt with separately and differently from other minerals.

It was early accepted in Victoria that the Sovereign had a prerogative right to mines of gold and silver, and that a Crown grant did not pass the rights to these minerals, unless express words were used. However, the reasons given for this common law principle in *The Case of Mines* (1567 1 PLOWD. 310 at pages 315 — 318) — the appropriation to the most excellent person (the King) of the most excellent things which the soil contains (gold and silver); the importance of being able to coin money and to pay armies and the fear of over-mighty subjects — were not so readily accepted.

In 1891, the Victorian Parliament passed an Act which declared gold and silver on or under all land in Victoria, whether alienated or not alienated and if alienated whenever alienated, to be the property of the Crown. In 1955, uranium and thorium were added to this list; but the reasons given for the addition of these minerals related to the importance of these minerals as sources of energy and in the manufacture of armaments.

For many years after Victoria became a separate Colony, land was alienated from the Crown without a limitation as to depth and without any reservation of minerals. Accordingly, the landowner acquired a title extending from the surface to the centre of the earth and including minerals other than gold and silver. The practice of including in Crown grants a limitation as to depth and a reservation of minerals commenced on 29th December 1891 but did not come into general use until 2nd March 1892. In 1891 an Act was passed that declared minerals in land not alienated by the Crown before 2nd March 1892 to be the property of the Crown. This declaration is now contained in ss.291 of the *Mines Act* 1958; and ss.339 of the Land

Act 1958 permits a limitation as to depth to be included in grants of land alienated on or after 29th December 1891. Section 340 of that Act prevents a Crown grant (other than a mining lease or licence) from conveying property in metals or minerals that are declared by any Act to be the property of the Crown. These provisions do not, however, affect land in which minerals are the property of the landowner.

Early mining legislation in Victoria permitted the grant of mining titles (that is to say, leases and licences permitting prospecting and mining) only in relation to Crown land. In 1884 an Act was passed permitting the grant of mining titles over private land where the minerals were the property of the Crown. It was not until the Mines (Minerals) Act 1944 that an attempt was made to regulate mining on land alienated without reservation of minerals. The provisions of that Act now appear as ss.292-298 of the Mines Act 1958.

It seems to have been assumed in the various Australian jurisdictions that mining is an activity which ought in the public interest to be encouraged; and that it is an activity which ought not to be governed by private negotiation alone; and also that a landowner ought not to have power to prevent mining upon his land, where he is not willing to mine minerals himself. Although the policies may be the same there is a considerable lack of uniformity among the States in relation to the means adopted for carrying those policies into effect; and there seems also to be an undesirable multiplicity of mining titles. It seems to have been assumed that the only way to regulate mining upon private land is by way of the concepts of property rather than by use of the concept of mining as a form of land use which must be regulated in the public interest but bearing in mind the public interest in encouraging other land use with which mining would interfere. There is, certainly, in ss. 300-302 of the Mines Act 1958 an attempt to prevent mining operations interfering with certain kinds of land use; but the attempt related only to such matters as the use of land for residential purposes, for certain industrial purposes, for orchards, vineyards, works of water supply, and to a lesser extent, primary production. Mining legislation seems to have been based upon the assumption that minerals must be vested either in the landowner or grantee of the minerals or in the Crown. The position is also made more uncertain for both landowner and mineral explorer and exploiter because mining legislation does not generally set out the policies followed by governments in relation to the issue and refusal of mining titles.

Western Australia and Victoria have similar legislation in relation to the bringing of land alienated without reservation of minerals under the operation of the respective mining Acts. The only real difference is that in Western Australia, the landowner receives the whole of the royalty payable upon minerals recovered from his land; whereas in Victoria, he receives ninety per cent of that royalty. In New South Wales, mining titles can be granted over any land, whoever is the owner of the minerals concerned; but cannot be granted over land alienated without reservation of minerals if mining operations are being carried on on the land by the owner or by a person with the consent of the landowner. In addition to compensation for surface damage and deprivation of possession of the surface and severence of land from other land of the landowner, a landowner is entitled to receive seven-eighths of the royalty payable in respect of minerals recovered. In Tasmania, it is provided by ss. 5(4) of the Mining Act 1929 that the Act does not apply to lands alienated without reservation of minerals and without a limitation as to depth, where a lease for mining purposes has been granted before the commencement of the Act and the lease continues to be held and worked to the Minister's satisfaction. Where an owner of private land takes out a

mining lease, he is not obliged to pay rent to the Crown. In Queensland, it is expressly stated that the Mining Act 1968 does not apply to lands alienated without reservation of minerals. In South Australia, property in all minerals is vested in the Crown and a person divested of his property in minerals may apply to the Minister for payment to him of any royalty payable in respect of those minerals. In addition, a person divested of his property in minerals who has commenced or commences mining operations for those minerals before on or after the commencement of the Mining Act 1971 (South Australia) may within three years after the commencement apply to the Minister for a declaration that the mine is a private mine. Private mines are exempt from the operation of the Act, and no royalty is payable in respect of minerals recovered from them (except upon extractive minerals), and upon recovery the property in minerals passes to the proprietor of the mine.

In Victoria, ss. 292-298 of the Mines Act 1958 enable land in which minerals are not reserved to be brought by declaration of the Governor-in-Council under the operation of that Part of the Act dealing with private land. Application for a declaration is made by petition, but the petition may not relate to land exceeding 260 hectares in area. The Minister may then order a geological survey to be made. If in the opinion of the geologist there is a "reasonable probability" that the land contains minerals in payable quantities, the Minster may give notice to the owner and occupier of the land that, unless within six months after the service of the notice arrangements are made to the satisfaction of the Governor-in-Council for the mining of the minerals, the land will be brought under the operation of the Act. It is not clear who pays for the geological survey. It appears that the geologist could be an employee in the Department of Minerals and Energy or a person employed by the petitioner. There is also provision for the Minister of his own motion to order the making of a geological survey, and so to initiate the process of bringing land under the operation of the Act. Whatever be the true position in relation to payment for surveys, a petitioner would have to be reasonably sure that there was a probability that the land contained minerals before he made his petition. This, of course, would again involve private arrangements with the landowner; and if the landowner refused to negotiate, a mineral explorer would be discouraged from petitioning the Minister. Where notice is given to a landowner, there must then elapse a six-month period before a declaration can be made bringing the land under the operation of the Act. This period may give the landowner too much time in which to decide whether or not to mine his land. Sections 292-298 enable the Governor-in-Council to exercise some control over arrangements for the mining of private land by the owner, but only where a notice has been served upon the owner declaring the Minister's intention to bring the land under the operation of the Act. The "reasonable probability" requirement is a stringent one. In Western Australia, the requirement is "reasonable likelihood"; in Tasmania, but only in relation to prospecting, the requirement is that the person proposing to carry out the prospecting has "reasonable grounds" for believing that the land in question contains minerals (Mining Act 1929 s.70(1)).

As I have indicated earlier, it is probable that petitions will only be made where agreement cannot be reached with the owner of the land; but without the consent of the landowner, an explorer for minerals may not be able to carry out the operations that will enable him to ascertain what is the degree of probability that the land contains minerals, and accordingly, whether a petition would be likely to be granted. These operations will, of course, involve considerable expenditure by the explorer. It is still possible that after this initial expenditure and after the making of a petition, the

landowners may decide to mine the minerals; so that the preliminary work will have benefited only the landowner.

Mining titles for which provision is made by other legislation (for example, the Petroleum (Submerged Lands) Act 1967 (Victoria)) are designed to conform to the general practice of the mining industry in relation to exploration for and mining of minerals. There is first an exploration licence covering a large area but for a relatively short term; so that mineral explorers are prevented from holding large areas of land for long periods and so preventing it from being used for other purposes. When a mineral is discovered, a lease is granted for a longer term and covering a smaller land area, enabling the mineral to be mined. In the case of private land, it seems to be assumed that mineral exploration occurs by private agreement; since the area which can be included in a petition is relatively small. The Act does not provide for a mining title which would authorize a person to explore for minerals on this kind of private land; a lease when granted authorizes mining for a mineral. The only other mining titles provided by the Mines Act 1958 in relation to this kind of private land are prospecting areas licences under s. 325 which are limited to quartz and alluvial mining; and exploration licences under s. 514, which are, in any case, only available in respect of land where the property in minerals is declared to be vested in the Crown. Under ss. 292-298, minerals in land included in a petition are declared to be the property of the Crown upon the bringing of land under the operation of the Act. For three months thereafter, the petitioner has a preferential right to a mineral lease of the land. If he then chooses to apply instead for an exploration licence and his application is granted, it appears that he would lose this preferential right. It also appears that another person could, before the petitioner has made application for a lease, apply for an exploration licence in respect of the land included in the petition; and that, despite the petitioner's preferential right to a lease, the land could not be leased to the petitioner without the licensee's consent under s. 526 of the Mines Act 1958.

It seems that, although ss. 292-298 of the Mines Act 1958 may originally have been designed to encourage mining, they may not have this effect; and in any event, may not be used. Explorers for minerals may well take the view that the expenditure involved before a petition can be made, even if a landowner is willing to agree to survey operations being carried out on his land, is not justified, having regard to the fact that the landowner may in the end decide to mine minerals himself. The only way to avoid this possibility is by agreement with the landowner; and, if this can be obtained, there will be no need to make a petition. The area of land in respect of which a petition may be made is too small, and provision of extra compensation to the landowner (ninety per cent of rent and royalty) may be inadequate. In addition, negotiations with many different landowners present difficulties of their own.

Mention should also be made of the difficulty in determining what is the relationship between the Extractive Industries Act 1966 and the Mines Act 1958 in relation to mining on private land which has been brought under the operation of the Mines Act and in which, accordingly, the minerals are Crown property. The interpretation of "mineral" in s.3 of the Mines Act (and the term has the same meaning in ss. 292-298) includes the ores and earths of certain minerals, such as antimony and copper; and "earth" is defined as including soil and rock. By s. 300(2), a lease of private land confers upon the holder a right to enter the land comprised in the lease and to mine (a term defined by the Act to include the removal of earth for the purpose of obtaining minerals). From an examination of the interpretation of "mineral", it appears that the Crown would have property in earth containing

minerals. However, a lessee may also have to remove some earth which does not contain minerals. By s.2(2) of the Extractive Industries Act 1966, stone (which includes soil and rock) on private land is declared to be the property of the landowner. There are certain exceptions to this rule, but these relate only to lands leased or worked for mining purposes before the commencement of the Act and apply only so long as the lease or work continues. The Act defines "stone" in such a manner as not to include minerals within the meaning of the Mines Act 1958. The question arises whether the authority given to a lessee under the Mines Act 1958 to mine on private land is sufficient to enable that mining, or whether, if he is to remove earth not containing minerals, he is also required to obtain the landowner's consent and to compensate him for the removal of his property. It may be possible for a landowner to refuse to grant this consent to a lessee, and so to prevent him exercising his rights under a lease. A mineral lease is, in any case, a somewhat unusual form of title; for it comprises property that is not Crown property (that is to say, earth that does not contain minerals), but it is granted by the Crown. I am aware of the fact that in feudal theory even landowners in fee simple are tenants of the Sovereign; but there is no provision in the Mines Act in relation to private land that, upon the vesting under ss. 292-298 of the property in minerals in the Crown, rights of access and occupation necessary to obtain those minerals also vest in the Crown. These are all matters to be borne in mind when mining titles are considered.

It would appear that ss. 292-298 of the Mines Act 1958 should be reconsidered, having regard to the need to balance the various competing interests of explorers for minerals and persons using land for purposes other than prospecting and mining for minerals; the need for a simpler system of mining titles applying alike to Crown land and private land, the extent to which mining should interfere with other forms of land use and the difficulties at present encountered in attempting to negotiate with large numbers of landowners. In 1567, the Judges hearing the Case of Mines were convinced that the common law was "founded upon reason" and one may hope that legislatures will adopt a similar rational and national approach in dealing with the problems in relation to mining upon land alienated without reservation of minerals.

COMMENT ON NEW SOUTH WALES MINING ACT

By W. Blanshard

On the question of mining on private property the only point I wish to add given the limited time available and Mr. Drummond's examination of the history of the New South Wales legislation, is to draw attention to the fact that private mining rights subject to the 1973 Mining Act might still exist in respect of substances which were unknown at the time of a Crown grant and which were therefore not included in the list of substances to be reversed from the grant. An example is that given by alumina, rutile and titanium which were not added to the list of substances declared to be minerals within the meaning of the Crown Lands Consolidation Act until 1955.

Turning to a couple of points on priorities, s.60 of the Mining Act of 1973 prohibits the granting of an Authority, if a prior application is still pending.

However, s.60 provides no certainty that a prior application will be successful. For example in *N.S.W. Mining Co. Pty. Ltd. and Another* v. *Attorney General for New South Wales and Others* (1967) 67 S.R. (N.S.W.) 341, an application was refused and a later application by the Electricity Commission accepted. This came before the New South Wales Court of Appeal, which by a majority held that the Governor-in-Council had an absolute and unfettered discretion which could not be reviewed. In Wallace J.'s view the wording of s.58(1) of the Mining Act of 1906 (which conferred the discretion and which stated that it was not obligatory on the Governor to grant any lease notwithstanding that the applicant may have complied with the provisions of the Act and Regulations) was conclusive. The priority granted by the Act is as to the consideration of applications, not to the grant of a lease: (at page 352). This decision was upheld by the High Court: 40 A.L.J.R. 551.

In *Cudgen Rutile (No.2) Ltd.* v. *Chalk* [1975] A.C. 520 which has already been mentioned the rights of the applicant appeared far more secure than those of the applicant in the *N.S.W. Mining Co. case*, the Authority itself containing an undertaking by the responsible Minister that a mining lease would be granted. On appeal to the Privy Council, it was again held that the discretion in those circumstances was unfettered, this time on the ground that a Ministers freedom of exercise and discretion cannot validly be fettered by anticipatory action; any attempt to do so is in excess of the Minister's statutory powers.

Section 59(2) of the Mining Act of 1973 (which is substantially the same as s. 58(2) of the Mining Act of 1906 just mentioned), entitles the Minister to refuse an application for a mining lease, notwithstanding that the applicant has complied with the requirements of the Act and the Regulations. In recent times these circumstances have arisen in the case of Coal & Allied Industries Limited which had done considerable work and spent substantial sums on its Warkworth authorisations. When a joint takeover offer was made for the shares in that company by C.R.A. Ltd. and its major shareholder, it was stated by the Government that a coal mining lease would be granted to the Electricity Commission and Coal & Allied might farm-in or joint venture on that lease. Circumstances have since developed of course which are well known to you. Possibly, a company in that situation might have some right to object to an application by the Electricity Commission under s.86 of the Coal Mining Act of 1973, although one doubts whether such a course would be successful.

Another aspect concerning priorities, is priority of interests or rights arising under different legislation. Where it is clear that a statute is intended to apply to lands

generally, its provisions may override the conclusiveness of the Real Property Act. Such legislation would include the Mining Act of 1973, the Coal Mining Act of 1973 and the Petroleum Act of 1955. This principle is illustrated in a New Zealand case *Miller* v. *Minister of Mines* [1963] 2 W.L.R. 92, which went to the Privy Council. There their Lordships said:

> The Mining Act 1926 provides its own separate and independent code for the registration of mining leases . . . if the licence is not registerable under the Land Transfer Act, and the indefeasibility provisions of that Act are to override the grant, the licence would be of no value to the licensee. Their Lordships do not consider that this can have been the intention of the legislature in enacting the compendious code of mining privileges in the Mining Act which are to exist for at least forty-two years.

Finally, a word on financial aspects. Detailed provisions governing royalties and their calculation are of course to be found in the legislation (see particularly ss. 97-104A of the N.S.W. Mining Act, 1973 and ss. 77-82 of the N.S.W. Coal Mining Act, 1973), and I need not go into detail on that point. However, it may be worth making a few remarks on the concept of royalties. The concept is based on the principle that a person who extracts the mineral should pay to the owner of the mineral a fee for that right to extract. Thus the word "royalty" is derived from the fact that gold and silver were originally royal minerals owned by the Crown. This concept is reflected in New South Wales where the royalty is paid to the Crown, except in the case of minerals owned by private persons where the bulk of the royalty, seven-eighths, must be paid by the Minister to the private owner, pursuant to s.96(2). This position may be contrasted with that in some other States.

The concept of a royalty has been criticised on occasions. For example, in 1968 the then Chairman of Western Mining Corporation stated in an address to the Institute of Directors that mineral deposits underneath the earth, in an undiscovered state, should not be regarded as assets; they are of no value to anyone. This issue was referred to in the Privy Council Case of *Michael Borys* v. *Canadian Pacific Railway Company* [1953] AC 217 at 229, as follows:

> A good deal of authority in the American and Canadian courts has been quoted showing the diverse view entertained in different countries and in the various states in the U.S.A. Some maintain that gases, oils and waters, being fugacious elements, do not belong to the owner of the soil in which they are found, not even when in situ: like wild animals they are only the subject of ownership when reduced into possession. The other view is that so long as they remain in situ they belong to the owner of the soil, but are subject, if one may use the expression, to defeasance in case they move elsewhere before the owner of the soil reduces them into possession.
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> For the purpose of their decision their Lordships are prepared to assume that the gas whilst in situ is the property of the appellant landowner even though it has not been reduced into possession, but the question is not whose property the gas is, but what means the respondents may use to recover their petroleum.

However, there are difficulties with arguing that the finder of minerals thereby gains title to them.

Another basis for criticising the concept of a royalty is that, since a rent is in any event being paid, a royalty ought not to be exacted as well. However, in New South Wales, the rent is calculated solely on the area of land affected, pursuant to s.95, and in the case of private ownership the rent is likewise paid to the private owner.

Finally, on the financial aspects, the question of the price of minerals is to my understanding not covered in any of the Mining legislation, although, of course, the Federal Government has power to control price through export permits.

COMMENT ON WESTERN AUSTRALIAN MINING ACT

By S.J.C. Wise

I am now an ex-Western Australian and with apologies to some of my more learned colleagues from Western Australia, I will try and do justice to the topic. My involvement with the Western Australian Mining Act is fast disappearing as the months roll on. I have been invited to zero in on some points referred to in the written paper and the vantage point I will put is that of an operator from an In-house lawyer as opposed to some of Mr. Nicholls' friends, the Out-house lawyers.

There is reference, very early on in the paper, to far-reaching changes which would follow the enacting of recommendations of the 1970 Committee of Enquiry, in Western Australia. We have had about two or three attempts this decade, to introduce a new Mining Act, and for various reasons, it has never proceeded. I understand that another attempt will be made later on this year, and from an operating point of view, I sincerely hope that we manage to arrive at a new Act. The present situation, of some 34-odd tenements, is a very cumbersome position.

The 1975 Bill, proposed 12 tenements, a prospecting licence and exploration licence, a mineral lease, a general purpose lease and eight miscellaneous licences: what we did not see in 1975, were the regulations that were to be promulgated under a new Act and I can only assume that there were no new types of tenements in the regulations to add to those twelve just mentioned. It is very difficult, to try and envisage what the new legislation would be like, assuming that the 1975 basis is going to be followed again, without some understanding of what the regulations are going to contain.

The current Act we are operating under is a 1904 Act. The major exploration tenement is a mineral claim and that is entirely a creature of the regulations which really brings me to what is my main point, from an operator's point of view. It is not so much what is in the Act, or in the Regulations, but it is in how the Mines Department administers that Act. There are so many unwritten rules that date back many decades and I have discovered in practice that it is really more important to have, if there is one, a Mines Department Guide on how the Mining Act and the Regulations are to be administered, to really go a long way. Unfortunately, no such guide is published.

Turning now to this question which has been touched on in the paper as to whether we have in Western Australia a system of title by registration, or system of registration of title, and to the conflicting views in the various cases. There is reference initially, to defects in the rights of a temporary reserve holder. There is reference to one defect as being that the right is not exclusive because a temporary reserve can be granted for different minerals, and there is reference also to the fact that the holder has no entitlement to renewal. I think, putting on a lawyer's cap and adopting a somewhat legalistic argument, there is a third defect. Because a temporary reserve is reserved land, it is not, by definition, "Crown Land" and in my view, it is therefore not open for pegging for a subsequent more advanced form of title, even by the holder of the temporary reserve. This is not how the Mines Department has administered the Act or the Regulations in practice. But I would submit, that there can be no suggestion of a temporary reserve holder conditionally surrendering his right of occupancy for the purpose of pegging a claim or a lease, because the land is not Crown Land (which is available for pegging) until the reserve lapses.

I think the Mines Department has a saving grace here, in that most temporary

reserve holders seem to go from temporary reserve through to mineral claim, and I get the impression that the Department relies on regulation 55(7) which enables the Minister to ignore the requirement under the regulation of actually taking possession of crown land and this then enables the temporary reserve occupant to avoid the gap in time between the expiry of the cancellation of his reserve and the date of his taking possession and application for a claim. If the proper view is that indefeasible ownership depends on properly taking possession, rather than registration, I would submit that regulation 55(7) is being erroneously relied on. The fact that it seems to be relied on suggests perhaps that the Mines Department practice supports the tag title, that we are proceeding by way of title by registration, rather than registration of title.

I think the conflict between the decision in *Florida Investments Pty. Ltd.* v. *Milstern (Holdings) Pty. Ltd.* [1972] W.A.R. 21 and the dicta in *Hazlett & Anor* v. *Rasmussen & Ors* [1973] W.A.R. 141 as to whether it is title by registration or registration of title, is not really clarified by the 1975 Bill. There is a tremendous amount of scope, for great freedom for Ministerial discretion and presumably, if you follow that through to its limit, that discretion can override all of the necessary preceding steps, that are part and parcel of staking your claim by possession, pegging, application, Wardens hearing and so on. I would submit that the presence of such a wide area of Ministerial discretion, in the Act, and I do not wish to make a value judgment on that, tends to give credence to the *Florida* line, that it is a system of title by registration.

From an operating point of view, one of the greatest defects, of the current Act is the complete failure to take into account the requirements of large mining corporations. There is reference in the paper, to the possibility of forfeiture of tenements for non-observance of labour conditions, and I am pleased to see in the 1975 Bill, on which I assume the Bill this year will be based, there is a more mature treatment of this question of how leases should be worked.

The reference to labour conditions which is suggestive of the wheelbarrow days of the early century has been dispensed with, and we have a much more realistic treatment of expenditure conditions. I would like to just outline some of the grounds on which exemption from those expenditure requirements can be granted. They are most significant, and I think they do tie in with the amendments to the South Australian Mining Act about a month ago, which made provision for the grant of a retention lease, which envisaged a holding situation. Under the 1975 Bill, a certificate of exemption could be granted in a number of areas; firstly if the title for the tenement was in dispute; secondly, if time was required to evaluate work done on the tenement to plan future explorations or mining, or to raise capital for the project; thirdly, if time is required to purchase and erect plant and machinery; fourthly, if the subject tenement is for any sufficient reason unworkable; and fifthly and sixthly, which I think are the two most significant ones; that the ground the subject of the mining tenement contains a mineral deposit which is uneconomic but which may reasonably be expected to become economic in the future; and lastly, that the ground the subject of the mining tenement contains mineral ore which is required to sustain the future operations of an existing or proposed mining operation. These last two points are key requirements of the mining industry, as I see it. I would say that in my experience the Mines Department is administering the spirit of these changes in the way they are administering the current Act. And that is why I say, it is important perhaps not so much to read what the Act says, but to understand how the Department administers it.