PROBLEMS IN THE CREATION, TRANSFER AND REGISTRATION OF LEGAL AND EQUITABLE INTERESTS IN MINING AND PETROLEUM CONCESSIONS IN NEW SOUTH WALES WITH RECOMMENDATIONS FOR LEGISLATIVE REFORM

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THE MINING ACT, 1973

This paper is concerned with the legislation of the State of New South Wales dealing with mining and petroleum tenements, namely the Mining Act, 1973, the Coal Mining Act, 1973 and the Petroleum Act, 1955.

The first part of the paper, dealing with the Mining Act, 1973, contains the most detailed discussion, because the relevant provisions of that Act and the Coal Mining Act, 1973, are almost identical, and raise many similar issues. The regime of titles under the Petroleum Act, 1955 is very different but more clear cut.

The Mining Act, 1973 ("the Mining Act") provides for two classes of mining tenements, namely *claims* and *authorities*. The latter class is further subdivided into *prospecting licences*, *exploration licences*, *mining leases* and *mining purposes leases*.

There are two other creatures of the Mining Act, which this paper does not cover. They are the *fossicking licence* and the recently created *opal prospecting licence*, both of which are personal licences, incapable of assignment.

Claims

Main features

Although the most numerous of all tenements in New South Wales, the claim is of only modest commercial significance, as it covers only a small area of land. Currently, there are about 4,200 unregistered claims, of which somewhat less than 5% are subject to transfer in any given year. The main features of the claim are:

Maximum area:	2,500 sq. metres (Crown land only)
Initial Term:	Until next following 31 December
Renewal Periods:	Indefinite number of renewals, each for one year.
Principal Rights:	(a) Exclusive rights to prospect and mine for minerals (b) Right to erect buildings, works etc. for connected purposes (c) Right to remove timber, stone or gravel for mining purposes (d) Right to apply for a prospecting licence or mining lease

Legal nature of claims

A registered holder of a claim enjoys rights which are in many ways analogous to those enjoyed by the holder of a mining lease, although in respect of a vastly smaller area. He has the right to enter, prospect and mine the land, but shall

not prospect or mine "by means of power operated equipment or machinery" without the prior consent of the Warden. He has the right to transfer the claim, subject to the approval of the Mining Registrar, and the Mining Act recognizes the devolution of his rights by operation of law.

It should be noted that a claim is of a different character to the similarly named right in at least some other State jurisdictions. Take Western Australia for example. In *Adamson* v. *Hayes*[1], the High Court considered the nature of a "claim" under the *Mining Act* 1904 (W.A.). That Act specifically provided that any land held as a claim, was to "be deemed and taken in law to be a chattel interest". In *Adamson* v. *Hayes*, Barwick C.J. commented that such chattel interests were "personal interests and not real interests".

As far as New South Wales is concerned, these comments are not directly applicable. Furthermore, a claim under the Western Australian Act is constituted merely by taking possession of land under a miner's right; by contrast, a claim under the New South Wales legislation is created by the act of registration by the Mining Registrar.

The case of *Ex parte Henry: Re Commissioner of Stamp Duties*[2] is of interest in this context. Herron ACJ and Manning J, in a joint judgment, echoed the words of *MacSwinney on Mines Quarries & Minerals*[3] when they observed that

> . . . a licence to dig minerals, coupled with a grant to carry them away, is more than a mere licence. It is a profit a prendre, an incorporeal hereditament lying in grant . . .

They went on to remark that

> . . . the grant of a profit a prendre . . . does not of itself, give to the grantee any proprietary right until . . . the minerals (are) won; the property in . . . the minerals passes on their severance . . . But even though this is so, we are satisfied that the right to take the coal . . . (is a) proprietary right . . .

Although *Ex parte Henry* was concerned with a licence to mine granted by a private landowner, its analysis of licences and profits a prendre is of more general application.

In New South Wales, it may be concluded that a claim is an interest in land. A claim confers a number of statutory rights including a right to prospect, a right to erect buildings and, importantly, a right to mine. These rights are properly described as a profit a prendre (i.e. "a right to take something off another's land".[4] At common law, a bare licence to dig minerals conferred no estate or interest in the land[5] but, when coupled with a deed of grant to carry them away, became a profit a prendre, an incorporeal hereditament.[6] Incorporeal hereditaments are included by s.7 of the Conveyancing Act, 1919 (NSW) in the definition of land.

A claim might reasonably be described as a profit à prendre in statutory disguise.

Creation, transfer and registration of claims

Registration of a claim and of any number of subsequent renewals is automatic, subject only to compliance with the substantive and formal requirements of the Act and Regulations, and such conditions as may be imposed by the Registrar in any particular case. Thus an application for a claim, or for its renewal, which complies with those requirements, creates in the applicant statutory rights which would seem to be proprietary in nature.

Pursuant to s.28(6), an applicant for a claim may nominate another person to be registered as the holder, thereby creating (subject to the contract which gives rise to the nomination) a legal right in the nominee to have the claim registered. Neither the Warden's approval, nor even the nominee's consent, appears to be required.

Sections 32(2) and (3) provide for a "certificate of registration" to issue upon registration or renewal of a claim.

Regulation 16 provides for a claims' register to be maintained by the relevant mining registrar, and for that register to be open for inspection by members of the public.

Regulation 17 prescribes a form of transfer, and specifies that such form shall be signed by the parties and lodged with the registrar within fourteen days of execution. The Act is silent as to the effect of non-compliance with this time limit, but in practice the registrar will decline to grant approval to a transfer lodged out of time. Although registration of a transfer is a straightforward procedure, the Warden takes the opportunity to ensure the conditions of the claim have been met and also to review those conditions.

Section 33(1) provides that a registered claim "may be transferred in the manner prescribed", and s.33(2) provides that a transfer "shall be of no effect until it has been approved by the mining registrar". Section 33(3) provides that "Upon the registration of the transfer of a claim . . . the transferee becomes the registered holder . . ." Accordingly, it is only at the time of registration (and not "approval" under s.33(2)) that the transferee becomes entitled as against the Crown to exercise the rights conferred by a claim. It is difficult to be sure what is intended to be the position after approval but before registration. On the one hand, the apparent implication of s.33(2) is that after approval the transfer becomes of some effect; on the other hand, s.33(3) seems to carry the necessary implication that registration must be effected before the transferee's position is recognised. On balance, it is suggested that, after approval but before registration the transferee has no better rights than before the approval was given.

The Act is silent as to whether, short of a transfer, it is possible, either with or without approval, to create other legal interests in a claim (e.g. mortgage or sub-lease), or equitable interests (e.g. option to purchase). When contrasted with the Act's strict limitation on dealings with authorities (as discussed below), it is submitted that the creation of such interests may be immediately effective.

Authorities

Prospecting licences

The prospecting licence is concerned with prospecting, not mining, and may be regarded as the smaller brother of the exploration licence. Its principal features are:

Maximum area:	256 hectares (Crown or private land)
Initial Term:	Up to one year
Renewal Periods:	Up to one further year (at Minister's discretion)
Transfer:	Subject to Minister's approval
Principal Rights:	(a) Exclusive right to prospect for those minerals specified in licence and such other minerals as may be authorized by Minister
	(b) Exclusive right to apply for a mining lease

Exploration licences

The exploration licence permits large scale exploration, and requires from the holder some substantial commitment of expenditure, and proof of financial ability to meet that commitment. Its principal features are:

Maximum area:	256 sq. kilometres (Crown or private land)
Initial Term:	Up to two years
Renewal Periods	Up to a further two years for one half of the original area (at Minister's discretion)
Transfer:	Subject to Minister's approval
Principal Rights:	(a) Exclusive right to prospect for those minerals specified in the licence (b) Exclusive right to apply for a prospecting licence or a mining lease for relevant minerals

Legal nature of prospecting licences and exploration licences

Both a prospecting licence and an exploration licence confer on the holder certain "exclusive" rights to prospect the subject land. However, the holder of either of these licences has no, or no significant, right to remove any property from the subject land. Neither licence, it is submitted, operates to create an interest in land. Rather, each licence is a bare licence to exercise a bundle of rights, the licence making lawful that which would otherwise be unlawful. Neither licence could properly be described as a profit a prendre.

Mining leases

The mining lease is the only tenement under which large scale commercial mining operations (other than for coal) can be conducted in New South Wales. It is the tenement most often the subject of transfer and other dealings. Its principal features are:

Maximum area:	256 hectares (Crown or private land)
Initial Term:	Up to twenty-one years
Renewal Periods:	Any number of periods each of up to twenty-one years (at the Governor's discretion)
Transfer:	Subject to Minister's approval
Rights:	(a) Exclusive right to prospect and mine the minerals to which the lease relates and any additional authorised minerals (b) To carry out any mining purpose

The legal nature of mining leases

Is there any reason to suppose that a mining lease granted under the Mining Act is anything other than a lease under the general law?

Clearly, the mere fact that the standard form printed document issued by the Department of Mineral Resources is headed "Mining Lease" does not of itself suffice to make the relationship between the parties one of lessor and lessee. As the Courts have emphasized frequently, it is the substance and effect of the transaction which must be examined, to ascertain the true intention of the parties.

Does the grantee have exclusive possession? Traditionally, this has been a crucial test. As Taylor J said in *Radaich* v. *Smith*[7]

> . . . where there is a grant of a right for a determinate period in respect of land, and the question is posed whether the grant creates a lease or a licence, the question may be resolved by considering whether the right in question is a right to exclusive possession.

However the right to exclusive possession is not in every circumstance the decisive distinction between a lease and a licence, as was pointed out in *Radaich* v. *Smith*. It is easy to find instances, both in the case of Crown land and in the case of private land, where third parties may have rights over the land, such as for pastoral purposes. This point was considered in *ICI Alkali (Aust) Pty. Ltd.* v. *Federal Commissioner of Taxation*[8] which involved a lease under the former South Australian Mining Act 1930–1962. On the facts of that case, McInerney J reached the conclusion

> Notwithstanding these matters (i.e. the existence of other rights over the same land), I am disposed to think that a mining lease under the Mining Act confers a leasehold interest within the ordinary acceptance of the term.[9]

However, McInerney J, on the issues before him, felt it unnecessary to reach a concluded opinion on this point. The *ICI Alkali case* is of interest in that it shows the approach of the Court to the resolution of an issue as to the existence of a lease. Essentially, it is a matter of scrutinising in detail the wording of the "lease", having regard to the Act and the Regulations issued under it. Are there habendum and redendum clauses in customary form? Are there appropriate lessor and lessee covenants?

Analysing the standard printed form of "Mining Lease" used in New South Wales on this basis, one is still left in some doubt. On the one hand, there is a clear demise ("DOTH HEREBY demise and lease . . ."); on the other hand, it is expressly stated that ". . . no implied covenant for title or for quiet enjoyment shall be contained herein".

One point to be considered is whether one can be said to have a "lease", in the commonly accepted sense, when the grantor is not necessarily the owner of the subject land. Can the Crown grant a lease over private land, in respect of which it is not itself entitled to possession, or to any estate or interest? It seems that this point has not been discussed in any reported decision.

Another point to be considered is exactly what is being "leased". Is it a certain area of land, or is it some particular mineral forming part of the land? For example, in *Gowan* v. *Christie*[10] Lord Cairns said

> What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is the liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and take them away, just as if he had bought so much of the soil.

Most mining leases issued under the Mining Act contain a demise of a certain piece or parcel of land usually restricted to a certain depth but including the surface, but this is not always the case. Section 89(6) of the Mining Act reads

> Where a mining area does not include the surface of the land in the mining area or any part of the surface of that land, the registered holder shall exercise the rights conferred on him by this Act and by the mining lease in such a manner as not to injure the surface of the land . . . or anything thereon.

It is not uncommon for a mining lease to be granted in respect of a particular area of land, but specifically excluding all of the surface, or all but a small area of the surface, from which a shaft may be sunk.

Weighing up all relevant factors, it is difficult to be sure that a statutory mining lease in New South Wales is, under the general law, a lease at all. But if it is not a lease under the general law, how are the rights undoubtedly conferred by the statute to be characterised at law? As a profit a prendre, it would seem (see the discussion in relation to the legal nature of claims above). There have been instances, not under the Mining Act, where mining leases have been held to be profits a prendre, are reported in *Mittagong Shire Council* v. *Mittagong Anthracite Coal Co Ltd*,[11] *Emerald Quarry Industries Pty Ltd* v. *Commissioner of Highways*[12] and *Mills* v. *Stokman*;[13] see also *Australian Blue Metal Ltd* v. *Hughes*[14].

To conclude this discussion, reference might be made to Lang and Crommelin's *Australian Mining and Petroleum Laws*[15] where the authors state

> Most mining leases would probably constitute a lease under the general law, but some might only constitute a profit a prendre, if the particular lease does not confer on the lessee the legal right to exclusive possession. Mining leases would certainly confer on the lessee more than a bare revocable licence.

Mining purposes leases

A mining purposes lease is invariably granted to the holder of an adjacent, or nearby, mining lease, for the purpose of allowing the holder to conduct operations for mining-related purposes (e.g. stockpiling, water storage) rather than actual mining operations. It should be noted that there is no equivalent of a mining purposes lease under the Coal Mining Act, and that where necessary such a tenement pursuant to the Mining Act would be available to the holder of a coal lease.

The main features of the mining purposes lease are:

Initial Term:	Up to twenty-one years
Renewal periods:	Any number of periods as per mining lease
Transfer:	Subject to Minister's approval
Rights:	As specified in lease (and see Regulation 6 for definition of "mining purposes").

Creation and transfer of interests in authorities

The creation and transfer of interests in prospecting licences, exploration licences and mining leases are the subject of provisions in the Mining Act and the Regulations thereunder ("the Regulations") having common application to each class of authority.

It should be noted that in contrast to Part IV of the Act, dealing with claims, there is no register, or system of registration, provided for authorities in Part V of the Act. Authorities are merely granted, and dealings with them are "recorded".

The crucial provisions dealing with transfers and other dealings are Sections 106 and 107 of the Mining Act. Section 106(1) provides (in part) that

> A legal or equitable interest in, or affecting, an authority, is not capable of being created . . . except by instrument in writing.

Section 107(1) provides (in part) that

> Unless the Minister approves . . . the transfer of . . . or an instrument by which a legal or equitable interest in, or affecting, an authority, is created, assigned or dealt with . . . the instrument or the transfer is of no force.

It seems that the requirement of writing in s.106 is to be read literally, and interpreted in like manner to s.23C of the Conveyancing Act, 1919 (NSW) and

parallel provisions in other jurisdictions, all deriving from the Statute of Frauds. Accordingly, it is submitted, an entirely oral dealing with an authority would be of no validity. Equally, subject to the requirement of writing, the legislation clearly recognizes that legal and equitable interests should be readily capable of creation. In practice, problems arise with the transfer and registration of those interests, once created.

Section 107, if construed literally, would render an entire instrument "of no force" unless and until approved by the Minister, if that instrument included a provision which purported to create or affect a legal or equitable interest in an authority. The Section does not say that such an instrument is of no force and effect "to the extent that" it purports to create or affect such an interest; it does not say that the instrument is "voidable unless" approval is obtained; it does not say that a legal or equitable interest in, or affecting, an authority is "not capable of being created etc." *unless* the Minister has approved it (viz. s.106).

The absurdity of a strict literal interpretation of s.107 is demonstrated by some simple examples:

A floating charge created by a company, which happens to be the registered holder of a single authority, is "of no force" unless the Minister has given approval under Section 107.

A floating charge by a company holding no mining interests, which subsequently acquires an authority, at that point of time becomes "of no force".

Until the very recent Western Australian case of *Southern Pacific Hotel Corporation Energy Pty. Limited & Ors* v. *Swan Resources Ltd. & Anor.*,[16] there had not been a single judicial determination as to the meaning in this context, of the words "of no force", or generally as to the intended scope of s.107. In a paper delivered to the New South Wales Branch of the Australian Mining and Petroleum Law Association in 1980, R.P. Meagher Q.C. discussed the difficulties caused by s.107, and it will perhaps be useful if the essence of that address is reiterated:

> The prohibition in s.107 is against dealings, not against contracts to deal.
>
> The legislation is not cast in terms that any instrument dealing with an authority must be approved by the Minister prior to execution. Instead, the section itself contemplates that instruments will be executed before being submitted for approval, and will have some legal effect prior to approval.
>
> It necessarily follows that an unapproved instrument is neither void nor enforceable nor illegal merely because it is unapproved.

Meagher went on to draw an analogy with s.272 of the Crown Lands Consolidation Act, 1913 (NSW) which provides that certain dealings with certain Crown lands are not "valid" (Meagher used the words "no force and effect" in his paper but the actual wording of s.272 is "shall not be valid") unless the Minister's approval is obtained. Meagher noted that in *Butts* v. *O'Dwyer*[17] the High Court had no difficulty in construing a purported lease of Crown lands, which s.272 said was not valid unless it had received the Minister's approval, as "an agreement for lease". The Court ordered the proprietor of the interest to seek the required Ministerial approval so that, if and when that approval was granted, the document in question took full effect according to its terms.

On the basis of such authority, Meagher concluded that a purported transfer or other dealing, for which approval is required pursuant to s.107, is to be treated, pending the outcome of the application for approval, as a contract (to

transfer, assign, establish a trust or otherwise) but creates no proprietary rights. The enforceability or otherwise of that contract would then depend on normal principles of contract law.

Meagher's opinion of the apparently wide scope of s.107 was

> When you get an instrument like an equitable charge which deals both with a mining interest and with other assets, it seems to me the Act somehow or other will be read as if the statutory prohibition applies only to the mining assets; the instrument itself (in other words) will still be of full effect against assets other than mining assets.

The details of the *Southern Pacific Hotels*[18] case are set out in the paper on Western Australia elsewhere in this publication, and need not be repeated here. Suffice it to say that the majority of the Full Court of the Western Australian Supreme Court, in an appeal on an interlocutory matter, held that where an instrument purports to deal with or affect an equitable interest then it is wholly of no force pending approval and registration; and a covenant by the holder not to deal with the subject tenement in a manner inconsistent with the agreement could not be enforced.

The dissenting judgment of Wickham J, and certain obiter of the Chief Justice, do however offer some comfort in suggesting that a purely personal covenant (e.g. to use best endeavours to obtain approval) may be enforced, and that an injunction will lie to support such a covenant. The case does not, it is submitted, resolve the matter once and for all and an authoritative judgment on the problem would be welcome.

Returning now to the Mining Act it will be noted that ss.106 and 107 treat legal and equitable interests in identical fashion, but it is important nonetheless that established rules of equity must not be forgotten. For example, if two separate equitable interests are created at different times by different instruments in the same authority, which prevails? The normal principle is that, where there are different equitable interests, they rank in order of time of creation.[19] However, it is submitted that the terms of s.107 constitute an exception to the general rule, because the instruments creating each equitable interest remain of no force, unless and until approval is obtained. Consequently, it seems that equitable interests must rank in the order they are approved.

Such an exception to the general rule seems perfectly compatible with existing exceptions. It could be regarded as an example of the established exception applying in the so-called negligence cases, i.e. those where the person with the prior equity is guilty of some negligence which has led the holder of the later equity to assume that no such prior equity exists. Alternatively, the exception established by s.107 could be regarded as akin to the exception arising where there is a failure to register a document under the registration of deeds legislation.

However, perhaps the most important principle of equity to keep in mind in the present context is the rule that a bona fide purchaser of a legal estate for value without notice of prior equities takes free from any such equities. For example, consider the case of a registered holder of an authority who purports to transfer the authority to a purchaser for value, notwithstanding the existence of previously granted (i.e. approved) equitable interests. Does the purchaser, on the transfer being approved, take free of such interests?

In practice, the crucial question is likely to be whether the purchaser had "notice" of those prior equitable interests and, as always in applying the bona fide purchaser rule, such notice can be either actual or constructive. Two quotes from

Meagher, Gummow & Lehane's *Equity — Doctrines and Remedies* are pertinent

> A person is deemed to have constructive notice of all matters . . . of which he would have received notice if he had made the investigations usually made in similar transactions[20] and,
>
> It is but rarely that a purchaser neglects to inquire at all. The usual case where the doctrine of constructive notice is called into play involves circumstances where the purchaser has inquired, but has not inquired sufficiently. Any purchaser who in the course of his inquiries, received notice of a relevant fact is affected with notice of all other relevant facts which he could have discovered by further proper investigation.[20a]

No authority can be quoted, but it seems indisputable that a prospective transferee of an authority must search the publicly available records at the Department of Mineral Resources, if he is to show that he had made "the investigations usually made in similar transactions". However, while the making of such a search may show that the purchaser "has inquired", to rely simply on the information obtained may leave the purchaser in the position of one who has "not inquired sufficiently". This paper gives some details of the Department's practice in recording legal and equitable interests, and, in particular, reference should be made to the Department's pencil annotation and its summary mentioned below. Quite clearly, there is a distinct possibility that a search at the Department will disclose evidence of some prior dealings, but at the same time will leave the prospective purchaser in the dark as to whether those prior dealings created equitable interests, and, if so, whether any particular such interest still subsists or has lapsed. It is submitted that the purchaser will have to pursue his inquiries further, and, in particular, try to obtain from his vendor, or from some independent source, sufficient information to satisfy himself as to the exact nature of the dealing covered by the pencil annotation or the summary. Nevertheless, in some cases, an element of risk will perhaps be unavoidable if the purchaser decides to proceed.

Finally, let us consider a problem often encountered by mining companies. Take an exploration agreement where the holder of an exploration licence, in consideration of a mining company undertaking exploration work within the licence area for the purpose of earning an interest in any minerals discovered within the area, agrees, upon the satisfactory performance of the work, to apply for mining leases and to transfer to the company an agreed interest in such leases as may be granted. Assume the Minister's approval under s.107 has been granted to the exploration agreement before the work commenced. How is such an agreement to be enforced after the work has been completed? Being future property, or a mere expectancy, the mining leases cannot be assigned at law. However, on the principle in *Holroyd* v. *Marshall*,[21] equity will treat the assignment for value of the expectancy as a contract to assign. It is a case of equity regarding as done that which ought to be done.

In this context, the speech of Westbury LC in *Holroyd* v. *Marshall* is worth noting

> But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.

It might further be noted that, although the principle in *Holroyd* v. *Marshall* was thought to be linked with the availability of specific performance, subsequent cases indicate that the principle is independent of it.[22]

It would appear that the assignee's right is some higher right not resting exclusively on contract. As Dixon J said in *Palette Shoes Pty Ltd* v. *Krohn*[23]

> As the subject to be made over does not exist, the matter primarily rests in contract.Because value has been given on the one side, the conscience of the other party is bound when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him. Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights or ownership for the assignee. But, although the matter rests primarily in contract, the prospective right in property which the assignee obtains is a higher right than the right to have specific performance of a contract; and it may survive the assignor's bankruptcy because it attaches without more *eo instanti* when the property arises and gives the assignee an equitable interest therein.

Departmental practice

What actually happens in the Department of Mineral Resources when an application for approval under s.107 is lodged? Major steps in the procedure are as follows:

(i) Regulation 37 requires than an application on the prescribed form be lodged, together with the executed instrument, and a certified copy of that instrument. The instrument must (although there is no provision to this effect in the Mining Act) be duly stamped, and the application must also be accompanied by the prescribed fee, and be lodged within ninety days of the date of the instrument.

(ii) Following receipt by the Department, the dealing is given a number in the specific "register leaf" relating to that authority, and a pencilled annotation is immediately made on the the file of the authority. That annotation would (or, at least, should) be disclosed in any search made thereafter at the Department.

(iii) Where the dealing relates to a mining lease the file is forwarded to the royalty section, which reports whether all royalty returns and payments in respect of the lease are up to date.

(iv) Next the file is forwarded, in the case of a mining lease or prospecting licence, to the local Inspector of Mines for a full review of the conditions of the authority. Unless the authority was granted only very recently, the Department will normally take the opportunity to insert new conditions (e.g. as to safety, or environmental protection) into the authority instrument, and to increase the amount of the security bond to be provided by the registered holder. In the case of a dealing with an exploration licence, it is the local Prospecting Board which reviews the conditions of the authority.

(v) In all cases, the ability of a transferee of an authority to meet the relevant continuing expenditure commitments will be assessed and taken into account.

(vi) Assuming the royalty section and local Inspector (or Prospecting Board) have no objections to the transfer or dealing, the instrument is then reviewed by the Department to ascertain its precise effect. No reliance, it seems, is placed on the short description of the dealing which is inserted in the form of application — it seems to be assumed, unless the contrary is shown, that the

parties are attempting to sneak through a sale under the guise of a mortgage, or whatever.

(vii) A submission recommending approval or otherwise is prepared and forwarded to the Minister. Thereafter the Minister (or his delegated functionary in the case of authorities other than leases) will grant or refuse his approval.

(viii) If the Minister grants approval, a summary of the effect of the approved transfer or instrument is prepared by the Registrar. A copy of that summary is given to the applicant to go on the original lease or licence; a copy is replaced on the duplicate lease or licence kept available at the Department for public inspection and a third copy goes on the Department's file. The transfer or other instrument itself does not become available for subsequent public inspection. Note that only in the case of a transfer (not e.g. a mortgage or option) is the Registrar directed by the Act to "record" the name of the transferee.

The foregoing procedure presently takes an average of five months, because of the restricted manning levels in the Department. Some dealings are handled more quickly, but some take considerably longer — up to eighteen months in some cases.

Since 1973 it has been Departmental policy to review all the conditions attaching to an authority when an application for approval under s.107 is lodged, even though the Act only expressly provides for review of conditions under s.69 (on renewal of an authority) and 76A (review of labour conditions).

Section 107(3) provides that the Minister is entitled to grant his approval "subject to such conditions as he deems necessary to impose in the public interest". One may well ask whether this apparently unlimited Ministerial discretion can properly be used as an opportunity to review the existing conditions of an authority or whether regard properly should be had only to what might be considered the factors relevant to a transfer (e.g. suitability of the transferee, degree of foreign ownership etc.). It should however be noted that all authorities granted since 1973 contain express provisions permitting review of conditions at any time.

It is not possible to obtain an actual approval under s.107 in advance of execution of documentation (see the requirements mentioned above), but in practice the Department will carry out substantially all its review procedure upon presentation of an unexecuted document and will even provide a written statement to the effect that, without in any way inhibiting the Minister's ultimate discretion, there appear to be no grounds for objection. From a practical point of view such a letter should be regarded as sufficient protection in all but the most extreme circumstances.

Foreign control

Section 61 of the Mining Act provides that the Minister or Governor may, in deciding whether to grant an authority, take into account the extent to which the controlling power in an applicant corporation is a foreign corporation or resident.

Although there is no equivalent provision in s.107, the degree of foreign ownership or control is the single most important factor considered by the Department in a s.107 application, and the official form of application provides for the necessary information to be provided to the Department when seeking approval.

Caveats

Section 109 of the Mining Act provides for the lodgment of caveats, the effect of a caveat being to prohibit the Minister from giving any approval in respect of an authority for a limited period of twenty-eight days from the date of lodgment. After that time the caveat automatically lapses unless the caveator obtains and serves on the Minister an order of a competent Court forbidding the Minister from giving the approval concerned.

Thus a person dealing with the registered holder and taking, for example, an option or a mortgage, and seeking to protect his position pending the grant of approval under s.107, could not easily use the caveat procedure to achieve this protection, since the time taken to obtain approval is far longer than twenty-eight days. Conceivably, a simple if rather cumbersome procedure would be to lodge a new caveat each twenty-eight days. Prima facie, there seems no reason why a person claiming an interest could not lodge a succession of caveats, which would inhibit the registered holder from dealing with other parties. However, although not as clear as the position under the *Mining Act* (W.A.) (Section 121(4) of which expressly prohibits successive caveats), the matter is not free from doubt. Section 109(3) seems to envisage that, at the end of the twenty-eight day period, the Minister shall be entitled to give his approval unless the caveator serves on him a Court order forbidding him from giving approval. It may be that a caveator cannot frustrate the approval process by lodging successive caveats.

Some statistics

Some interesting statistics:

During the calendar year 1981, the New South Wales Department of Mineral Resources received only fifty-three applications for approval under s.107, forty-two relating to leases and eleven relating to exploration licences.

Of these applications a total of thirty-five were approved, ten were refused and eight were still (as at April 1982) being investigated.

None of the refusals were on technical or policy grounds, they all resulted effectively from withdrawal of the applications by the parties concerned. Typically, an option in respect of a prospecting title commonly lapses, or the exploration activity is completed, before the relevant application has been dealt with, and so the application is withdrawn or deemed refused.

Only eighteen caveats have been lodged in the last three years.

Information supplied by the Officer-in-Charge of the Titles Branch indicates that the reasons for refusal of s.107 applications would almost invariably be one of the following: in the case of mining leases only, failure to comply with the Department's 50% "Australian ownership" requirement; rarely, the transferee being considered unsuitable or undesirable, e.g. by reason of past failure to comply with the conditions of an authority; or failure to comply with procedural requirements.

Unlike in, say, Queensland, the Department does not prohibit "trafficking" in authorities, and pays no regard to the consideration shown in a dealing, except if the instrument gives rise to a suspicion that the parties are endeavouring to avoid stamp duty (i.e. by understating the consideration). However, a party clearly engaged in trafficking in exploration titles might find great difficulty in persuading the Minister to exercise his discretion to obtain further titles.

Practical steps to protect unregistered interests

In practice, the means available to a person dealing with an authority and desiring to protect his position as against third parties, include:

Obtaining prior departmental approval in principle to the dealing;

Obtaining delivery, or lodgment in escrow, of the original authority document;

Immediate stamping of the dealing and lodgment of an application under s.107, and

For more abundant caution, attempting to lodge a series of caveats until such time as approval has been obtained.

On a more commercial level, it is likely that the two most common forms of dealings with authorities would be, firstly an exploration agreement conferring an option to purchase an interest in an exploration or mining title, coupled with the right to enter and conduct exploration work, and, secondly, a transfer or sublease of a mining lease. In both situations, the purchaser will be anxious to commence exploration or mining activity (as the case may be), although his legal adviser will be concerned that he should not commit significant expenditure until approval to the dealing under s.107 has been obtained. It is suggested that the lawyer should:

(i) in the case of an exploration agreement, frame the agreement in such manner that the purchaser's potential interest in the authority becomes a proprietary right at the earliest possible juncture;

(ii) if possible, obtain departmental approval in principle in advance;

(iii) ensure that the purchaser (in the case of a mining lease) will be able to comply with the 50% Australian ownership guidelines;

(iv) conduct enquiries at the Department to confirm the status of the tenement and, if possible, enquiries of the relevant local Inspector to determine whether all conditions of the existing authority have been complied with;

(v) create, separately from the principal instrument of option or sale etc., a further document which will confer contractual right of entry (but not property rights) forthwith on execution. In the case of an intending purchaser of a mining lease who wishes to commence immediate mining operations, the secondary documents would commonly provide that until approval to the principal instrument has been obtained the purchaser is to be deemed a contractor engaged by the registered holder, and entitled to enter and mine the property and to retain the proceeds of production;

(vi) pending stamping of the instrument (necessary before it can be lodged with the Department) and approval under s.107, lodge a caveat.

(vii) if the full consideration passes from the purchaser/optionee on execution of the instrument, obtain a completed royalty return (in the case of a mining lease) and delivery of the authority document.

(viii) if payment of the full consideration is contingent upon Minister's approval, ensure that the authority document is lodged in escrow e.g. with the vendor's solicitors.

THE COAL MINING ACT, 1973

In many respects — and certainly in so far as dealings with the principal coal title (coal leases) are concerned — the Coal Mining Act, 1973 (the "CMA") parallels very closely the Mining Act.

The paper delivered to the Australian Mining & Petroleum Law Association in 1980 by Alan H. Loxton, and entitled "Legal Aspects of Coal Mining in New South Wales", is a thorough and most useful guide to the CMA, and reference should be made to that paper for an understanding of the CMA.

It should however be noted that, since that paper was published, the Coal Acquisition Act, 1981 has effected an absolute resumption (without legal right to compensation) of all privately owned coal in New South Wales. In addition, the complementary Coal Mining (Amendment) Act, 1981 abolished the previous right (given under s.21 of the CMA) for an owner of coal, or a person with his consent, to apply for an authorization to mine it.

One other matter to note before proceeding with discussion of the CMA — the policy of the Department of Mineral Resources in administering the CMA is very different from the policy employed in respect of the Mining Act. An innocent lawyer approaching the CMA for the first time might well imagine that by careful study of the Act he would be able to advise his client how to procure a coal mining or prospecting title in New South Wales. He would be wrong. The development of New South Wales coal resources is treated as an almost entirely political matter, and the CMA forms nothing but the bare legal framework within which policy decisions may be implemented. One is tempted to remark that large parts of the CMA are so irrelevant to day to day questions involving coal mining, as to be virtually redundant.

Before proceeding further, the reader is reminded that this section of the paper will not canvass issues which have been discussed in respect of the Mining Act.

Subject to the above comments, consideration is now given to the two classes of titles available under the CMA, namely authorizations (i.e. to prospect for coal), and concessions. Concessions comprise exploration permits and coal leases (including coal leases granted, and still current, under the previous Mining Act, 1906).

Authorizations

Main features

Since the Coal Acquisition Act, 1981 abolished the "private coal" authorization under s.21 of the CMA, only s.20 authorizations are of any great practical significance.

The main features of such an authorization, under either ss.20 or 21A, (which covers authorizations to drill bore holes, carry out investigative work, etc.) are:

Maximum Area:	Not fixed (Crown and/or private land)
General Shape:	Rectangular
Initial Term:	No maximum (usually two years)
Renewal periods:	At Minister's discretion
Expenditure/security conditions:	Varies
Approval of transfer:	Not transferable
Rights:	Section 20 — Exclusive right to prospect for coal Section 21A — The right to carry out specified investigations for coal

It is to be noted that a s.20 authorization is available only, in effect, to a person who is invited by the Minister to apply, and a s.21A authorization is available only to an applicant or tenderer for a coal lease, or the owner of a mine or holder of a coal lease.

Legal nature of authorization

The grant of an authorization is effected by a formal document containing the conditions and covenants required by the Crown, and signed by the Minister and required to be signed by the grantee by way of acceptance. It differs from a prospecting licence or exploration licence under the Mining Act in two important respects, namely that it is not transferable, nor is provision made for devolution by operation of law.

In all other significant respects, the effect of an authorization is the same as a prospecting or exploration licence. It does not include a right to mine, or even a right to apply for a coal lease (the grantee's written acceptance specifically including confirmation of the lack of any such right). Instead, an authorisation merely authorises the holder to enter upon property for the purposes of prospecting for coal.

It is suggested that an authorization creates in the registered holder no interest in land but merely bestows a statutory licence to enter. It should be noted that a common authorisation condition is that "the Minister reserves the right to vary or revoke this authorisation for any reason deemed good and sufficient"; such a condition makes it clear that the Crown intends to create no rights of property by the grant of an authorization.

Creation and transfer of interests in authorizations

As previously indicated, an authorization under the CMA (unlike a prospecting or exploration licence under the Mining Act) is not capable of being transferred. Section 103(2) of the CMA provides that an authorization is not transferable.

Further s.105 which deals with the devolution of rights of the registered holder of a concession by operation of law, does not apply to the holder of an authorization.

Arguably, of course, an authorization can be dealt with, short of absolute transfer, without any ministerial approval, since s.104 does not apply to authorisations, and the prohibition in s.103(3) is only on transfers. In practice, an authorization is not uncommonly the subject of a trust. The Department will not accept that such a dealing is effective, but will, if it is proposed to invite application for a coal lease under s.34, suggest that the holder of the authorisation request that the invitation from the Minister be made to the beneficiary or intended assignee.

Concessions

Exploration permits

An exploration permit is available only by tender following invitation by the Minister.

Its chief characteristics are:

Maximum Area: 100 blocks (Crown and/or private land)

General Shape:	Rectangular
Initial Term:	Two years
Renewal periods:	To a maximum term of four years
Expenditure/labour. security conditions:	Varies
Transfer:	Subject to Minister's approval
Rights:	Exclusive right to prospect for coal A right (note: not, in law, an exclusive or indeed a priority right) to apply for a coal lease.

Legal nature of exploration permits

An exploration permit is merely a different version of an authorization — it is a permit to prospect for coal, but granted (unlike an authorization) in pursuance of a tender.

Like its kindred titles under the Mining Act, an exploration permit creates no interest in land, but constitutes a bare licence to enter.

Coal leases

An applicant for a coal lease must either be the holder of an exploration permit, or a successful tenderer (in response to the Minister's invitation to tender), or an invitee of the Minister.[24] Coal leases are also, of course, granted by way of renewal.

The general features of a coal lease are:

Maximum Area:	Twelve blocks (in the case of an application by the holder of an exploration permit); otherwise as specified in the tender/invitation (Crown and/or private land).
General Shape:	Usually, but not necessarily, rectangular
Initial Term:	Maximum twenty-one years
Renewal periods:	Maximum twenty-one years each renewal
Expenditure/labour/ security conditions:	Varies
Transfer:	Subject to Minister's approval
Rights:	Exclusive right to prospect and mine

Legal nature of coal leases

A coal lease under the CMA carries with it the same incidents as, and is cast in similar terms to, a mining leases under the Mining Act.

Having regard to that similarity, and to the comments earlier in this paper in relation to mining leases, it seems that a coal lease does confer a proprietory right on the lessee and, if it is not a lease under the general law, may be properly described as a profit a prendre.

Creation and transfer of interests in concessions

As in the case of authorities under the Mining Act, there is no "registration" of concessions as such, and the CMA provisions dealing with creation of legal and equitable interests in concessions apply both to exploration permits and to coal leases. All the comments earlier in this paper in respect of those provisions of the Mining Act which deal with transfers of authorities apply *mutatis mutando* to

s.102–108 of the CMA (those sections being for the most part cast in virtually identical terms).

Practical considerations

A very important (and by no means obvious) consideration arises having regard to the political context in which the CMA is administered. Whereas the identity of the potential transferee of an authority under the Mining Act is not examined closely, the same is most definitely not the case with a concession under the CMA.

The Minister can and does exercise his discretion in respect of transfers of concessions in such a way as to ensure that holders of concessions are corporations which are willing and able to meet the perceived requirements of the Department in respect of the holder of a coal production title. Thus, experience in the coal industry, financial capacity, marketing ability, and even exclusively political factors (such as might apply in the case of the Electricity Commission of New South Wales) will be assessed and taken into account.

Chief among the matters which will be taken into consideration by the Minister is that specified in s.45 of the Act, namely ". . . the extent, if any, to which the controlling power in the direction of the corporation's affairs is a foreign corporation . . .". In the case of the transfer of a concession to a foreign corporation, or to a group in which foreign participation exceeds 49%, the Minister, if he can be persuaded to approve the transfer at all, will commonly require as a condition of approval that within a specified period (commonly two years) the necessary degree of Australian ownership must be introduced into the project.

Further, in granting an approval under s.104 of the CMA it is not unusual for the Minister to impose a condition, or several conditions, relevant to the specific concession. For example, he may require that mining at a specified rate per annum will commence or will continue unabated, or that employment will be maintained at a certain specified level. These conditions may be quite severe. In this regard the provisions of s.104(4) should be noted in that failure to comply with any such condition may, if the Minister so directs, cause an approval in respect of any instrument other than a transfer to lapse, and the instrument thereupon to be "of no force".

So pervasive is the government's control over the ownership and utilization of New South Wales coal resources that it would be prudent for a company proposing to purchase a controlling shareholding interest in any company holding a concession, to obtain Ministerial approval. This is so even though nowhere does the Act specify that any such dealing (which by no reasonable interpretation could be seen to be a matter "affecting a legal or equitable interest" in the concession itself) should be subject to the prior approval of the Minister.

Notwithstanding the lack of express legislative power the Minister has on at least one recent occasion granted his "approval" to the sale of shares in a New South Wales company with substantial coal interests. And having regard to the extent of ministerial discretion relevant to all aspects of coal mining, particularly the grant of further coal leases or the renewal of an existing title such approval should be obtained whenever a share dealing will effect a substantial alteration in the ultimate beneficial ownership of a concession.

PETROLEUM ACT, 1955

The Petroleum Act, 1955 ("the Petroleum Act") creates two classes of

petroleum tenements, the petroleum exploration licence and the petroleum mining lease.

Petroleum Tenements

Petroleum exploration licences

The main features of a petroleum exploration licence are:

Area:	Maximum of 10,000 square kilometres and minimum fifty square kilometres (Crown and/or private land)
General Shape:	Rectangular
Initial Term:	Up to two years
Renewal periods:	Up to twelve months
Transfer:	Subject to Minister's approval
Rights:	Exclusive right to carry out surveys and test for petroleum deposits

Petroleum mining leases

The petroleum mining lease is the production title under which on-shore petroleum can be recovered in New South Wales. A lease is not granted as of right to the successful holder of a petroleum exploration licence. The principal features of a petroleum mining lease are:

Area:	Maximum of fifty square kilometres and minimum of ten square kilometres (Crown and/or private land)
General Shape:	Rectangular
Initial Term:	Up to twenty years
Renewal periods:	Up to twenty years
Transfer:	Subject to Minister's approval
Rights:	Exclusive right to conduct petroleum mining operations, and to construct associated works, buildings, etc.

Legal nature of petroleum tenements

Section 37 of the Petroleum Act states

> Every licence or lease under this Act or every interest in any such licence or lease shall be deemed and taken in law to be personal property and shall not be of the nature of real estate and subject to this Act may be disposed of during the lifetime of the holder and shall on his death descend or devolve on intestacy or by will as personal property.

This provision settles beyond any doubt the question of the nature of petroleum tenements under the Petroleum Act. Notwithstanding the nomenclature of a petroleum mining lease, and the words of demise used in the prescribed form, a petroleum mining lease is deemed not to be in the nature of real estate.

Creation, transfer and registration of petroleum tenements

Section 38 of the Petroleum Act deals with the creation etc. of interests in petroleum concessions in New South Wales. The main effects of s.38 may be summarized as follows:

(i) Every transfer of, and every instrument affecting, any licence or lease under this Act, must be lodged for "the concurrence" of the Minister and for registration. The Minister may refuse such concurrence or may grant it

absolutely or subject to such amendments or conditions as he may think necessary in the public interest.[25]

(ii) No transfer or assignment of, and no instrument affecting, any licence or lease shall have any force or effect unless it is in writing and signed by the parties thereto.[26]

(iii) No transfer, assignment or other instrument shall have any force or effect until it is registered.[27]

There are thus three conditions to be satisfied to give effect to a dealing with a petroleum concession — writing, the concurrence of the Minister, and then registration. As will be apparent from s.38(4)(b), it is the final step of registration which gives legal force and effect to the instrument.

Section 38(5) provides for the lodgement of a caveat by any person claiming an interest in a concession. This provision is in identical terms to the provisions in the Mining Act[28] and Coal Mining Act[29] and previous comments in respect of caveats again apply.

Mention should be made of those sections of the Petroleum Act which deal with agreements for joint drilling of wells[30] and agreements in respect of unit development.[31] In the case of a unit development agreement, s.68 expressly provides that s.38 will apply. However, in a rather unusual provision, s.67(2) simply provides that an agreement for joint drilling of wells "shall have no force or effect until it has been submitted to and approved of by the Minister". This provision would appear to displace, by implication, s.38, but it does not expressly do so, and it is difficult to see how such an agreement could fail to be an instrument "affecting" the leases in question, within the terms of s.38. Accordingly there must remain some doubt whether, even if an "approval" under s.67 has been obtained, s.38 still remains applicable according to its general terms (i.e. requiring registration).

Finally, some differences between the Petroleum Act, the Mining Act and the CMA are worthy of note, namely:

Section 38 of the Petroleum Act is not limited in application to an instrument "creating or affecting a legal or equitable interest" in a concession,[32] it applies to any instrument affecting a lease or licence. The section even specifies a tribute agreement, and a working agreement, or any other instrument. Is it conceivable that this apparently unlimited provision could, for example extend to a drilling contract which authorizes entry into a concession, or a geological survey contract?

Under the Petroleum Act, lodgement for concurrence and registration is not only a prerequisite to the dealing being given effect to, but is mandatory,[33] failure to do so leading to criminal sanctions. The Mining Act and the CMA contain no equivalent provisions.

Under the Mining Act and the CMA it is the Minister's approval which gives efficacy to a dealing, whereas it is registration which is the relevant step under the Petroleum Act.

Under the Petroleum Act, failure to comply with a condition imposed in respect of the Minister's concurrence leads to criminal sanctions, but the Act does not provide that such failure to comply thereupon renders the dealing "of no force". This is to be contrasted with the Mining Act and Coal Mining Act, where a failure to comply with a condition of approval is not an offence but may, if the Minister so directs, lead to the cancellation of the approval, which will thereupon render the instrument "of no force".

SUGGESTIONS FOR LEGISLATIVE REFORM

Mining Act

On any comparison of the equivalent provisions dealing with transfers and the like in the various Australian jurisdictions, one thing becomes abundantly clear. That is that in Western Australia the new *Mining Act*, 1978–1981 ("the WA Act") has come closest to establishing a relatively clear and certain system for dealing with mining tenements.

It is suggested that, without departing from the policy requirements now evident in the New South Wales statutes, the Mining Act could be substantially improved by the following simple amendments:

Substitute for s.107(1) a provision to the following effect

> (1) No transfer or instrument shall be effectual to pass or affect any legal or equitable interest in an authority, or to charge or encumber the same, until it has been approved by the Minister and duly registered.

Such a provision would clearly preserve the efficacy of the instrument inter partes, pending approval and registration; and also preserve the clear requirement of the State that no interest in an authority should be dealt with without ministerial approval.

Provide for a system of registration, not only of transfers but also of other instruments creating legal or equitable interests. Such a provision should be similar to Regulation 110 of the Regulations to the WA Act, for example a new Section 107(5):

> (5) If the Minister gives his approval to the transfer of an authority, or to any other instrument of the type referred to in sub-section (1), the Registrar shall record the name of the transferee as the registered holder of the authority, or particulars of that instrument, as the case may be.

Thus an official register would need to be established (as, for example, under the Petroleum Act) which would note the existence of registered legal and equitable interests.

Amend the caveat procedure[34] so that it can be effectively used to protect the position of a party dealing with an authority pending approval and registration. Again, the procedures provided for in both the WA Act and in South Australia, whereby a caveat will remain in force until withdrawn, or until a warden orders its removal, or until fourteen days after receipt by the caveator of notice of a dealing, seem both reasonable and effective. It is recommended that similar provisions be inserted in the Mining Act in lieu of the existing s.109.

Insert a provision similar to that found in s.116(2) of the WA Act, for example:

> 107A Except in the case of fraud no person dealing with a registered holder of an authority shall be required or in any way concerned to enquire into or ascertain the circumstances under which the registered holder or any previous holder was registered, or to see to the application of any purchase or consideration moneys, or be affected by notice, actual or constructive, of any unregistered trust or interest unless a caveat has been duly lodged in respect thereof, 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."

The corollary provision in Regulation 103 under the WA Act — expressly protecting a bona fide purchaser without notice under a subsequent registered dealing is perhaps superfluous having regard to the foregoing. However, the WA Act may be deficient in failing to provide for the priority which should be afforded,

as under the Torrens statutes, to the dealing lodged first in time; it is suggested that such a provision should be inserted in the Mining Act.
It should be noted that such a provision as the suggested s.107A will not necessarily give complete protection to a person dealing with a party other than the registered holder, for example a mortgagee or the holder of an equitable interest. However, that person need not do more than establish the chain of title under registered instruments subsequent to the date at which the registered holder obtained title.

Although not a legislative change, it is further suggested that steps could be taken to expedite the administrative processing of applications for approval under s.107. It would seem that many of the procedures currently undertaken by the Department at this time could equally be performed subsequent to the transfer, or indeed at any time during the currency of an authority.

Coal Mining Act

Virtually identical changes should be made to the CMA.

However, for the sake of clarity it is suggested that a further amendment be made to s.103(3), which currently provides "An authorisation is not transferable". As pointed out earlier, there is considerable doubt as to whether this section effectively avoids any purported dealing with an authorization, not being a transfer, and there seems no reasonable policy reason why, having regard to the nature of an authorization (i.e. a bare licence, conferring at best a contingency in respect of a subsequent coal lease) it should be treated any differently from an exploration permit or a coal lease.

Petroleum Act

The amendments suggested to the Mining Act are all, to some degree, equally appropriate to the Petroleum Act except that the Petroleum Act already provides for the "registration" (not merely recording) of dealings.

Accordingly, it is submitted that consideration should be given to the following amendments to the Petroleum Act:

1. Amend s.38(4) in the manner suggested above in reference to s.107(1) of the Mining Act.
2. Delete the unnecessarily wide reference in Section 38 to instruments "affecting" a lease or licence.
3. Insert a provision to the effect of that suggested above for a new s.107A of the Mining Act.
4. Amend the caveat procedures in the manner referred to above.
5. The apparent inconsistency raised by Section 77(2) should be removed.

FOOTNOTES

* BA LLB (Syd) Solicitor, Sydney.

1. (1973) 47 ALJR 201.
2. (1963) 80 WN (NSW) 435.
3. Sweet & Maxwell, London, 1912.
4. *Sutherland (Duke of)* v. *Heathcote* (1892) 1 Ch 475.
5. *Doe* v. *Wood* (1819) 2B & Ald 724.

6. *Crocker* v. *Fothergill* (1819) 2B & Ald 652.
7. (1959) 101 CLR 209, 217–8.
8. (1976) 11 ALR 324.
9. 339.
10. [1873] LR 2 Sc & Div 273 at 283.
11. (1957) 3 LGRA 290 (SC (NSW)).
12. (1976) 14 SASR 486.
13. (1966) 116 CLR 61 per Barwick CJ, 71–2.
14. (1962) 79 WN (NSW) 498.
15. Butterworth, Sydney 1979, 153.
16. Unreported — but see Andrew G. Thompson "*Petroleum Law in Western Australia — Onshore Aspects*" — a paper given to the Law Society of Western Australia Mining Law Seminar 1981 and a case note by David IPP in AMPLA Bulletin, (1982) 1(1) 15.
17. (1952) 87 CLR 267.
18. See n. 16.
19. *Latec Investments Pty Ltd* v. *Hotel Terrigal Pty Ltd* (1965) 113 CLR 265.
20. Butterworths, Sydney 1975, 220.

20a. Ibid, 221.

21. (1862) 10 HLC 191.
22. See *Tailby* v. *Official Receiver* (1883) 13 App Cas 523; *Re Lind*; *Industrial Finance Syndicate Ltd.* v. *Lind* [1915] 2 Ch 345; *Palette Shoes Pty. Ltd.* v. *Krohn* (1937) 58 CLR 1; *Akron Tyre Co Pty Ltd* v. *Kittson* (1951) 82 CLR 477.
23. (1951) 82 CLR, 27.
24. Under s.34.
25. Section 38(2).
26. Section 38(4)(a).
27. Section 38(4)(b).
28. Section 109.
29. Section 106.
30. Section 67.
31. Section 68.
32. C.f. Section 107 of the Mining Act or s.104 of CMA.
33. Section 38(3).
34. Mining Act s.109.