BOUNDARY DISPUTES INVOLVING MINERAL TITLES

By D. G. Williamson, Q.C.*

The topic 'Boundary Disputes Involving Mineral Titles' has been chosen for presentation at the Eleventh Annual Conference of AMPLA because it is believed that there has been something of an upsurge in mining tenement boundary disputes in Australia in recent years.[1] The purpose of this paper is to direct attention to the following matters:

- the procedures by which mining tenement boundaries are established;
- some questions concerning the validity of title to mining tenements;
- the implications of some recent cases;
- the remedies available for the resolution of boundary disputes.

LEGISLATION

Mining legislation and regulations differ widely amongst the various States and Territories of Australia, including the provisions relating to the acquisition of tenements and the establishment of boundaries. This paper does not propose to discuss the detailed provisions in each jurisdiction, for that task has been tackled admirably elsewhere, and the writer has had the advantage of being able to draw heavily upon those sources in the preparation of the paper.[2]

Notwithstanding the prospect that generalisations may be contradicted by specific provisions lurking in the legislation of any particular State or Territory, the paper discusses issues of fairly common application, so as to provide at least a starting point from which more detailed consideration of an actual dispute might proceed. It must be stressed that anyone confronted with a boundary dispute needs to check carefully the precise legislation and regulations applicable in the appropriate State or Territory at the relevant time. Similar care is necessary when referring to decided cases, for in many instances the legislative basis of the decision would have changed and careful distinctions may need to be drawn.

NATURE OF MINING TENEMENTS

As something may turn upon the nature of the mining tenements under consideration in a boundary dispute, it is useful to set out a very brief

* LL.B. (Hons)(Melb) Barrister Vic., N.S.W., W.A., N.T., A.C.T., Tas.

1 The writer gratefully acknowledges the assistance given by Mr. Michael W. Hunt in discussions about this paper.

2 J. R. S. Forbes & A. G. Lang, *Australian Mining & Petroleum Laws*, 2nd ed. (1987), esp. chaps. 7, 8 & 9; M. W. Hunt & M. A. Lewis, *Mining Law in Western Australia* (1983), esp. chaps. 7, 8, 9, 12, & Appendix A. See also the papers by D. F. Jackson D. P. Drummond and P. A. Keane. 'Mining Law and Petroleum Legislation in Australia' (1977–78) 1 *AMPLJ* 323.

note of the principal forms of tenements. For a fuller description of tenements in each State and Territory reference may be made to the sources noted previously.[3] Although the labels and precise characteristics of tenements vary from one State or Territory to another, it is convenient to adopt the method of description used by Forbes and Lang[4] as set out below.

First the exploration tenements. An *exploration licence* is a comparatively recent form of mining tenement. In Queensland it is also known as an authority to prospect. It enables exploration and sampling over an area extending hundreds of square kilometres for a period in the order of five years, subject to progressive relinquishment in some jurisdictions. In contrast, a *prospecting licence* enables exploration and sampling over a much smaller area, in the order of a few hundred hectares and for a shorter duration than an exploration licence, typically in the order of two years. The prospecting licence as such no longer exists under Northern Territory legislation.

Next the production tenements. A *mining claim* permits mining over a small number of hectares. In some jurisdictions there is no limit upon duration, in others there is a limitation but the Registrar or Warden may exercise a discretion to renew the claim. The mining claim as such no longer exists under current Western Australian legislation. The most secure form of production tenement is the *mining lease.* It permits mining over a larger area than in the case of a mining claim, and for a period in the order of 21 years, with provision for renewal.

OVERLAPPING TENEMENTS

In some State or Territories (especially Queensland) there is scope for different tenements to be held by different persons in respect of the same ground at the same time. This is usually because the tenement is granted only in respect of a particular mineral or group of minerals, or because mining and petroleum tenements are granted concurrently pursuant to different statutory regimes. The possibility also exists of strata tenements. There is substantial uncertainty, and a lack of statutory provision, with respect to resolution of conflicts between tenement holders in such circumstances. These matters have been canvassed elsewhere[5], and are noted here simply to distinguish conflicts of this nature from true boundary disputes, though it is possible that similar considerations might arise, such as one party attacking the validity of the other party's tenement.

THE NEED FOR MARKING OUT

Mining legislation seeks to provide an orderly system for determining what ground is available for exploration and mining, establishing

3 *Ibid.*

4 *Op. cit.* n.2.

5 S. MacCallum 'Overlapping Titles — Legal Problems' [1983] *AMPLA Yearbook*, 299 & commentaries by R. A. North 341 & M. G. Blakiston 346. See also R. A. North 'The Mining Act and Other Acts Amendment Bill 1981 (Qld.)' (1982) 1 *AMPLA Bulletin* 29, 30–31.

priorities between competing applicants, and resolving disputes between parties as to the location and validity of their respective tenements. Effective definition of the boundaries of tenements lies at the heart of this process.

Before a tenement may validly be acquired, the ground must be available, in the sense of not being otherwise occupied for mining purposes. Subject to the possibility of overlapping or concurrent tenements referred to previously, if a current and valid mining tenement already exists, the ground is not available for another tenement in favour of some other party.[6] There are some statutory exceptions to this. An example is that a prospecting licence for gold or precious stones may be marked off over part of another person's exploration licence area in Western Australia.

On the other hand, if the pre-existing tenement is invalid, or has terminated for any reason, then the ground may be regarded as unoccupied for mining purposes. This is why careful and proper marking out is important, in cases where marking out is required as the first step in acquiring a tenement.

> . . . failure to peg a claim conformably to the Mining Act and regulations results in a failure by a person to obtain ownership of a claim. Such a pegging is ineffective and leaves the way open to someone else to peg a claim which would include at least past of the area within the limits of the ineffective pegging.[7]
>
> In providing that priority follows the order of marking out, section 15C(5) proceeds consistently with the general principle applicable to mining leases that has been enshrined in Australian mining legislation over a very long period of time, namely, that the title to mine has been based upon possession; the person first taking such possession under restrictions imposed being held to have the best right (*Warrior Gold-Mining Co. v. Cotter* [1866] 3 WW&a'B(M) 81 at 90; see also *Ex Parte Murphy; Re Mineral Deposits Pty. Ltd.* (1963) 80 WN(NSW) 786 at 790).[8]

In the case of a large scale exploration licence it is impracticable to require the ground to be marked out physically. Instead, the mining legislation requires an application for an exploration licence to be accompanied by a map and written description of the area sought, and also requires that prescribed notices be given. The description may possibly refer to blocks, graticular sections, positions defined by reference to latitude and longitude, or a starting point defined by reference to an established survey point or some obvious physical feature.

Where there has been a correctly documented exploration licence application, there is unlikely to be any real scope for doubt about the location of boundaries, as the tenement would not be tied to the location of posts in the ground marked out by the applicant, for there would be none. Instead of a datum post there would simply be a starting point described in the application. Disputes would be more likely to centre upon the availability of the ground sought, or whether subsequent activity by the

6 *Delhi International Oil Corpn. v. Olive & Anor.* [1973] WAR 52, *Australian Anglo American Prospecting Ltd. v. CRA Exploration Pty Ltd* [1981] WAR 97.

7 *Kenda v. Andrea* (1966) 115 CLR 519, 523 *per* Barwick CJ.

8 *Stow & Ors v. Mineral Holdings (Australia) Pty Ltd* (1976–7) 14 ALR 397, 403 *per* Mason J.

licensee or rival party is being conducted within the licence area described and granted.

In the case of the smaller areas of ground associated with a prospecting licence, mining claim, or mining lease, completely different considerations apply. The *first step* that is required in acquiring any such tenement is to mark out and take possession of the ground in question. It should be noted that the requirements as to marking out are very detailed, they may vary from one form of tenement to another, and they certainly vary from one State or Territory to another. They are usually contained in the regulations made under the relevant Mining Act.

MARKING OUT PROCEDURE ('PEGGING')

It is essential to pay close attention to the specific requirements of the regulations. They are likely to deal with matters such as the location, nature and height of posts; the location, length and depth of trenches which indicate the direction of the boundary lines from each post; the clearing of boundary lines; the interval between posts; the location of the datum post (*e.g.* in the north-east corner); the information to be fixed to the datum post and the time and manner of affixing; the length of boundaries; and the shape, proportions and total area of the ground marked out. There are some exceptions to the general requirements, such as when the land has previously been surveyed, or when natural features or existing tenements dictate a different shape for the area available to be marked out.

There are usually provisions requiring the proper maintenance of the marking out during the life of the tenement, but failure to comply with those provisions is more likely to lead to penalties than to forfeiture.

There is one practical aspect of marking out which is likely to become extremely important in the event of a boundary dispute. It is that the datum post or 'peg' should be positioned by reference to distance and direction from some unassailable feature — either an established survey point, or some permanent and readily identified physical feature. Too often it is found that the datum post has been positioned and described by reference to something quite uncertain, very often a corner of an adjoining tenement which itself has not been surveyed. In the latter case there is the risk of error being compounded in domino-like fashion. At a later date argument can arise as to which of several posts is in fact the datum post (the notice originally attached to the datum post having long-since disappeared), and the subsequent identification of the wrong post might have the effect of shifting the location of the intended tenement up, down or sideways on the map.

CAN DEFECTS IN MARKING OUT BE CURED?

In the early days of Australian mining, it was plain that a failure to comply with the marking out requirements for a mining claim would be fatal. The ground would be available for someone else to mark out by over-pegging the whole or part of the original ground.

This was at a time when there was no need to apply for the grant of a claim, or to register a claim. All that was needed was the miner's right, possession of which entitled its holder to mark out and take possession of,

occupy for mining purposes and mine, Crown land which thereby became a claim.[9]

It is small wonder that in the circumstances there was insistence upon strict compliance with marking out requirements. *Thompson v. Land*[10] is an example.

However, there has been the subsequent development of tenements other than the mining claim. Acquisition of these further tenements entails some or all of the processes of application, notice or advertisment, objection, recommendation, consideration, grant and registration. Even the erstwhile mining claim itself has become the subject of registration, either from practical necessity or because registration has become compulsory.[10a]

Thus the range of tenements has expanded from tenements as of right based on marking out and possession, to tenements gained by the exercise of a discretionary grant, with various gradations of tenement existing between the two extremes.

An important question which arises is this. Does a process which culminates in the grant or registration of a tenement have the effect of curing pre-existing defects (and in particular, defects in marking out) so that in a boundary dispute it would not be open for a rival party to assert that the tenement which had been granted or registered earlier is not valid?

Issues relevant to this question have been addressed a number of times in AMPLA proceedings. There has been considerable writing and discussion about whether title vests upon marking out, upon registration, or at grant; whether registration confers a Torrens-type guarantee of title; the existence and enforceability of equitable interests; and the extent of controls upon the exercise of administrative discretion.[11]

It is not appropriate in this paper to traverse once more the ground which has already been gone over so thoroughly, especially when the results have been matters of uncertainly in some aspects.

However, it does seem that certain propositions, or contentions, do stand out:

(i) Many tenements today are far removed from the early form of claim based on the miner's right in which title clearly followed upon the simple process of marking out and taking possession of the ground. Today the picture is not so simple and not so clear.

(ii) When there is added to the early form of claim a system of mechanical and virtually automatic registration, it is still fairly easy to accept the argument that this constitutes registration of existing

9 *Adamson v. Hayes* (1973) 130 CLR 276, 288 *per* Barwick CJ.

10 (1866) 3 W.W. & a'B(M) 13.

10a S. MacCallum 'Registration of Mining Titles in Victoria' (1982) 1 *AMPLA Bulletin* 5; Forbes & Lang *op. cit.* para [601].

11 Forbes & Lang, *op. cit.* para. [728] [926]. Hunt & Lewis *op. cit.* 82, 100, 104, 107–9. Jackson, Drummond & Keane *op. cit.* MacCallum *op. cit.* See also Western Australia (1978) 13 *Univ. of WA Law Review* 305; & Queensland (1980) 11 *UQLJ* 175. C. J. Carr & others 'Problems in the Creation, Transfer and Registration of Legal and Equitable Interests' (1982) 4 *AMPLJ* 432. M. W. Hunt 'The Mining Act 1978 of Western Australia', (1979) 2(1) *AMPLJ* 1 (especially 13–14); (1981) 55 *ALJ* 317; (1982) 1 *AMPLA Bulletin* 12 & the commentary by E. M. Franklyn Q.C. (1979) 2(1) *AMPLJ* 24. Also Hunt n.17.

title, rather than acquisition of title by registration.[12] The decision to the contrary by Lavan J. in *Florida Investments Pty. Ltd. v. Milstern Holdings Pty. Ltd.*[13] is difficult to sustain in the face of those other cases. There are also early cases reported in New South Wales and Victoria after the introduction of registration which tend to show that registration was not conclusive.[14]

(iii) However, greater significance may be attached to registration in cases where there are provisions like regulation 110(3) of the regulations under the Mining Act 1978 (W.A.), which provides that 'no dealings will be effectual to pass any estate or interest in a mining tenement or in any way to charge or encumber a mining tenement until registered in accordance with sub-regulation (2)', or regulation 14 of the 1975 regulations under the Mines Act 1958 (Vic.), which provides that 'the pegging of a claim shall confer no rights unless the claim is registered'.

It may be argued that a regulation such as either of those regulations comes closer to providing title by registration, but it may be argued to the contrary that such a regulation is invalid (as exceeding the regulation-making power conferred by the Act), or it does no more than inhibit dealings with an otherwise valid tenement until registration is effected.

In Victoria regulations 40 and 54 of the 1975 regulations go further, with provisions which require a mining lease (and any transfer, sub-lease, mortgage or encumbrance of a lease) to be registered in the Titles Office. It is the view of S. MacCallum that those unique provisions attract all the consequences of registration under the Torrens system.[15]

(iv) Further considerations emerge when questions of discretionary grant arise. Not only might legislation give a Minister discretion to reject a recommendation by a Warden that a licence or lease be granted, or to grant a licence or lease despite a recommendation not to do so, but the Minister might also be given power to ignore a failure to comply with the requirements of the regulations, or even the statute.[16]

For example, section 75(4) of the Mining Act 1978 (W.A.) provides that a mining lease may be granted by the Minister notwithstanding the applicant may or may not have complied with the provisions of the Act. Further, since amendment in 1986 section 116(2) of the same Act in effect provides that once the grant of a tenement has been made, it cannot be 'impeached' or rendered 'defeasible' by reason of any informality or irregularity in the application or in the proceedings prior to the grant of the tenement.[17]

12 See *Kenda v. Andrea* above n.7; *Hazlett v. Rasmussen* [1973] WAR 141 (F.C.) esp. *per* Burt J. 143–144, Wickham J 145; *Allied Minerals N.L. v. Adamson* [1974] WAR 27 *per* Wickham J.

13 [1972] WAR 21.

14 See *Australian Digest* (2nd ed.) Vol. 28 Mines & Minerals paras. [51] & [52].

15 MacCallum *op. cit.* n.10a.

16 Forbes & Lang, *op. cit.* para [926].

17 M. W. Hunt 'Legal Aspects of Mining Tenement Management in Western Australia' (1986) 6 *AMPLA Bulletin* 33, 37.

Legislation may go further and specifically confer power to ignore a failure to comply with marking out provisions.

If the legislation is to the effect of any of the above provisions, there is a compelling argument that once the grant is made, the title cannot be invalidated.

(v) Yet there are arguments in favour of a limit to the concept of validation by grant. A discretion must still be exercised properly. Freedom to forgive defects can hardly be pushed to the point of ignoring the fundamental basis of the legislation.[18] What if there is no marking out at all? Similarly, in the absence of the plainest statutory mandate, it is difficult to see that the Minister could grant a tenement in respect of land which is not available due to an existing rival tenement (subject to the possibility of overlapping titles mentioned earlier in this paper). Contrast on the one hand cases such as *Associated Minerals Pty. Ltd. v. NSW Rutile Mining Co. Pty. Ltd.*[19] (valid grant notwithstanding late filing of application for leases) and *Murphy v. Ramsay*[20] ('marginal' discrepancies between description in application and ground actually marked out) and on the other hand *Bromley v. Muswellbrook Coal Co. Pty. Ltd.*[21] (held that the Minister had wrongly granted a mining lease over private land where the applicant did not have the necessary authority to go on the land at the time of marking out).

The following *dicta* should also be noted:

> Likewise if there is no objection to an application for a special prospector's licence, the Minister may decide those matters administratively but not conclusively. I say not conclusively because the Minister has, for example, no power to grant a special prospector's licence except in respect of unoccupied land as defined, and a person who fails to object but in fact has a freehold interest in such land would not be defeated by the grant by the Minister of a prospector's licence.[22]

(vi) For present purposes it is enough to say that in the case of a tenement which has arisen from a discretionary grant, and perhaps also in a case where one of the more exotic forms of compulsory registration is applicable, there is a strong argument available to the effect that a defect in marking out does not entitle the rival party to challenge the validity of the tenement itself. Rather, the defect may pose a difficulty to the tenement holder in establishing where the boundary really is, and this is discussed later in the paper.

(vii) Further support for an argument against invalidity may be found in those statutes or regulations which provide that in addition to marking out, the ground shall be surveyed prior to grant, or that the Warden may direct that there be a survey in the event of objection,

18 R. D. Nicholson 'Challenging Government Decisions on Resources: New Avenues' [1984] *AMPLA Yearbook* 36, P. McNamara 'Challenging the Exercise of Ministerial Discretion' [1984] *AMPLA Yearbook* 93 & E. J. Vickery's Commentary 121 *cf.* E. M. Franklyn Q.C. 'Commentary on the Mining Act of Western Australia' (1979) 2(1) *AMPLJ* 24 & the fears expressed there.

19 (1961) 35 ALJR 296.

20 (1964) 111 CLR 344.

21 (1973) 129 CLR 342.

22 *Stow v. Mineral Holdings (Australia) Pty Ltd* (1976–1977) 14 ALR 397, 416–417 *per* Aickin J.

or that the grant be made subject to subsequent survey, or that survey may be ordered if some dispute arises after grant and that the boundaries shall be adjusted accordingly. Provisions such as those all suggest a willingness to accept that a defect in the original marking out of the tenement is not fatal.

All of these possibilities or arguments underline once more the need to look closely at the provisions of the specific legislation and regulations applicable to the particular tenement. Further, the provisions ought not be construed in isolation. Especially in the case of recent legislation, it is essential to construe particular provisions in their full context, and give due weight to the objectives of the legislation as a whole.

TITLE AS PEGGED, OR AS DESCRIBED? SOME RECENT CASES

When a mining tenement has been obtained by grant, as distinct from simple marking out and possession, a particular problem may be highlighted by a boundary dispute.

The mining legislation and regulations require that an application for grant shall set out accurately by map and description the ground applied for. It is intended of course that the map and description should relate precisely to the ground that has been marked out. But in reality there is often a discrepancy between the ground so described and the ground actually marked out.

Assume that the grant of a mining tenement is made in those circumstances, without objection and prior survey, and very likely without the granting authority being aware of any discrepancy.

Does the grant comprise the land described in the application, or the land actually marked out? Does the answer differ according to whether the discrepancy is slight, substantial or total?

This is not to repeat the question of whether the grant is valid, which has been discussed already. Let it be assumed that the grant is valid, notwithstanding the failure to describe the ground actually marked out, or to put it the other way around, notwithstanding the failure to mark out the ground which has been described.

As a matter of logic, one would expect that the grant would correspond to the application, especially as the underlying premise is that the description in the application is accurate. Yet it would be odd if title could be acquired by a process of misdescription (whether deliberate or innocent) as to what had actually been marked out.

The matter has been brought into focus by several recent cases decided in Western Australia.

Whitfield v. Gardiner and others was decided in the Warden's Court at Leonora during 1986. In September 1982 W had marked out two parcels of land, one immediately north of the other, and was granted two prospecting licences. Subsequently in May 1984 G and others marked out two parcels of land, one immediately north of the other, and each immediately west of W's tenements. G and others were granted prospecting licences for those two parcels. Later again, in November 1984 W converted his two prospecting tenements to mining leases, which were duly granted. Survey

of the mining leases then followed, and during it a dispute arose as to the location of the boundary separating W's tenements to the east and G's tenements to the west.

The Warden noted the importance of the sequence of events to the issue of which land was available for marking out. Effective marking out of the prospecting licence ground by W would have meant that none of that ground would have been available subsequently to G. On the other hand, if it had been available to G for his licences, then it would not have been available subsequently to W for his leases. Thus knowing where the boundaries were for W's initial prospecting licences was crucial.

The Warden found that W's marking out of his prospecting leases had not been in accordance with the Act and regulations. He found that there was a paucity of evidence on marking out by W, and considered that it would be grossly wrong in this instance to rely on descriptions because on the evidence they were unreliable. He held that the ground along the eastern boundary of G's ground was open for mining when marked out by G and others. Given the G's marking out was effective, the Warden held that the western boundary of W's mineral leases would be ascertained by determining the eastern boundaries of G's prospecting licences.

It is worth setting out at length some of the observations made by the Warden, for they illustrate how the various principles discussed previously become relevant in practice.

> I reject Whitfield's evidence that point 'B' was the datum of P.L. 38/43 and P.L. 38/44. Even if I had accepted this evidence it would not be open to me on the whole of the evidence concerning marking out to conclude where the boundaries for these two prospecting licences were. I find that these two prospecting licences were not marked out in accordance with the Act and Regulations.
>
> These findings do not render the grant invalid. Under the Mining Act 1904 as amended, marking out the ground in accordance with the Regulations thereto conferred title to the ground. If the ground was not marked out in accordance with those Regulations, then title could still be obtained but it would be obtained at the point of registration. If there were any defects in marking out then these were cured upon registration. Under the [1978] Act title is not conferred by marking out but by grant. A person cannot plaint for forfeiture because of non-compliance with marking out provisions. If there were defects in marking out then in my opinion these are cured by the grant.
>
> The Act does of course place great significance on marking out (see section 105A on rights in priority). Persons inspect any area of interest, decide what it [*sic*] open for mining and what they want and then mark out so that such ground is captured within the boundaries of the marking out. "Pegs in the ground" is the only true indication of where the tenement is. The only way that a person can satisfy himself as to whether the ground is open for mining is to do a field inspection and inspect the marking out. It is necessary for tenement holders to maintain marking out (see Regulation 71).
>
> A description is an indication to other interested members of the public of the location of the marking out. It is not uncommon to find that descriptions are wrong. It would be ideal if descriptions were always accurate, however they can really only be taken as a guide. That is not to say that on some occasions the description may accurately reflect the situation on the ground. Descriptions are used to prepare public plans. When tenements are surveyed and found to have been wrongly described then the plans are altered to reflect the true position on the ground.
>
> When the Warden hears a survey dispute he looks to see where the marking out is on the ground. A person may apply to amend a description. I have previously stated that if I was to find that "pegs in the ground" was not the paramount consideration then a shiver of uncertainty would run through the mining industry. My decision in *Clements v. Victor Petroleum and Resources* emphasised the need for marking out provisions to be strictly

> complied with. This coupled with compliance with Regulation 71 should dramatically decrease the frequency of survey disputes.[23]
>
> . . . In my opinion, it would be grossly wrong in this instance to rely on descriptions to reach a conclusion on the proper position of the boundaries the subject of this dispute. This is not only because the descriptions are so unreliable but also because great reliance would need to be placed on description because of the paucity of evidence of marking out. I have previously stated that "pegs in the ground" is the paramount consideration in these sorts of disputes. Determining the boundaries should not be achieved by speculation.[24]

The views expressed by Warden Reynolds S.M. in *Whitfield v. Gardiner and ors.* may be set against those expressed in *Campbell v. Knightsbridge Holdings Pty. Ltd. and ors.*,[25] in the reasons for judgment delivered on 17 October 1986 by Franklyn J.

A number of issues were raised in *Campbell*'s case, but only one is relevant here. C had been granted a group of prospecting licences under the Mining Act 1978 (W.A.). He negotiated with the defendants for the sale of the licences to them. A proposed sale of the licences fell through, the defendants obtained tenements over the area themselves, and litigation ensued.

On the evidence, which is set out in great detail in the reasons for judgment, it was found that the ground pegged by C was not located anywhere near where described in his licence applications. Even worse, C had in fact pegged over existing tenements known as 'the Scott claims'. Later the Scott claims terminated so that the ground became available, C's tenements were rescinded by the Warden upon the application of the defendants, and new tenements were granted to the defendants.

In the course of reasons for judgment Franklyn J. made the following observations:

> In my view there is no room under the provisions of the present Mining Act for any contention that a person acquiries a prospecting licence over land as marked off on the ground, when the land as described in the application is entirely different.[26]

His Honour then set out[27] the numerous provisions of the Act and regulations which show the necessity for a connection between the ground applied for and the ground marked out. He then came to the following conclusion:

> In my opinion these provisions clearly provide that a prospecting licence is acquired by grant, and may only be granted in respect of the land the subject of the application for such licence, which land is the land described in the application and delineated on the map accompanying the same. Before making such application the applicant is obliged to mark out, as required by the Act and regulations, the land the subject of that application. The evidence makes it clear that, even if the plaintiff had marked off the ground the subject of the Scott claims at no time did he apply for a prospecting licence in respect of those lands and so had no title or right to title thereto.[28]

It is noted that Franklyn J. found that the land described and applied for was 'entirely different' from the land marked off. This may be

23 Extracted from 8–9 of the reasons for judgment.
24 *Ibid* 10.
25 No. 1011 of 1986 S.C. W.A.
26 *Ibid* 24.
27 24–25.
28 26.

contrasted with the 'marginal difference' that existed between description and marking out in *Murphy v. Ramsay*[29], in which the High Court had no difficulty in applying what was described as the 'slip rule' contained in section 27 of the Mining Act 1906–1952 (N.S.W.). Section 27 permitted a discretion to grant a lease notwithstanding that the description in the application did not correspond with the land marked out.

> ... when making applications for special leases of that land ... (the) respondent, in describing by metes and bounds the land of which in fact possession had been taken, failed in respects that at best were marginal accurately to describe that land... In my opinion the divergences between the description in the respondent's applications and the land as marked out in this case fairly fell within the terms of s.27.[30]

Some apprehension has been expressed about the views stated by Franklyn J. in the passages quoted above.[31] It has been said that doubt is cast upon the general perception that the important factor in determining the location of a tenement is the situation of the pegs in the ground, not the description in the application. It has also been said that if the *obiter dicta* of Franklyn J. is correct, then (in terms of Warden Reynold's observation) some of us are going to do a lot of shivering.

I would suggest however, that the views expressed by Warden Reynolds S.M. and Franklyn J. are not necessarily inconsistent.

Warden Reynolds has accepted the concept that title is derived from the grant. He does not regard the description in the application as irrelevant. It enables an enquirer to know where to start looking for the pegs. In effect what he says is that the grant will not be invalidated by errors in the description, but one needs to look at pegs in the ground to find out what has been granted.

Franklyn J. does not regard the pegs as irrelevant. His Honour does not say that title can be obtained by description regardless of pegs. He says precisely the opposite. The description in the application was held to be of no avail because it did not relate to the ground which had been pegged in any way. In effect his Honour is saying:

> You can peg all the ground you like, but if you don't apply for it you will not get it.

I would suggest that it is implicit in what Warden Reynolds S.M. and Franklyn J. are each saying that proper pegging and proper description is necessary, subject only to the discretions permitted by the legislation. Pegging without proper application in respect of what is pegged is of no avail. Application without sufficient relationship to what has been pegged is of no avail. It would be reading too much into the reasons given by Franklyn J. to suggest that the nitty-gritty of where a boundary actually lies is to be determined without primary reference to the pegs.

What has happened is that the need for a close correlation between pegging and description has been highlighted. Perhaps greater use should be made of provisions in legislation and regulations designed to bring pegging and description closer together. Those provisions may include

29 (1964) 111 CLR 344.
30 *Ibid per* Barwick CJ 349–350.
31 M. W. Hunt & C. Foley, Information Service (WA) (1986) 5 *AMPLA Bulletin* 69, 70.

survey before grant, or making a grant conditional upon subsequent survey, or post-grant amendment of description and adjustment of boundaries in the event of dispute.

There has been a number of tenement cases recently in Western Australia, notes of which can be found in the *AMPLA Bulletin.*[32] Many of the cases arise from objections to the grant of prospecting licences. In Western Australia those licences are granted or withheld by the Warden. If several applicants seek the same ground, section 105A of the Mining Act 1978 (W.A.) gives priority to the applicant who has first marked out the ground in the prescribed manner. Currently several Wardens appear to be taking the view that this requires strict compliance, not just substantial compliance, thus giving full weight to 'pegs in the ground'.[32a] The recently noted cases have not been boundary disputes as such (with the exception of *Whitfield v. Gardiner*) but they are of relevance to the issues likely to arise in a boundary dispute. This is because basically there are two types of boundary disputes. One type arises where it is accepted that the adjoining tenements are valid, but there is a dispute about where a common boundary lies. This tends to occur when at some stage after grant there is the realisation that ground near the boundary may be highly prospective. At its simplest, this type of dispute might involve no more than making a survey based on the pegs in the ground, and the correction of what has been shown on a map. The other type of dispute arises where the attack by the 'jealous neighbour' is carried all the way by the assertion that the other party's tenement is invalid. The most likely allegations are that the pegging took place on ground which was not available, or that the pegging failed to comply with the regulations in circumstances where strict compliance was called for. The consequence of a successful attack on validity would be to open up the ground for pegging by someone else. The sort of merry-go-round which this can lead to is well illustrated by the South Australian cases of *Anisimoff v. Fraser (No. 1)*[33] and *Anisimoff v. Fraser (No. 2)*[34], in which a precious stones claim was irregularly pegged; it was then overpegged by A but also irregularly; then it was overpegged by F, but with a minor error; the Warden then exercised a discretion to permit the error to be rectified.

THE REMEDIES AVAILABLE

The courses of action open in a boundary dispute are perhaps best illustrated by taking a hypothetical situation. Assume the following sequence of events:

(i) A is granted a prospecting licence over certain ground;
(ii) Subsequently B is granted a prospecting licence over adjoining ground;

32 (1986) 5 *AMPLA Bulletin* 49–50; (1986) Vol. 5(4) 69–71; (1987) Vol. 6(1) 35–36. Also see M. W. Hunt *op. cit.* n.17 35–37.

32a *Cf. Melville v. Hunter Resources Ltd.* (1987) unreported, in which the F.C. of the S.C. W.A. held by majority that substantial compliance is sufficient. Leave to appeal has since been granted by the High Court.

33 (1983) 33 SASR 453.

34 (1983) 33 SASR 458.

(iii) A and B each assert title over the same ground near the common boundary, there is an overlap of ground alleged to have been pegged by each of A and B, they are unable to resolve their differences;

(iv) B applies to have his prospecting licence converted into a mining lease, including the ground in the disputed area.

Now look at the problem from A's point of view. What courses of action are open to him? Particular note should be taken of the provisions of the mining legislation which will define the jursidiction and powers of the Warden's Court. In addition, consideration should be given to the common law remedies available in a court of civil jurisdiction — in this case the Supreme Court.

The following possible steps by A come to mind, and there may well be more. These steps would of course need to be checked off against the applicable legislation:

(i) Object to B's mining lease application, on the basis that the disputed ground is not available to B, due to A's existing tenement. This objection would lead to an examination of the tenement boundaries.

(ii) If the Warden recommends to the Minister that the lease be granted to B, make submissions to the Minister to show reason why his discretion should be exercised against the grant to B.

(iii) File a Plaint with the Warden's Court requesting the Court to determine the boundary between the tenements, to order B to deliver up to A all samples and information derived from unlawful entry, to restrain B from further entry, and to order B to pay damages.

(iv) Seek an order by the Warden's Court for survey of the boundary, together with a declaration that B is not lawfully in possession of the disputed ground, and consequential orders.

(v) Seek a declaration from the Supreme Court as to A's tenement, with consequential orders for injunction, delivery up, and damages for B's trespass.

(vi) Seek a declaration from the Supreme Court that B's prospecting licence is invalid because the ground claimed by B was not available, that B's pegging did not comply with the requirements, and that B's application for the prospecting licence did not comply with the requirements.

(vii) Seek an order by the Warden's Court forfeiting B's prospecting licence for B's non-observance of the conditions contained in the licence.

In summary, the Warden's Court is given an extensive jurisdiciton and wide powers sufficient to deal with matters concerning boundaries, title and possession, and trespass. However, in some circumstances it would be more advantageous to take proceedings in the Supreme Court.

The actual course to be taken in a particular dispute will depend upon factors peculiar to that dispute, including the availability of evidence, and the reliability of witnesses. In the end, 'people in the box' might be just as crucial as 'pegs in the ground'.