REGISTRATION OF MINING TITLES IN WESTERN AUSTRALIA

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The discovery of gold in Australia at the beginning of the 1850's came at a time when statutory mining law was virtually non-existent. The licensing system was rapidly introduced, but proved to be a wholly unsatisfactory means of policing mining activities on the goldfields. The first true mining titles were introduced several years after the goldrushes began. Provision was made for the issue of mining leases as early as 1853,[1] and in 1855 the concept of the miner's right was introduced.[2] The miner's right itself is not a mining tenement, but the holder of a miner's right has the ability to obtain such an interest by pegging out land and taking possession of an interest called a claim. In more recent times, provision has been made in the mining statutes for large exploration titles.[3]

The concept of registration of mining titles has been present from early times. It does appear that the original purpose of the registration of mining titles was merely to record the area of claims taken up and their owners. However, as far back as 1864, the argument was raised that registration should form the basis of title, rather than act as a mere record.[4] It is in the Western Australian mining legislation that the concept of title by registration has gained its greatest support. The purpose of this paper is to analyse the provisions relating to the registration of mining titles under the Western Australian *Mining Act 1904* and to discuss the effects of these provisions. To determine these effects, the registerable mining titles in Western Australia, the claim and the lease, will be studied in the following way.[4a] The

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1 17 Vic., No. 4 (1 December 1853).

2 The Goldfields Act 1855, 18 Vic., No. 37 (12 June 1855), s. 3.

3 Queensland, Mines Amendment Act 1930; Tasmania, Mining Act 1958; New South Wales, Mining Amendment Act 1963; Victoria, Mines (Exploration) Licences Act 1964; South Australia, Mining Act 1971; Western Australia, Mining Act 1904 (as amended), s. 276 (Use of Minister's powers to declare temporary reserves).

4 *Victorian Hansard,* Vol. XI Part 1, pp. 686-687.

4a Apart from the claim and the lease, there is also provision for the registration of a prospecting area. This is an area which can be marked out by the

method of acquisition of each mining title and the rights flowing from the title itself will be set out. The registration provisions and any further rights flowing from registration will then be discussed. Finally, the overall effects of registration of the title will be mooted.

Further, various other schemes of registration of land titles will be compared with the system of registration of mining titles in Western Australia.

1. CLAIMS

Despite the fact that the miner's right has been widely regarded for several decades as an anachronism and wholly unsuitable to present-day large-scale mining activities, the possession of a miner's right remains a pre-requisite to the acquisition of a claim in Western Australia.[5] Under s. 26 of the *Mines Act 1904,* the holder of a miner's right is entitled to a wide variety of rights and privileges. *Inter alia,* he is entitled to occupy the land for mining purposes and to mark out his claim in accordance with the regulations passed pursuant to the Act.[6] Moreover, any person taking up land by virtue of a miner's right is deemed in law to be possessed (except as against the Crown) of such land taken up and occupied.[7]

The holder of a claim has a right to transfer or encumber his interest.[8] The claim holder's right to deal with his interest has been severely criticized.[9] In the current mining boom in Western Australia, the majority of claims have been pegged for prospecting purposes only, despite the fact that the claim in Western Australia can be

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holder of a miner's right but it can only be held for a very limited period. At the end of the period, the holder of the prospecting area must apply for a lease or mark out a claim over part of the area. Where the prospecting area is taken up over private land, registration is compulsory. In fact by regulation 135, it is only upon registration of a prospecting area over private land that the holder may enter and search for minerals. Apart from regulation 135, registration of the prospecting area appears to have no effect.
In relation to large-scale exploration titles, the Governor uses his power to create temporary reserves. However, there are no provisions relating to registration of these temporary reserves.

5 Mining Act 1904, s. 26.

6 In Victoria and South Australia the rights have been considerably reduced. Mines Act 1958 (Vic.), s. 15; Mining Act 1971 (S.A.), ss. 22 and 25.

7 Mining Act 1904, s. 31 (2).

8 Mining Regulations, reg. 188 and reg. 192.

9 Western Australia, Report of Committee of Inquiry 1971. (Appointed to inquire into, and report on the operation of the Mining Act of the State and to report whether any and what amendments should be made to the Mining Act 1904), 19-20.

regarded as a combined prospecting and production title.[10] In many cases, land has been pegged with little regard to the mineral potential of the area and ground has been held indefinitely. The labour conditions and the self-regulatory system surrounding forfeiture of the claim for failure to comply with labour conditions should adequately police such a situation. But the Western Australian Mines Department has found it impossible to police the large number of claims and the self-regulatory process is not being used.[11] Because claims are transferable, they have been " . . . sold virtually as real estate." In recent amendments to the mining legislation in South Australia and Victoria, the claim holder's right to transfer has been removed. The Report of the Committee of Inquiry reviewing the mining legislation in Western Australia, suggests that the various assortment of claims should be abolished and replaced by a prospecting title and that there should be no right to transfer such a prospecting title.[12]

However, as the legislation stands at present, there are many types of claims which can be acquired, including the ordinary lode claim, the ordinary alluvial claim, the dredging claim and the mineral claim. Claims can be obtained over Crown land and over private land subject to compliance with Part VII of the Act.

(a) *Registration provisions*

All claims, other than ordinary alluvial claims, must be registered. Ordinary alluvial claims may be registered.[13] A person who has pegged out a claim must apply for registration within ten days of pegging out the claim.[14] The application is lodged with the Warden of the appropriate gold-field. The Warden, after obtaining a report from the Government geologist or other professional officer, is required to hear the application and objection (if any) and to submit the application and report together with a recommendation to the Minister. The Minister may refuse or approve the application for registration for the whole or any part of the area applied for and may impose conditions as he thinks fit.[15] Moreover, where two or more applications are made

10 Ibid.
11 Ibid.
12 Ibid.
13 Mining Regulations (W.A.), (hereinafter referred to as Mining Regs.), reg. 40.
14 Minings Regs., reg. 153.
15 See generally Mining Regs., reg. 55. This regulation applies to mineral claims. Slightly different procedure is followed in relation to other types of claims.

for the same land, the Minister has a discretion as to the priority of registration.

All dealings affecting registered claims must be registered at the Warden's office.[16] Although there is no clear legislative direction, it appears that it is the duty of the Warden for each gold-field to keep a register of all mining tenements, other than leases, and any dealings therein.

The Act provides for the lodgment of caveats in ss. 284-286. Any person claiming an interest in a mining tenement may lodge a caveat forbidding the registration of any transfer or instrument affecting the interest. Upon receipt of the caveat, the Warden or Mining Registrar must notify the holder of the mining tenement that the caveat has been lodged. The holder may summon the caveator before a judge of the Supreme Court to show cause why the caveat should not be removed. The caveat remains in force until certain circumstances arise. If a transfer or other dealing is lodged for registration, the caveator must be given notice. Upon the expiration of fourteen days after notice is given, the caveat will lapse unless the caveator obtains a court order to restrain registration. It is only upon a dealing being lodged for registration that a caveator must actually prove he has a supreme right.

Specific provision is made for the lodgment of a caveat by consent when a contract for the sale of a mining tenement has been entered into. Such a caveat remains in force for the full period specified in the agreement.[16a]

(b) *Rights flowing from registration of the claim*

There are a number of specific areas in which rights flow directly from registration of a claim. No mortgage of a mining tenement is effective until it is registered[17] and the transfer of a mortgage is only effective upon registration.[18] Registration of a claim taken up over private land is also very important. S. 154 states that the marking off, registration or grant of a claim, confers no right to mine until a certificate of registration is issued and no certificate of registration will be issued until compensation is paid or an agreement as to compensation is made.

16 Mining Regs., reg. 46.
16a Mining Act 1904, s. 285.
17 Mining Regs., reg. 192.
18 Mining Regs., reg. 201.

(c) *Effect of Registration*

Although there have been a number of clear judicial statements in Western Australia that title to the claim is conferred by the pegging out of the land, registration does appear to have same other important effects. In *Hazlett v Rasmussen,*[19] Burt J. stated that such title as a miner acquires under the *Mining Act 1904* is acquired by his taking up and occupying land in accordance with the provisions of the Act and the regulations. He stated,

> Title is antecedent to registration. The scheme is one for registration of title not title by registration.[20]

Wickham J. in the same case made statements to a similar effect. He stated that the registration provision making registration compulsory was a mere regulatory matter and that the certificate of registration is just evidence of a pre-existing title.[21] He raised the question as to whether or not failure to register could at some point have the effect of divesting title properly acquired, but on the facts found it unnecessary to answer.

In *Allied Minerals N.L. and Allied Eneabba P.L. v Adamson & Others,*[22] Wickham J., in a dissenting judgment, again expressed the view that title to a claim was not gained by registration. This case arose as a result of the High Court decision in *Adamson v Hayes.*[23] The appellants in the *Allied Minerals* case had had a claim for specific performance of an agreement rejected in *Adamson v Hayes.* They had claimed equitable interests in a number of mineral claims pursuant to an oral agreement with the syndicate. They had lodged caveats with the Mining Registrar at Perth claiming an interest in the mineral claims under the agreement and forbidding the registration of any transfer affecting the claims.

After the High Court decision, the members of the syndicate lodged applications for the transfer of the shares in the mineral claims to Western Titanium Pty. Ltd. The Registrar gave notice to the appellants as caveators pursuant to s. 284(7) of the *Mining Act.* The appellants then commenced proceedings under s. 284(9) of the Act for an order to direct the Registrar to delay the registration of the transfers pending the outcome of a petition by the appellants for special leave to appeal

19 [1973] W.A.R. 141.
20 Id. at 144.
21 Id. at 145.
22 [1974] W.A.R. 21.
23 (1973) 130 C.L.R. 276.

to the Privy Council against the High Court decision which denied them any interest in the claims.

The judge in chambers refused the appellants the order on the basis that the effect of granting an order would be to stay the judgment of the High Court. On appeal to the Full Court of the Supreme Court of Western Australia, it was held that the appellants were entitled to the order.

All three judges agreed that the granting of the order would not stay or render nugatory the judgment of the High Court. The fact that the appellants' claim for specific performance in the High Court had been dismissed, did not divest the appellants of their rights pursuant to s. 284(9) of the *Mining Act* to appeal to a judge for orders directing the Registrar to delay registration of the transfers.

Lavan and Jones JJ. held that having regard to the facts of the case and the serious consequences which could ensue to the appellants, the judge in chambers should have exercised his discretion to grant the order. Evidence was led to show the loss to the appellants would be great if they were deprived of the opportunity of dealing with the mineral claims. Both judges doubted that the prior equities of the appellants (if they were so held to be by the Privy Council) would survive once the claims were registered in the name of Western Titanium.

> . . . I take the view that if the transfers are registered and contrary to the opinion of Wickham J., the trustees do not in fact take subject to any prior equities, the appellants may sustain financial injury of such gravity as to be incapable of being adequately compensated.[24]

Although doubtful on this issue, Lavan and Jones JJ. both inclined more to the view that registration of the claims would defeat prior equitable interests even where the new registered holder of the claim become registered with notice of the prior equitable interests. Nevertheless, it can be argued that they were more concerned with the practical consequences of holding against the appellants, than with the effects of registration as such. Even if the appellants' equitable interests were ultimately upheld in the Privy Council, and registration did not operate to defeat the interests, the appellants still stood to lose a great deal financially. Once Western Titanium became registered holders of the claims, it could immediately start working the claims and large profits were expected quickly.[25] It would be impossible to adequately

[24] Supra note 22 at 25.
[25] Ibid.

compensate the appellants for losses incurred in this intervening period and Jones J. went so far as to say that a Privy Council decision in favour of the appellants would be rendered nugatory.[26]

The dissenting judgment of Wickham J. is a more carefully reasoned one. He stated that to decide if the registration of the transfers would involve the appellants in any serious injury, the effects of registration of a claim and registration of a transfer of a claim must be examined. In reiterating that registration of a claim has in itself no investing effect, Wickham J. relied on the earlier decision of *Hazlett v Rasmussen*. Similarly, registration of a transfer of a claim could have no investing effect: the transfer itself operates as a conveyance of the bundle of rights in the mineral claim. Wickham J. stated that there was nothing in the Act to suggest that registration of a transfer of a mineral claim defeats equitable interests when the transferee becomes registered with notice of the prior equitable interests.

The only possible statutory provision which could be read as encompassing such a principle would be regulation 232. Regulation 232 provides that every deed, contract or other instrument relating to the title or transfer of any mining tenement required by the Act or regulations to be registered and which is not registered, shall so far as regards any property affected, be void as against any person claiming bona fide and for valuable consideration under any subsequent deed, contract or instrument duly registered. The regulation does not mention notice but notice of a prior unregistered interest may affect bona fides.[27]

Wickham J. doubted that there was any power in the Act for such a regulation,[28] but held that it was inapplicable to the facts of the case anyway. Regulation 232 strikes at unregistered documents and instruments, as distinct from interests, and the whole point of the case was that the appellants did not have a document to create or evidence its alleged interest.

However, if the reasoning of Wickham J. is upheld, and the transfer document itself operates to convey the claim, a question arises as to the relevance of the caveat provisions. Of what benefit is it to the holder of an equitable interest to prevent the registration of a person holding a valid transfer if the latter already has good title through the transfer document? It is submitted that the holder of the equitable interest, by lodging a caveat, would provide the transferee with con-

[26] Id. at 30.
[27] See Davidson v O'Halloran [1913] V.L.R. 367.
[28] Supra note 22 at 27.

structive notice of his interest. The transferee would not be a bona fide purchaser of the legal estate for value without notice and would have to take subject to the interest of the equitable interest holder.[28a]

Thus, although the majority in *Allied Minerals* were prepared to hold that registration of a transfer of a mineral claim may defeat prior equities, even where the registered holder has notice, the reasoning of Wickham J., in dissent, denying such a proposition is certainly more convincing. If legislation does not specifically change some rule of common law, the common law must stand. The common law rule here is that it is only a bona fide purchaser of a legal estate for value without notice of prior equitable interests who obtains a clear title. There are no provisions in either the *Mining Act* or the regulations which change this proposition. If a simple conflict arose between a prior equitable interest and a subsequent registered interest, the registered holder having notice of the equitable interest, it is submitted that the reasoning of Wickham J. should be followed.

Even though registration may not defeat prior equitable interests, it can be argued strenuously, in Western Australia at least, that registration may cure defects in the acquisition of title. In *Florida Investments Pty. Ltd. v Milstern (Holdings) Pty. Ltd.*,[29] the defendant pegged out several mineral claims in August 1969. Each of the areas marked out was in a temporary reserve, that is land reserved from occupation. He applied for registration of the claims and in May 1970, the Minister for Mines registered the defendant's claims. In October 1969, the lands in question ceased to be lands reserved from occupation and in November 1969, the plaintiff pegged out claims over portions of this land. He applied for registration. Objection to the plaintiff's registration was lodged by the defendant and in March 1971, the Warden struck out the plaintiff's application. The plaintiff then claimed declarations from a judge in chambers that the defendant's marking out was illegal because the land at the time was part of a temporary reserve and that his marking out could not have founded a valid application for registration. The defendant claimed that the plaintiff's action should be struck out as showing no reasonable cause of action. Lavan J. held in favour of the defendant despite the High Court authority of *Kenda v Andrea*.[30]

Kenda v Andrea was a South Australian case and was thus decided under the South Australian *Mining Act 1930-1962* and the regula-

28a Pilcher v Rawlins, (1872) 7 Ch. App. 259.
29 [1972] W.A.R. 21.
30 (1966) 115 C.L.R. 519.

tions.[30a] A competition arose between two parties both of whom had pegged out the same area of land. Andrea had pegged out the land first and registered his claim, but had failed to peg out the land in accordance with the Act and regulations. Kenda applied to the mining warden for a declaration that Andrea was not lawfully in possession and for consequential orders. On appeal to the High Court, Kenda was successful in obtaining ownership of the claim. It was held that failure to peg a claim in accordance with the Act and regulations resulted in a failure to obtain ownership, notwithstanding that the claim had been registered. Barwick C.J. stated that although a failure to register may be an offence under the legislation " . . . no investing effect appears to be given to registration itself."[31] Under the principle enunciated in *Kenda v Andrea,* it cannot be said that registration will cure a defect in title, for example a defect in the marking out of the land.

Lavan J. distinguished *Kenda v Andrea* on the basis that the *Mining Act* in South Australia was substantially different from the Western Australian Act. In South Australia, there is no ministerial discretion or direction involved in the registration process. In the case of an uncontested application for registration of a mineral claim, little more is required than production of a miner's right and payment of a fee: registration is then automatically granted. Contested applications are decided by a Warden from whose decision an appeal lies to the Supreme Court.[32] In Western Australia, the Minister has an unfettered right to determine whether or not registration of a claim can be effected. Once such registration has been effected, its investing effect remains until the registration is cancelled. Thus, although the defendant's claim had not been marked out in accordance with the regulations, the registration of his claim gave him an interest which could not be defeated by a person who later marked out in the same area in accordance with the regulations.

This decision is in some ways inconsistent with other decisions of the Western Australian Supreme Court which state that registration of a mineral claim has no investing effect. However, perhaps the two lines of authority can be reconciled in the following way. The marking

30a The South Australia Mining Act 1930-1962 and regulations have been repealed and replaced by the Mining Act 1971 and Mining Regulations 1972. However, the sections and regulations upon which the decision in the Kenda v Andrea case was based are substantially the same as under the later Act and regulations.

31 Supra note 30 at 523.

32 Mining Act 1971 (S.A.), s. 24 (3); Mining Regulations 1972 (S.A.), reg. 28 (3).

out of the land in accordance with the regulations confers title to the claim. If land is not marked out in accordance with the regulations, title to the claim can still be obtained but it will be obtained at the point of registration. To this limited extent, registration must be said to have an investing effect: it will cure defects which have occurred in the marking out of the claim.

(d) *Conclusion*

Title to a claim is acquired by the pegging out of the land in accordance with the regulations, but registration does have important effects. Where there is a defect in the title, registration appears to have an investing effect. Further, the mortgage of a claim and any transfer of the mortgage are only effective upon registration.

Where a conflict arises between an unregistered interest and a registered interest in a claim, it does not appear that registration itself will displace the common law principles of notice. The majority in the *Allied Minerals* case were prepared to hold that registration of the claim may have this effect, but it is submitted that their decision was not based on a correct interpretation of the legislation.

In the light of the current view that the claim should be reduced to a mere prospecting title, it is submitted that the provisions in the Act and regulations relating to claims and the registration of claims should be amended. In South Australia and Victoria, the mining legislation has been radically amended to reduce the rights of the holder of a claim.[33] The South Australian legislation provides an appropriate model.

Under the South Australian *Mining Act 1971* the holder of a mineral claim has an exclusive right to conduct mining operations upon the area of the claim and to apply for a mining lease.[34] However, by s. 25(2), a person cannot remove from the area of a mineral claim minerals or soil and minerals exceeding a mass of one tonne unless authorized to do so by the Director of Mines. Further, the ownership of a mineral claim does not confer the right to sell or dispose of minerals or to utilise minerals for a commercial or industrial purpose.[35] A mineral claim cannot be transferred.[36]

The registration provisions in South Australia play an important part in ensuring the proper regulation of claims. It provides a record

33 See supra note 6.
34 Mining Act 1971 (S.A.), s. 25 (1).
35 Id., s. 25 (3).
36 Id., s. 26 (1).

of all existing claims and ensures that that record is a complete one by providing that the claim holder will be divested of his interest if he fails to register.[37] Because there is a complete record of all claims, the aim of reducing the claim to a prospecting title is also made easier to achieve. At the expiration of twelve months from the registration of the claim, the claim automatically lapses unless the holder has made application for a mining lease or licence.[38]

2. LEASES

Several types of mining leases and gold-mining leases may be granted under the *Mining Act 1904*. The Governor has an absolute discretion to grant or refuse a lease notwithstanding that the applicant may or may not have complied with the Act and the regulations thereunder.[39] The lease is granted for a term not exceeding twenty-one years and the lessee has a right of renewal for a further twenty-one year period, subject to compliance with the Act and regulations.[40] An applicant for a lease must first mark out the land in accordance with regulation 99. Within ten days of marking off the land, he must make application for the lease with the Warden or Mining Registrar.[41]

S. 47 provides that the lessee under a gold-mining lease has the exclusive right of mining for gold and other minerals on the subject land, after the approval of an application for a gold-mining lease. It would appear that the lessee's right to mine under a gold-mining lease accrues when the Governor grants his approval. The section relating to mineral leases does not contain such a provision. S. 51 states that a mineral lease shall be granted for the working of some mineral or combination of minerals. In the absence of any other provisions, the right to mine would arise upon the execution of the lease.

The lessee or an applicant for a lease may, with the approval in writing of the Minister, transfer, sub-let, mortgage, encumber or otherwise deal with the lease or application.[42] However, s. 287 states that no contract relating to any mining lease shall be enforceable by any action or other legal proceeding unless some note or memorandum

37 Id., s. 24 (5).
38 Id., s. 26 (2).
39 Mining Act 1904, s. 76 (1).
40 Id., ss. 45 and 53.
41 Mining Regulations, reg. 100 (1).
42 Mining Act 1904, s. 82 (1). The provisions regulating transfers are set out in regs. 116 and 182 and those regulating mortgages are set out in regs. 192-201.

in writing of the contract is made and signed by the party to be charged.

(a) *Registration Provisions*

By s. 81, every lease must be executed in duplicate by the Minister and registered in the Department of Mines in Perth. The original lease is filed and the duplicate is issued to the lessee on payment of a fee of two dollars. Registration of the lease is automatic: the lessee does not need to apply for registration. If there is any dispute as to the original of any lease, or other instrument, the original as filed is conclusive.[43]

S. 83 directs that a Register of Gold-mining Leases and a Register of Mining Leases be kept at the Department of Mines in Perth. All applications for leases, transfers, sub-leases, liens, charges and encumbrances and other dealings or transactions must be registered in the appropriate register.[44] The registers are open to the public on payment of a fee.

(b) *Rights Flowing from Registration of the Lease and the Effect of Registration*

The Act appears to be creating a system of title by registration in relation to leases. However, it is unclear whether the original leasehold interest is vested in the lessee from the time of the execution of the lease or from the time of the registration of the lease. There is no specific provision stating that the leasehold interest is only created upon its registration. As registration is automatic, it may be artificial to distinguish the time of the execution of a document from the time of the registration of a document. However, the issue could arise if there were, for example, an administrative error and the lease was not registered. Perhaps it is fair to state in light of provisions such as ss. 82(1), 85 and regulation 232 (discussed infra), that title to the lease is vested in the lessee upon registration. S. 47 which gives the lessee the right to mine gold from the time of the Governor's approval is inconsistent with this analysis. However, it could be that although the lessee has the right to mine at that time, title is only vested in him upon registration.

The position is clearer in relation to dealings with the lease. By s. 82(1) no transfer, sub-lease, mortgage, encumbrance or other instrument is effectual to pass any estate or interest in a lease or application for a lease or charge or encumber a lease until it is regis-

43 Id., s. 81 (3).
44 Id., s. 82 (1) and (2).

tered in accordance with the Act and regulations. Registration certainly constitutes title as soon as there are any dealings in the lease. An issue arises as to whether or not it is possible to create unregistered equitable interests.

A similar provision to s. 82(1) was discussed in *Barry v Heider*,[45] a case dealing with land under the Torrens system of registration of land titles. It was held that the provision did not exclude the creation of equitable interests which were unregistered. Isaacs J. took the view that the equitable interest in the case at hand was created by the transaction behind the transfer. That is to say, the equitable interest was created by the agreement to sell. Griffiths C.J. held that the handing over of the transfer document itself created the equitable interest. In view of the relevant provision, which states that no transfer until registered can pass any interest, it is submitted that the view of Isaacs J. is the better one. Both judges stated that the Torrens system, by setting up a caveat system and by allowing for the deposit of declarations of trust with the Registrar, envisaged the creation of equitable interests. Similarly, the Western Australian *Mining Act 1904* envisages the creation of equitable interests. It sets up a caveat system whereby the holders of unregistered interests can protect their interests.

However, the Western Australian decision of *In re Blue Bird Mines (N.L.)*,[46] decided directly on s. 82(1) of the Act, appears to be inconsistent with *Barry v Heider* and with the concept that equitable interests can be created under the Act. A company executed a memorandum of charge over certain mining leases it held to the Bank of New South Wales. The leases were deposited with the bank. A warrant of execution on the leases was taken out by one of the company's creditors. Subsequently, the bank lodged a caveat under the Act to protect its interest. The company was liquidated and the liquidator brought an action to determine the respective rights of various parties, including the bank and the execution creditor. The main issue was whether or not the bank was a secured creditor.

Dwyer J. held that the bank was not a secured creditor. He reasoned that mining leaseholds were granted pursuant to express statutory provisions. The lessee's covenants are expressly enacted, including the covenant against assigning without the previous written consent of the Minister. Thus, no interest can pass where ministerial consent is lacking. Dwyer J. relied on two old Irish decisions, *Donoughmore v Forrest*[47] and *Wogan v Doyle*.[48] Both these cases concerned leases

45 (1914) 19 C.L.R. 197.
46 (1942) 44 W.A.L.R. 85.

which contained covenants prohibiting alienation without the consent in writing of the landlord. In both cases, the leases were assigned without the written consent of the landlord and it was held that the assignments were void and failed to pass any interest in the leases.[49]

The facts of *Blue Bird Mines* showed that consent had not been given to the company to mortgage to the bank. Therefore, Dwyer J. held that no interest, legal or equitable, had passed to the bank. He also gave a second reason for deciding that the bank did not obtain an equitable interest. This was based on that part of s. 82(1) which states that no interest shall pass until the instrument is registered. As the memorandum of charge had not been registered, this fact was sufficient in itself to preclude the bank from claiming as the holder of any interest in or security over the leases.

It seems that in this respect, the Torrens system of registration of land titles and the system of registration of mining leases in Western Australia may operate in different ways. There is a vital difference in the relevant provisions. In the case of the transfer or mortgage of land titles under the Torrens system, there is of course no question of ministerial consent. The transaction for the sale or mortgage of land is entered into between two independent parties who are free to contract in any way they wish. In the case of the mining lease, the lessee has covenanted with the lessor, the Crown, that he will not assign without ministerial consent. The decision in *Blue Bird Mines* makes it clear that this sort of covenant in a mining lease prevents the passing of any interest, legal or equitable, where the consent is lacking. On this basis, the decisions of *Barry v Heider* and *Blue Bird Mines* are not inconsistent with each other.

The second reason enunciated by Dwyer J. is in direct conflict with the decision in *Barry v Heider*. Dwyer J. interpreted s. 82(1) in its literal sense. He was not prepared to look at the transaction behind the instrument and thereby hold that an equitable interest had been created as was the court in *Barry v Heider*. If his decision on this point were to be followed, it would seem that it would not be possible to have unregistered equitable interests in mineral leases.

47 (1871) 5 C.L.Ir. 443.

48 (1883) 12 L.R.Ir. 669.

49 There is substantial authority for the view that a covenant against alienation without consent will not prevent the passing of the interest to the assignee. However the lease will be open to forfeiture. Massart v Blight, (1951) 82 C.L.R. 423; Wood v Eisen, (1947) 48 S.R. N.S.W. 5; Williams v Earle, (1868) L.R. 3 Q.B. 739.

However, the Act does contemplate the creation of equitable interests. A caveat system is set up and s. 85 and regulation 232 infer that equitable interests can exist under the Act. Further, the decision in the *McDermott v The Registrar of Mines*[50] implies that equitable interests can exist under the Act. If a situation arose where, for example, ministerial consent had been obtained for a memorandum of charge over the mineral lease but the charge was not registered, it may be possible to confine *Blue Bird Mines* to its facts and hold that an equitable interest had passed to the mortgagee. This would be inconsistent with the second reason of Dwyer J., but consistent with the decision in *Barry v Heider*. This analysis holds more weight in light of the fact that the decision in *Blue Bird Mines* was that of a single judge.

The Act displaces the common law doctrine of notice and creates indefeasibility of title upon registration. S. 85 states that, "Except in the case of fraud, no person dealing with a registered applicant for, or holder of, a lease shall be required or in any way concerned to inquire into or ascertain the circumstances under which the registered applicant, or holder or any previous holder was registered, or to see to the application of any purchase or consideration money, or be affected by notice, actual or constructive, of any unregistered trust or interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such unregistered trust or interest is in existence shall not of itself be imputed as fraud."

Thus, if the holder of a lease enters into a contract to sell the lease to A (and contrary to *Blue Bird Mines* A does obtain an equitable interest), and the holder then transfers the lease to B who registers the transfer, B will not be subject to A's equitable interest even if he had notice of that interest. However, if it could be proved that B was fraudulent, he would have to take subject to A's equitable interest. S. 85 has a similar effect to s. 68 of the *Transfer of Land Act 1893-1959* and comparable provisions are in other State Acts dealing with the Torrens system of land registration. The section 68 type of provision has been interpreted so as to give the definition of fraud a very narrow meaning.

In *Wicks v Bennett*,[51] Knox C.J. said that fraud imported something in the nature of "personal dishonesty or moral turpitude." In *Assets Co. Ltd. v Mere Roihi*,[52] it was stated that the fraud " . . . must be brought home to the person whose registered title is impeached or

50 (1905) 7 W.A.L.R. 270.
51 (1921) 30 C.L.R. 80.
52 [1905] A.C. 176.

his agents . . . [I]f it can be shown that his suspicions were aroused and that he abstained from making enquiries for fear of learning the truth . . . fraud may properly be ascribed to him."[53] These definitions of fraud could properly be used in relation to s. 85 to aid a court in reaching a decision.

The question as to whether the indefeasibility of registered title operates on a wider scale and cures inherent defects in title is a more difficult one. For example, A the registered holder of a lease, forges the relevant ministerial consent to a transfer and then assigns the lease to B who becomes the registered holder of the lease. B then obtains valid ministerial consent and assigns the lease to C who becomes registered. Would B and C obtain indefeasible titles to the lease?

The wording of s. 85 implies that B and C would obtain indefeasible titles. Similar provisions in the Torrens system have been subjected to close scrutiny. The view originally taken in the Privy Council in *Gibbs v Messer*,[54] was that a person registering a void instrument did not obtain indefeasibility of title. Thus, in the example given, B would not obtain an indefeasible title but C would. The *Gibbs v Messer* theory has since been overturned and the principle of immediate indefeasibility has been embraced.[55] If a person registers a void instrument and has not been fraudulent, he will obtain an indefeasible title. In the example given, registration would confer good title on both B and C.

It is interesting to muse upon the decision that would have been given by Dwyer J. in *Blue Bird Mines* if the bank had registered its memorandum of charge. On the basis of the analysis above, it would be thought that registration of the bank's charge would have given it valid title and made it a secured creditor. Despite the fact that the instrument itself was void because of lack of ministerial consent, registration would cure the defect. However, it is very much doubted that Dwyer J. would have reached this decision!

The situation of registration of a document of transfer or mortgage without ministerial consent could only arise in the case of administrative error. In practice, an instrument effecting a transfer or a mortgage would only be registered when produced with the written ministerial consent.

Regulation 232 is a priority provision similar to the priority provisions set up under the system of registration of instruments con-

53 Id. at 179.
54 [1891] A.C. 248.
55 Frazer v Walker, [1967] A.C. 569.

cerning general law land.[56] The need for such a provision in relation to leases is unclear: it is perhaps even inconsistent with the provisions of the Act itself. The scheme, as explained, is one of title by registration—a scheme akin to the Torrens system of registration of land titles. A deed, contract or instrument relating to a lease which is not registered may have no effect anyway[57] and pursuant to s. 85 has no effect as against a subsequent registered interest.

Another interesting point to note in relation to mining leases in Western Australia is that they form an express exception to indefeasibility under s. 68 of the *Transfer of Land Act 1893-1959.* In the proviso to s. 68, it is stated that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to, *inter alia,* " . . . any mining lease or licence issued under the provisions of any statute . . . " Western Australia is the only State which has enacted such a provision. An issue arises as to the necessity for this exception. The registered proprietor of land does not own the minerals in his land: they are owned by the Crown. When a mining lease is granted over private land, it is granted by the Crown although the registered proprietor is entitled to compensation from the lessee for damage to his land. A transferee from the registered proprietor would not obtain any right to the minerals in the land. The indefeasibility of his title would only extend to the land itself. Thus, it is submitted that the express exception to indefeasibility in s. 68 is unnecessary.

In conclusion, it is submitted that the Act sets up a system of title by registration in relation to mining leases. It grants indefeasibility of title to the registered holder and displaces the common law doctrine of notice.

It is important to note that the registration provisions in relation to leases in Western Australia are far more consequential than the lease registration provisions under the mining legislation of the other States and the Territories. Although the legislation in several States provides that the transfer of a lease will only be effective upon registration of the transfer,[58] Western Australia is the only State which

56 Registration of Deeds Act 1897-1967 (N.S.W.); Property Law Act 1958 (Vic.), Part 1; Property Law Act 1974 (Qld.), ss. 8, 240-248; Registration of Deeds Act 1935-1973 (S.A.); Registration of Deeds, Wills, Conveyances and Ordinances 1856-1923 (W.A.); Registration of Deeds Act 1935 (Tas.).

57 In re Blue Bird Mines, supra note 46.

58 Mining Regulations 1972 (S.A.), reg. 50 (1) (e) (ii) and reg. 89 (1); Mining Regulations 1931 (Tas.), reg. 49 (4); Mining Regulations 1940-1946 (N.T.), reg. 130.

displaces the common law doctrine of notice and creates indefeasibility of title.

The idea is to establish certainty and simplicity of mining leasehold interests by setting up a register which conclusively establishes title. A transferee of a mining lease need rely only on the register: even notice, actual or constructive, of any unregistered interest will not affect his title once his interest is registered. In this way, the Western Australian scheme would appear to be superior to the schemes operative in other States. However, the holders of interests which are defeated by the application of the principle of indefeasibility of title do not seem to be given the same protection as under the Torrens system. No guarantee fund is set up: the position of the holder of unregistered interest is an invidious one indeed.

3. OTHER SYSTEMS OF REGISTRATION OF LAND TITLES

It is interesting to compare the system of registration of mining tenements set up by the Act with the general law land system of registration of titles and the Torrens system of registration of land titles. The general law land system is one of voluntary registration of instruments whereas the Torrens system is one of title by registration. The Western Australian *Mining Act 1904* includes characteristics of both systems.

General law land is land which was alienated by the Crown before the various Acts setting up the Torrens system of registration came into operation, and which has not been brought under the operation of these various Acts. Title to the land is acquired by the execution of the document. The importance of registration under the system is that a deed which is registered generally takes priority over a deed which is not registered. As stated, a similar priority provision is set up in relation to both claims and leases in Western Australia. The necessity for such a provision is extremely doubtful in light of the indefeasibility provisions. In any case, the inherent problems of the priority provision in the general law land system of registration are even more evident in the case of mining tenements. Where an interest is created without an instrument the provision can have no effect. For example, an interest in a claim is created by the marking out of the land.

The Torrens system of registration is a far more effective one. The purchaser of an interest does not have to search every document in the chain of title to ensure he will obtain a valid title—he merely relies on the register. He will not lose his interest if it is discovered that one

of the documents in the chain was void for some reason. It could be argued that a system of indefeasibility of title, as is set up in Western Australia in relation to leases, is not essential in relation to mining leases. They are only granted for periods of up to twenty-one years, admittedly with a right to renewal, and the task of searching the chain of title would not be an onerous one. It would be very unusual for a chain of title in a mining lease to contain more than one or two documents. However, the replacement of the common law doctrine of notice is valuable as long as sufficient provision is made for the holder of an unregistered interest to protect his interest.

One idea would be to allow for the registration of mining leases under the *Transfer of Land Act 1893-1959*. In this way, all the benefits of a State guaranteed register of titles would accrue and the position of the holder of an unregistered interest would be safeguarded. However, large costs would be involved in bringing such a scheme into operation.

Whether this type of scheme could be adopted or not, it is submitted that there should be a uniform system throughout Australia regulating the creation and registration of mining tenements. The unique Western Australian system of indefeasibility of interests under mining leases may not be essential. However, as long as adequate safeguards are given to the unregistered interest holder, it may prove the easiest to manage.