RESOURCES LAW AND PUBLIC POLICY

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Control of Natural Resources

During the first half of the nineteenth century, control of natural resources in the Australian colonies remained firmly with the United Kingdom government. The agents of the United Kingdom government for the exercise of this control were the colonial Governors, who acted in the disposal of the "waste lands of the Crown" in accordance with various statutes,[1] regulations, orders-in-council and instructions emanating from London.

However, the significance of this control was not lost on the local settlers — after all, the "waste lands of the Crown" represented the principal asset and source of revenue in the colonies. Accordingly, the agitation for self-government in New South Wales in the 1840's included a specific demand for control of Crown lands. In this regard, the *Australian Constitutions Act (No. 2)* 1850[2] was a disappointment. Although the Act authorized the establishment of bicameral legislatures in New South Wales, Victoria, Van Diemen's Land, South Australia and Western Australia, and provided for the conferral of extensive legislative power upon such bodies, the administration of Crown lands was expressly excluded from the ambit of such power.[3]

Nevertheless, the *Australian Constitutions Act (No. 2)* 1850 did authorize the colonial legislatures of New South Wales and Victoria to draw up their own constitutions. In an act of quite remarkable defiance, these bodies prepared constitutions which expressly transferred the control of Crown lands from the Governor to the legislature. These constitutions required ratification by the United Kingdom Parliament: hence the passage of the *New South Wales Constitution Statute* 1855[4] and the *Victorian*

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1. "An Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies", 5 & 6 Vict., c.36 (Imp.); "An Act to amend an Act for regulating the sale of Waste Lands belonging to the Crown in the Australian Colonies, and to make further Provision for the Management thereof", 9 & 10 Vict., c.104 (Imp)
2. "An Act for the better Government of Her Majesty's Australian Colonies", 13 & 14 Vict., c.59 (Imp.)
3. Section 14
4. "An Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of New South Wales, 'to confer a Constitution on New South Wales, and to grant a Civil List to Her Majesty' ", 18 & 19 Vict., c.54 (Imp.)

Constitution Statute 1855.[5] The control of Crown lands was vested exclusively in the local legislatures by covering clause II of these statutes,[6] in the following unequivocal terms:

> . . . the entire Management and Control of the Waste Lands belonging to the Crown in the said Colony . . . , and of the Proceeds thereof, including all Royalties, Mines and Minerals, shall be vested in the Legislature of the Said Colony . . .[7]

The *Australian Waste Lands Act* 1955[8] provided the opportunity for the legislatures of Van Diemen's Land and South Australia to assume control of Crown lands within their jurisdiction. Subsequently, Queensland[9] and Western Australia[10] obtained comparable provisions in their constitutions.

The historical significance of such provisions is undoubted. They represent a major triumph for the colonists over the United Kingdom government, achieved in advance of full responsible government. But their significance is by no means only historical. The demise of the prerogative relating to Crown lands in the Australian States has practical significance today, as illustrated by the cases of *Nicholas v. Western Australia*[11] and *Cudgen Rutile (No. 2) Pty Ltd v. Chalk*.[12] These cases show that State governments, and Ministers therein, are entirely dependent upon statutory authority for their power to deal with Crown lands and resources. In the absence of statutory authority, arrangements concluded with State governments for the acquisition of interests in Crown lands and resources are invalid, regardless of the solemnity with which they were negotiated, the form in which they appear, and the consideration that may have passed from the private party in reliance thereon.

In contrast, the prerogative relating to Crown lands appears to have been resuscitated in the A.C.T.[13]

5. "An Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of Victoria, to establish a Constitution in and for the Colony of Victoria", 18 & 19 Vict , c.55 (Imp)
6. The status of these provisions as covering clauses is worthy of note As such, they appear to be incapable of repeal or amendment by the legislatures of New South Wales and Victoria. The powers of constitutional amendment conferred on these bodies by the stautues are confined to the provisions contained in the schedules to the statutes, and do not extend to the covering clauses: see 18 & 19 Vict , c 54 (Imp.), s.XXXVI, and 18 & 19 Vict., c.55 (Imp), s.LXI.
7. 18 & 19 Vict., c 55 (Imp), cl II The language of 18 & 19 Vict., c 54 (Imp), cl.II is slightly different, but the effect appears to be the same
8 "An Act to repeal the Acts of Parliament now in force respecting the Disposal of the Waste Lands of the Crown in Her Majesty's Australian Colonies, and to make other Provision in lieu thereof", 18 & 19 Vict , c 56 (Imp)
9 Constitution Act of 1867, 31 Vict , c 38 (Qld), sections 30 and 40
10 Western Australia Constitution Act 1890, 53 & 54 Vict c.26 (Imp.) s.3. See Midland Railway Co v Western Australia [1956] 3 All E R 272 at 276.
11 [1972] W A R 168
12 [1975] A C 520
13 Johnson v Kent (1974-75) 132 C L.R 164

Ownership of Natural Resources

Control of Crown lands provided an opportunity for the colonial legislatures to depart from the policies of the United Kingdom government regarding disposal of interest therein. This opportunity was rapidly taken, in a way which transformed the management of natural resources in Australia.

The English common law presumes that the owner of land is entitled to all that lies above or below the surface: *cujus est solum, ejus est usque ad coelum et usque ad inferos*. Minerals are part of the land in which they naturally occur,[14] and thus pass into private ownership upon Crown grant of the land, unless they are specifically reserved from the grant.[15] The only exception to this general rule is made in the case of the royal metals, gold and silver, which (by virtue of the prerogative) remain subject to Crown ownership notwithstanding the Crown grant of the land in which they naturally occur, unless that ownership is relinquished by "apt and precise words".[16]

In England it was not the practice to relinquish Crown ownership of the royal metals, but neither was it the practice to reserve other minerals from Crown grants.

The Australian colonies inherited this common law[17] and this practice. Accordingly, in the middle of the nineteenth century, private landowners were usually entitled to all minerals within their land other than gold and silver.

However, during the last quarter of this century the legislatures of the Australian colonies rejected this English practice, and adopted the radical policy of reserving all minerals from future Crown grants of land.[18] The reason for this departure from the English practice is not entirely clear, although it is interesting to note that similar action was taken by the Dominion government in Canada in 1887 and 1889.[19] In more recent times, Crown ownership of minerals in place has been strengthened in Vic-

14. Wilkinson v. Proud (1843) 11 M. & W 33
15. Williamson v. Wootten (1885) 3 Drew 210
16. The Case of Mines (1568) 1 Plow. 310
17. The applicability of the common law was confirmed by s 24 of the Australian Courts Act 1828, 9 Geo.IV, c.83 (Imp.), which stated.

    " .. all Laws and Statutes in force within the Realm of England at the time of the passing of this Act [25 July 1828] . . shall be applied in the Administration of Justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said Colonies ."

    Two cases which involved the recent application of this provision are Dugan v. Mirror Newspapers Ltd (1978) 142 C L.R 581 and State Government Insurance Commission v. Trigwell (1978-79) 142 C.L.R. 617
18. Crown Lands Act 1884 (N S.W.) s 7; Lands Act 1891 (Vic), s 12 and Mines Act 1891 (Vic), s.3; The Mining on Private Land Act of 1909 (Qld), ss.6, 21A, Crown Lands Act 1888 (S A), s 9, Mining Act 1978-1982 (W.A), s. 9, Crown Lands Act 1905 (Tas.), s.27, and Mining Act 1911 (Tas.), s 339.
19. Thompson "Petroleum Land Policies Contrasted" (1964) 36 *Colorado Law Review* 187

toria,[20] Tasmania,[21] South Australia[22] and New South Wales[23] by legislation expropriating some of the minerals which passed into private ownership before the policy of general reservation was adopted. A further step in this direction is now planned for Victoria.[24]

In the case of petroleum, all Australian States have declared that petroleum in place is owned by the Crown without exception, regardless of when the land containing such petroleum may have passed into private ownership.[25] By this bold approach they avoided the complexity which surrounds mineral ownership in some States,[26] while at the same time providing a clear answer to the question which has bedevilled American petroleum jurisprudence; namely, is petroleum in place capable of ownership?[27]

The result in Australia is an established norm of State government ownership of minerals and petroleum in place. This ownership, together with the vesting of control of these resources in the State legislatures, provides the foundation of Australian resources law, and represents a starting-point for the development of public policy regarding natural resources.

The Nature of Resources Law: A Digression

Resources law in Australia draws most heavily on the traditional fields of constitutional law, administrative law, property law and contract law. At least at this early stage of its development, it is true to say that resources law is a functional category of law, cutting across these conceptual categories.[28] Nevertheless, the legal issues raised by resources development are often unusual, if not unique. They frequently strain the accepted principles of the conceptual categories of law. Moreover, they have a tendency to arise at the boundaries of the conceptual categories, inviting decisions which are peculiar to their resources context.[29] In time we may see the establishment by the courts of a set of principles derived from a new concept, that of government management of natural resources.

Today the most interesting questions of resources law remain unanswered by the courts. What obligations (if any) are cast upon State

20 Mines (Uranium and Thorium) Act 1955 (Vic.) (uranium and thorium)
21. Mining Act 1962 (Tas.), s.3 (atomic substances)
22. Mining Act 1971 (S.A.), s. 16 (all minerals)
23 Coal Acquisition Act 1981 (N.S.W) (coal)
24. Mines (Amendment) Bill 1982 (Vic.), cl.45 (all minerals)
25 Petroleum Act 1923-1982 (Qld.), ss. 5, 6; Mining Act 1929 (Tas.), s. 28, Petroleum Act 1940-1981 (S.A.), s.4; Petroleum Act 1955 (N.S W.), s.6; Petroleum Act 1958 (Vic.) s.5; Petroleum Act 1967-1982 (W A.) s.9
26. Lang and Crommelin, *Australian Mining and Petroleum Laws — An Introduction* (1979) at 11-17
27 Williams and Meyers *Oil and Gas Law* (looseleaf) Vol.1, pp. 17-186.10(14)
28 Daintith "The Journal" (1983) 1 *Journal of Energy and Natural Resources Law* 1 at 2
29 E.g. Cudgen Rutile [No.2] Pty Ltd v. Chalk [1975] A.C. 520

governments by virtue of their ownership of minerals and petroleum in place? What limitations (if any) are placed upon State legislatures in the exercise of their exclusive control over Crown lands and resources? What approach should be adopted by the courts in construing a statute relating to the management and sale of natural resources? Where such a statute authorizes the conferral on private parties of rights and obligations regarding the exploration for and the exploitation of government-owned natural resources, should such rights and obligations be characterized in terms of public law or private law concepts?[30]

This last issue lurked beneath the surface of the signal decision of the Judicial Committee of the Privy Council in *Cudgen Rutile (No. 2) Pty Ltd v. Chalk*[31] (where the action was for breach of contract), but the reasoning of their Lordships offers no hint of a solution. Closer to home, the High Court has held that a mineral claim under the *Mining Act* 1904-1971 (W.A.) constitutes "land" as defined by the *Property Law Act* 1969 (W.A.)[32] and that both a mining lease and an approved application for a mining lease under the *Mining Act* 1930-1965 (S.A.) are "leases" for the purposes of ss. 85 and 88B of the *Income Tax Assessment Act* 1936 (Cth.).[33] Moreover, the High Court has recently affirmed the general rule that the courts will construe a statute in conformity with the common law and will not attribute to it an intention to alter common law principles unless such an intention is made clear by the statute.[34] Specifically,

> [t]his rule applies to the principles of the common law governing the creation and disposition of rights of property. Indeed, there is some ground for thinking that the general rule has added force in its application to principles respecting property rights.[35]

Nevertheless, recourse to the common law of property is by no means universal. In *Maddalozzo v. The Commonwealth*[36], Gallop J. asserted that the holder of a mining lease under the *Mining Ordinance* 1939-1971 (N.T.) had a statutory right to take minerals which should be distinguished from the right enjoyed at common law by the holder of a profit a prendre. More importantly, perhaps, the High Court recently declined to regard a grazing licence granted pursuant to s.107 of the *Crown Lands Act* 1931

30. This issue is discussed in Daintith (ed.) *The Legal Character of Petroleum Licences A Comparative Study* (1981)
31. [1975] A.C 520
32. Adamson v. Hayes (1972-73) 130 C.L.R 276
33. ICI Alkali (Australia) Pty Ltd (in vol. liq.) v F.C.T. (1978) 22 A L.R. 465
34 American Dairy Queen (Qld) Pty Ltd v. Blue Rio Pty Ltd (1981) 37 A.L.R. 613; 56 A.L.J.R 47; see also Wade v N.S.W. Rutile Mining Co. Pty Ltd (1969) 121 C L.R. 177 at 184-5
35. (1981) 37 A.L.R. 613 at 616; 56 A.L.J.R. 47 at 49 (per Mason J.)
36. (1979) 22 A.L.R. 561 at 565

(N.T.) as an interest in land, notwithstanding the similarity which existed between the rights conferred by the grazing licence and those enjoyed at common law by the holder of a profit a prendre.[37] On this occasion, Mason J. remarked:

> The grazing licence is the creature of statute, forming part of a special statutory regime governing Crown land. It has to be characterized in the light of the relevant statutory provisions without attaching too much significance to similarities which it may have with the creation of particular interests by the common law owner of land.[38]

Rights and obligations in respect of natural resources must, in Australia, be "the creature of statute". Legislative control of the management and sale of Crown lands ensures that result. In itself, however, the statutory origin of such rights and obligations should mean little. Certainly it is true that these rights and obligations must be characterized "in the light of the relevant statutory provisions", for to do otherwise would be to erode that legislative control. The real issue is undoubtedly one of statutory interpretation. Accepting that, however, it is difficult to see what further significance should be attached to the statutory origin of the rights and obligations. A statute may do no more than authorize a Minister to grant established proprietary interests in natural resources, recognized as such by the common law. In such a case the statute would be simply a means rather than an end.

The burning question is what constitutes "too much significance" in comparing rights and obligations in respect of natural resources with established proprietary interests. This question is still to be answered by the High Court. In principle, the approach adopted to statutory interpretation in *American Dairy Queen (Qld) Pty Ltd v. Blue Rio Pty Ltd*[39] seems preferable to that applied in *Re Toohey; Ex parte Meneling Station Pty Ltd.*[40]

Constitutional Significance of Ownership

The ownership of minerals and petroleum in Australia by State governments has great constitutional significance: it provides an opportunity for the States to collect economic rent.

Economic rent is a surplus: the difference between the revenue derived from production of a natural resource and all costs necessarily incur-

37. Re Toohey, Ex parte Meneling Station Pty Ltd (1982) 44 A.L.R. 63; 57 A.L.J R. 59
38. (1982) 44 A.L.R. 63 at 76; 57 A.L.J.R. 59 at 65
39. (1981) 37 A.L R. 613; 56 A.L.J.R. 47
40 (1982) 44 A L.R. 63; 57 A.L.J.R. 59

red in that production. In simple terms, it is the net present value of the resource in place. To quote Joan Robinson:[41]

> The essence of the conception of *rent* is the conception of a surplus earned by a particular factor of production over and above the minimum earnings necessary to induce it to do its work. This conception of rent, both verbally and historically, is closely connected with the conception of "free gifts of nature". The chief of these free gifts of nature (of which the essential character is that they do not owe their origin to human effort) is space, and for this reason they have usually been referred to simply as "land" — land being understood to comprise all the other "free gifts" besides mere space. Consequently the term rent, which in ordinary speech means a payment made for the hire of land, was borrowed by the economists as the title of the sort of surplus earnings which the free gifts of nature receive. The whole of the earnings of *land* in the economist's sense is *rent* in the economist's sense, for it follows from the definition of the free gifts of nature that they are there in any case, and do not require to be paid in order to exist.

The variability of location, quality and quantity of mineral and petroleum deposits, together with the unpredictability of the discovery process, makes it likely that many deposits will have a rent component. This was recognized by David Ricardo:[42]

> Mines, as well as land, generally pay a rent to their owner . . . The metal produced from the poorest mine that is worked must at least have an exchangeable value, not only sufficient to procure all the clothes, food, and other necessaries consumed by those employed in working it, and bringing the produce to market, but also to afford the common and ordinary profits to him who advances the stock necessary to carry on the undertaking . . . This mine is supposed to yield the usual profits of stock. All that the other mines produce more than this will necessarily be paid to the owners for rent.

The collection of economic rent should be distinguished from taxation. A tax has been described as "a compulsory levy by a public authority for public purposes".[43] In contrast, rent collected by a State government

41 Robinson *The Economics of Imperfect Competition* (1954) at 102; for further discussion of the concept of rent, see Crommelin "Concluding Note: Economic Rent and Government Objectives" in Crommelin and Thompson (eds.) *Mineral Leasing as an Instrument of Public Policy* (1977) 273-280.

42. Ricardo *The Principles of Political Economy and Taxation* (1969) at 46-47

43 Parton v. Milk Board (Vic.) (1949) 80 C.L.R. 229 at 259 (per Dixon J.)

upon resource production is the price paid by the producer for acquisition of the right to exploit the government-owned resource.

This distinction is important to the States, given the limitations imposed by the Commonwealth Constitution upon the taxation power of the States. Section 90 of the Constitution confers an exclusive power on the Commonwealth Parliament to levy duties of excise. The High Court has decided that most taxes upon goods are duties of excise.[44] Accordingly, the States[45] are unable to levy taxes upon the production, refining, distribution and sale of natural resources within their boundaries.

However, the collection of rent upon the production of natural resources owned by the State governments is a different matter. As long as the rent payment is the price exacted by the government for acquisition of the right to exploit the resources, it is not a tax and accordingly can not be a duty of excise.

A rent payment may take a variety of forms. A lump sum cash payment provides a clear example, but there is no reason to impugn the more familiar royalty (whether calculated by reference to volume, gross value or net value of production) provided that royalty truly represents the consideration for the acquisition of the production rights. What is really important is the link between the grant of the resource title and the obligation to pay the consideration. The more tenuous that link, the greater the likelihood that the State levy will be characterized as a tax and thus a duty of excise.

A natural consequence of State government ownership of minerals and petroleum is that the States rather than the Commonwealth should be engaged in rent collection, unless the States choose to assign that function to the Commonwealth.

Yet another consequence of the ownership of minerals and petroleum by State governments is the prospect that resource titles may be used as a bastion of State power in the field of resource management, particularly against encroachments by Commonwealth legislation upon the traditional domain of the State legislatures, namely, control of resource exploration and exploitation. In designing resource-management regimes, State legislatures must be wary of the fact that Commonwealth legisla-

44. Matthews v. Chicory Marketing Board (Vic.) (1938) 60 C.L.R. 263; Parton v Milk Board (Vic) supra n.43; Anderson's Pty Ltd v. Victoria (1964) 111 C.L.R. 353; Western Australia v. Hamersley Iron Pty Ltd (No. 1) (1969) 120 C.L.R. 42; Western Australia v. Chamberlain Industries Pty Ltd (1970) 121 C.L R. 1; Dickinson's Arcade Pty Ltd v. Tasmania (1974) 130 C.L.R. 177; M.G. Kailis (1962) Pty Ltd v. Western Australia (1974) 130 C.L.R. 245; H.C. Sleigh Ltd v South Australia (1976-77) 136 C.L.R. 475, Logan Downs Pty Ltd v. Queensland (1976-77) 137 C.L.R. 59. See Crommelin "Sections 90 and 92 of the Constitution: Problems and Solutions" in Saunders et al. *Current Constitutional Problems in Australia* (1982) 37-50

45. It remains to be seen whether the Northern Territory is similarly inhibited by s.90 of the Commonwealth Constitution In essence, this depends upon whether the power vested in the Commonwealth Parliament by s.122 of the Constitution is qualified by the terms of s.90

tion renders inoperative any inconsistent State legislation.[46] There is thus an incentive to deal with issues of potential friction between the Commonwealth and the States by appropriate provisions of resource titles rather than more directly by State legislation. In Australia we have not yet witnessed anything comparable to the Alberta petroleum and natural gas lease in the form of a determinable grant, the occasion for termination being the failure by the lessee to comply with Alberta controls placed upon the interprovincial movement of gas[47] (controls which may well lie beyond provincial legislative power). Still, any revival of conflict between the Commonwealth and the States over resource policy could lead to a closer examination by the States of the advantages of control mechanisms applicable through resource titles.

The Role of Resource Titles

Notwithstanding the norm of public ownership of minerals and petroleum in Australia, it has been the usual practice of State legislatures to provide for the development of these resources by private enterprise.[48] This has been achieved through legislation authorizing the grant of various exploration and production titles. These titles constitute the meeting point of resources law and public policy.

In my view, maximization of the resource rent collected by government should represent a central objective of resource policy. Even if this objective is not always pursued to the exclusion of all others, it offers a benchmark against which the cost of any alternative policy may be measured. Rent foregone is the opportunity cost of an alternative policy.

The amount of economic rent available for collection by government is dependent upon the regime of resource titles provided by law.[49] Several examples may be offered in support of this assertion. First, a "free entry" regime, in which resource production rights are accorded to the first party to occupy and work land (claim-staking),[50] encourages premature exploration and production at the expense of economic rent.[51] Secondly, a tender system for resource titles under which applicants bid in terms of work or expenditure commitments,[52] involves a government

46. Commonwealth Constitution, s.109
47. Crommelin, "Jurisdiction over Onshore Oil and Gas in Canada" (1975) 10 *University of British Columbia Law Review* 86 at 120-122
48. There are, of course, notable exceptions, such as the State Electricity Commission of Victoria (coal), the Electricity Commission of New South Wales (coal), and the South Australian Oil and Gas Corporation Pty Ltd (petroleum).
49 This issue is the subject of various papers collected in Crommelin and Thompson (eds.) *Mineral Leasing* supra n.41
50. E.g. Mining Act 1904 (W.A.), s.26.
51. Gaffney "Objectives of Government Policy in Leasing Mineral Lands". in Crommelin and Thompson (eds.), *Mineral Leasing* supra n.41, 3 at 17-18
52. E.g. Petroleum (Submerged Lands) Act 1967 (Cth.), s.20

subsidy to exploration, again at the expense of economic rent.[53] Thirdly, royalties levied by reference to the volume or value of resource production[54] drive a wedge between the marginal revenue from and the marginal cost of production, and thereby induce premature abandonment of resource deposits. Royalties levied by reference to the net value of production (without deduction of an appropriate rate of return on capital)[55] do likewise, though perhaps to a lesser extent.[56] Fourthly, restrictions placed upon dealings with resource titles[57] limit the scope for pooling of risk and thus diminish rent, if private parties are averse to risk. Finally, the size of rent depends on how the resource titles distribute risk as between the government and private enterprise.[58]

The capacity of the legal regime of resource-titles to dissipate economic rent is limited only by the amount of the rent otherwise available for collection. At the very least, then, the regime of resource titles must complement the system for rent-collection.

This should not present a problem when both matters are addressed by a State legislature. However, there are serious implications for public policy when one task is assumed by a State legislature and the other by the Commonwealth Parliament.

There is no constitutional basis for intervention by the Commonwealth Parliament in the design of resource titles. Nevertheless, there may be some basis for intervention by the Commonwealth Parliament in rent collection.[59] Such intervention without the willing co-operation of the States, however, appears destined to encourage policies of rent dissipation on the part of the States. In the absence of Commonwealth-State co-operation, the case for State rent collection is overwhelming.

The Place of Rent in Tax-Sharing

In its *Report on Tax-Sharing Entitlements 1981*, the Commonwealth Grants Commission observed:

> The Australian intergovernmental financial system is based on the principle of revenue-sharing, an important element of which is fiscal

53. Erickson, "Work Commitment Bidding" in Crommelin and Thompson (eds.), *Mineral Leasing* supra n.41, 61
54. E.g Petroleum (Submerged Lands) Act 1967 (Cth.)
55. E g. Mineral Royalty Act 1982 (N.T)
56. Jenkins "Comment" in Crommelin and Thompson (eds.), *Mineral Leasing* supra n 48, 91
57. E.g. Petroleum (Submerged Lands) Act 1967 (Cth.) sections 78 and 81
58. Leland "Comment" in Crommelin and Thompson (eds.), *Mineral Leasing* supra n 41, 57
59. Various powers may be utilized here: e.g. Constitution s.51(1) (overseas trade) and s.51(2) (taxation). Sole reliance on the taxation power, however, may give rise to interesting questions. Is a true resource rent tax a law with respect to taxation? Perhaps not, if the distinction urged above between taxation and rent collection is adopted by the High Court. Alternatively, do the provisions of s.114 of the Constitution inhibit the Commonwealth in the collection of rent from resources owned by State governments?

> equalization. This basic philosophy, which has been accepted by successive Commonwealth and State governments, has as one of its primary objectives the establishment of a political and economic environment within which all are provided with an adequate level of financial resources to enable them to carry out their constitutional and financial responsibilities and provide services at standards not appreciably different from those prevailing in other States of the Commonwealth.[60]

Neither revenue-sharing in general nor fiscal equalization in particular is a requirement of the Commonwealth Constitution.[61] However, both have been important features of federal financial relations in Australia for the past fifty years.[62]

There has been little discussion, though, of how economic rent collected by State governments from resource development should be treated for the purposes of revenue-sharing and fiscal equalization. The Commonwealth Grants Commission in 1981 selected the value added in mineral production as the measure of each State's fiscal capacity regarding minerals.[63] This measure of profitability was derived by making various deductions from the value added in mineral production, in respect of wages and salaries, pay-roll tax, workers' compensation insurance and average annual capital outlay. In 1982 the Commission made various adjustments to this measure of profitability in the case of minerals other than black coal, to take account of contributions made by mining companies in Queensland and Western Australia to social and economic infrastructure costs.[64] Nevertheless, there was a concession in the 1982 report that the Commission remained less than completely satisfied with its adopted methodology:

> In any further review, the Commission would wish to undertake a further comprehensive examination of the procedures to be adopted

60 Volume 1 – Main Report, 1

61. Section 94 of the Constitution provides for the distribution by the Commonwealth to the States of "all surplus revenue of the Commonwealth", but in the first decade of federation the Commonwealth devised a method of avoiding this obligation: New South Wales v. The Commonwealth (Surplus Revenue case) (1908) 7 C L.R. 179. Section 87 declares that not more than one-quarter of the net revenue of the Commonwealth from duties of customs and excise shall be applied annually by the Commonwealth towards its expenditure (with the object of ensuring that the remaining three-quarters are "surplus revenue of the Commonwealth"), but only "[d]uring a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides". Parliament provided otherwise in 1910: Surplus Revenue Act 1910 (Cth.)

62. Doubts have recently been expressed, however, regarding the commitment of some elements of the federal system to fiscal equalization: Mathews "Federalism in Retreat The Abandonment of Tax Sharing and Fiscal Equalization", Address to Canberra Branch of the Economic Society of Australia and New Zealand, 8 July 1982

63. *Report on State Tax Sharing Entitlements 1981*, Volume 1 – Main Report, 85-86

64 *Report on State Tax Sharing and Health Grants 1982*, Volume 1 – Main Report, 88-91

> in the measurement of the States' capacities to raise mining revenues.[65]

Two issues regarding mineral revenues, however, were not addressed by the Commission.

First, there was no recognition of the limitation placed by s.90 of the Commonwealth Constitution upon the power of State legislature to tax mineral production, refining, distribution and sale. The measurement of fiscal capacity of the States in terms of the profitability of mineral production assumes no such impediment. Of course, the States have devised methods of collecting revenue from mineral production which so far have escaped constitutional challenge.[66] Nevertheless, the constitutional impediment is significant, and may well require a reappraisal of the capacity of the States to derive revenue from mineral production.

Secondly, the Commission made no distinction between rent collection and taxation by States in its treatment of mineral revenues for tax-sharing purposes. If it is accepted, as argued above, that rent is the price paid for the right to produce minerals owned by a State government, the question must be asked whether it is appropriate to include capacity to collect rent in the measure of a State's fiscal capacity.

In this regard it may be noted that in its 1981 and its 1982 report the Commonwealth Grants Commission decided to exclude all revenue derived from land sales from its revenue comparisons on the ground that these reflected differences in past or current policies and hence in relative revenue-raising effort, and that they represented capital receipts. However, lease rentals from rural land were treated as an offset to the costs of lands administration in each State, and were thus reflected in the relevant expenditure standards.[67] It is difficult to see how lease rentals are any less subject to policy influences than the proceeds of land sales. Indeed, the capacity to derive lease rentals would appear directly dependent on past or current policies regarding land alienation. Further, lease rentals and the proceeds of land sales are both payments for the acquisition of rights over land. The justification for differential treatment is not apparent.

Moreover, the legal status of minerals as land suggests the need for comparable treatment of minerals and land by the Commission. To the

65. *Report on State Tax Sharing and Health Grants 1982*, Volume 1 – Main Report, 91; see also Mathews "Resource Development and Fiscal Equalization" in Harris and Taylor (eds.) *Resource Development and the Future of Australian Society* (1982) 121

66. A striking example is provided by railway freight charges levied by the Queensland government upon the transportation of minerals. The Commonwealth Grants Commission considered these charges in its *Report on State Tax Sharing Entitlements 1981*, Volume 1 – Main Report, 87-89.

67 *Report on State Tax Sharing Entitlements, 1981* Volume 1 – Main Report 84-85, *Report on State Tax Sharing Entitlements 1982, Volume 1* – Main Report 86-88

extent that State revenues derived from mineral production are rent (and to the extent that they are not they may be open to constitutional challenge) they are the proceeds of land sales.[68] As such they reflect differences in past or current policies of the various States and hence in revenue-raising effort.

These two factors combine to suggest the need for a different approach to State resource revenues and needs in pursuing fiscal equalization. The starting point for a new approach should be the legal capacity of the States to collect resource revenues. Even there, however, it appears necessary to distinguish between two elements of resource revenues, the economic rent and the resource tax. While there can be no doubt regarding inclusion of the latter in the computation of fiscal equalization, the case for inclusion of the former requires demonstration.

Conclusion

In a country where natural resources are the subject of extensive government ownership, resources law and public policy are inextricably linked. In the first place, resources law is the instrument for implementation of resources policy. The rights and obligations under resource titles give a much more accurate picture of government policy than most Ministerial statements. A failure to comprehend the policy ramifications of different resource titles makes the achievement of policy goals well nigh impossible. Secondly, resources law imposes severe constraints on resources policy by limiting the freedom of action of both the Commonwealth and the States. Again, a failure to comprehend the significance of these limitations diminishes the likelihood of achievement of policy goals.

68. Cf Gowan v. Christie (1873) L.R. 2 Sc. & Div. 273, at pp. 283-4 (per Lord Christie):
> ".. although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land It is 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 to take them away, just as if he had bought so much of the soil."