EXPLORATION AND MINING ON PRIVATE LAND: AN ANALYSIS OF THE LAW IN WESTERN AUSTRALIA

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INTRODUCTION

The principal statute which governs the law in Western Australia relating to the prospecting and mining for gold, silver, precious metals and hard rock minerals is the Mining Act 1904 ("the 1904 Act").

In 1978 the Government of the day passed the Mining Act 1978 ("the 1978 Act") which Act, when proclaimed, would have the effect of repealing the 1904 Act. A limited number of provisions of the 1978 Act then came into operation, the balance to come into effect on a date to be fixed by proclamation. The Government indicated that the remaining provisions would not come into operation until draft regulations were circulated, submissions from interested parties received and considered. Those steps now being complete, it is understood that the draft regulations shall be tabled in the next sittings of State Parliament. It is anticipated that the 1978 Act and the regulations will come into operation on January 1, 1982. However, it is probable that amendments will be made to Section 34 of the 1978 Act beforehand. Therefore, in considering this paper in the light of the 1978 Act regard should be had for any amendments that may occur prior to proclamation of the 1978 Act.

Part 1 — What is "Private Land"?

"private land" means any land that:

(a) has been or may hereafter be alienated from the Crown for any estate of freehold or

(b) is or may hereafter be the subject of —

  (i) any conditional purchase agreement, or

  (ii) any lease or concession with or without a right of acquiring the fee simple thereof *other than* for pastoral or timber purposes

BUT

(aa) In relation to mining for minerals other than gold, silver and precious metals, for the purposes of division 3 of Part III of the 1978 Act (the division of the 1978 Act that relates to prospecting and mining on private land) the term *does not include* land alienated before January 1, 1899, except as provided in that division; and

(bb) No land that is the subject of a mining tenement is private land for the purposes of that division (s.8(1)).

Therefore the term "private land" appears to include:

(1) Land alienated from the Crown for an estate of freehold on or after January 1, 1899.

(2) Land held by any person on conditional purchase under division (1) of Part V of the Land Act 1933 (as amended).

(3) Perpetual leasehold demised under the War Service Land Settlement Scheme Act 1954 (as amended).

(4) Special lease or licence granted to or held by a person pursuant to Part V or VII of the Land Act
(5) Lease granted to the Commonwealth pursuant to s.7(4) of the Land Act (e.g. for defence purposes).
BUT would seem not to include:
(6) A pastoral lease held by a person pursuant to Part VI of the Land Act
(9) A permit or license to take forest produce granted to or held by a person pursuant to Part IV of the Forest Act 1919 (as amended).[1]

Part 2 — Ownership of Minerals on Private Land

The term "minerals" is defined to include all naturally occurring substances obtained or obtainable from land by mining operations whether carried out under or on the surface of land, and includes gravel, shale, sand, clay, limestone, rock and evaporites, but does not include —
(a) soil or any substance the recovery of which is governed by the Petroleum Act 1967, or the Petroleum (Submerged Lands) Act 1967; or
(b) gravel, shale, sand, clay, limestone or rock *when on private land*
Section 9 of the 1978 Act provides that subject to that Act:
(a) all gold, silver and any other precious metal existing in its natural condition on or below the surface of any land in the State whether alienated or not alienated from the Crown and if alienated whenever alienated, *are the property of the Crown*;
(b) all other minerals existing in their natural condition on or below the surface of any land in the State that was not alienated in fee simple from the Crown before 1 January 1899 *are the property of the Crown.*

It is interesting to note that whilst the term private land does not include land alienated from the Crown *for an estate of freehold* before 1 January 1899, s.9 provides that minerals on land not alienated *for an estate in fee simple* from the Crown before 1 January 1899 are the property of the Crown. As there are three estates of freehold, namely fee simple, fee tail and life estate, and terms of years or leaseholds it would appear that where land has been alienated for an estate of freehold other than an estate in fee simple, before 1 January 1899, the minerals contained therein are the property of the Crown and such land is not private land for the purposes of Divison 3 of Part III.

Furthermore, that is not to say that the owner from time to time of land alienated in fee simple from the Crown before 1 January 1899 ("Pre-1899 Land") owned the minerals existing in their natural condition on such land. In some circumstances the Crown might have reserved to itself in the original grant of the fee simple, ownership of all or specified minerals. More often than not there was no such reservation and it was commonplace for a subsequent registered proprietor of Pre-1899 Land, to reserve to himself (e.g. contemporaneously with a conveyance or transfer), ownership of all or specified minerals.[2]

Therefore when seeking to establish ownership of minerals on private land which falls within category (1) of Part I above, it is necessary to search the title to the land and ascertain the date of alienation from the Crown and also the estate for which it was granted. If the grant is other than for an estate in fee simple or if the date coincides with or is subsequent to 1 January 1899 then it is not necessary to proceed further; the minerals are vested in the Crown by virtue of s.9(1)(b) of the 1978 Act.

Alternatively if the grant is for an estate in fee simple and the land was alienated prior to 1 January 1899, a reading of that grant will establish whether any minerals are reserved to the Crown. Failing such a reservation, it could be assumed that ownership of those minerals was vested in the then grantee.

If the land is "old system" title a search in the Deeds Office of the chain of title would be necessary to ensure that ownership of the minerals remained with the owner from time to time.

If the land is under the operation of the Transfer of Land Act 1893 a search of the "chain of title" may strictly be necessary to ensure that ownership of the minerals ran with ownership of the land. Such an exercise has obvious practical difficulties. When faced with this problem in 1969 the writer of the paper was informed by the then Commissioner of Titles as follows:

> "It is at present, and as far as I know has always been the strict practice to note on every certificate a reference to any reservation of minerals contained in a transfer ...
>
> Here again there is always the possibility of human error occurring at some time. I agree that the procedure outlined in your letter of obtaining photocopies of the original grant from the Crown and the current certificate of title should, allowing for the element of human error, enable you to ascertain whether the owner from time to time of the fee simple owns or does not own the minerals, in the case of land alienated in fee simple from the Crown prior to 1st January 1899 ..."

An example of the difficulties of establishing ownership in minerals is that of the land formerly owned by the Midland Railway Co. of Western Australia Ltd. ("MRC"). In 1886, by a contract with the Western Australian Government, one Waddington was obliged to build in sections, a railway some 250 miles in length, from Guildford to Geraldton. The agreement further obliged Waddington to procure the introduction into the colony from Europe of five thousand adults of European extraction. For every statute adult as procured and for every mile of railway so completed, Waddington was entitled to a grant in fee simple of blocks of 50 acres and 12,000 acres respectively. In 1895, Waddington assigned his rights and interest under the agreement to MRC and from time to time after 1895, Crown grants were made to MRC. All such grants were in the form prescribed by the Land Regulations of 1882 and contained no reservation of minerals. Indeed there was no reservation of petroleum or mineral oil.[3] In 1963, the State approved an agreement whereby the Commissioners of the Rural & Industries Bank of Western Australia as nominee for the State of Western Australia acquired all of the stock of MRC. In 1964, following liquidation of MRC all the property of MRC was transferred to the Crown by the Government Railways Amendment Act 1965 (s.2). All of the right and title of MRC in all minerals on or below the surface of land granted or alienated at any time to MRC by force of s.2 of the Amendment Act became the property of the Crown subject to any estates or interests granted by MRC in respect thereof and/or the purposes of Part VII of the 1904 Act (the Part relating to mining on private land). The land was deemed not to have been alienated in fee simple from the Crown before 1 January 1899.

Part 3 — Consent of Owner and Occupier in relation to Exploration and Mining and Certain Private Land

The holder of a mining tenement (defined to mean a prospecting licence, exploration licence, mining lease, general purpose lease or a miscellaneous licence granted or acquired under the 1978 Act) cannot prospect for, explore for or carry

out any mining operations for any mineral, or enter upon for any such purpose, any private land the subject of the mining tenement of which he is the holder and which is upon land of one or more of the following classes:

(a) land which is in bona fide and regular use as a yard stockyard garden orchard vineyard plant nursery plantation or *land under cultivation*

(b) a cemetery or burial ground

(c) a reservoir

(d) land on which there is erected a substantial improvement

(e) land that is within 100 metres of any land referred to in any foregoing paragraphs or

(f) land that is a separate parcel of land and has an area of 2,000 square metres or less.

Unless

- the consent in writing of the owner and occupier of the land has first been obtained *or the holder has satisfied the Warden that such consent has been unreasonably refused* or
- the prospecting, exploration or the carrying out of the mining operations is or are carried out at a depth of not less than 30 metres from the lowest part of the surface of the land or
- in regard to the land referred to in paragraph (e) above the Warden by order otherwise directs (s.34(1)).

The term "land under cultivation" is defined to include:

- land being used for the purpose of cropping or pasturing
- land whether cleared or uncleared used for the grazing of stock in the ordinary course of management of the owner's land of which the land so used forms the whole or any part.

The question arises whether the Warden, in hearing the application for the mining tenement or the Minister, in granting or refusing the mining tenement should be required to be satisfied as to the currency of any consent of the owner or occupier under s.34. (Reference is made later in this paper to the absence in the 1978 Act of any provision requiring the filing of a compensation agreement with the Mines Department.)

As the 1978 Act is silent on the point it would appear that the application for the mining tenement can proceed to recommendation and granting without the applicant having to demonstrate to the Warden or the Minister that a consent under s.34 (where applicable) had been obtained from the owner and occupier. And if the holder of the mining tenement prospects, explores or carries out mining operations for any mineral or enters on the land for any such purpose without first obtaining consent, then the only remedy available to the owner or occupier is to institute proceedings against the holder to restrain him from such operations.

In s.34 there is a significant departure from the provisions of the 1904 Act. Under the 1904 Act the consent of the owner or occupier could be arbitrarily withheld. Under the 1978 Act if the owner or occupier declines consent the holder of the mining tenement may go to the Warden and endeavour to satisfy him that such consent was unreasonably refused. This is the principal change in the 1978 legislation and is one that is a major concern to farmers and owners whose lands are likely to be affected by prospecting or mining operations, so much so that changes have been foreshadowed to s.34 prior to proclamation.

The draft 1978 Regulations apparently provide certain criteria which the Warden may follow in order to determine whether consent has been unreasonably withheld, and whilst it would be presumptuous to anticipate what principles a Warden may in fact follow, the following considerations may be relevant:

(a) If the owner/occupier is concerned to keep his farm as a complete unit and solely for his livelihood and does not want it disturbed in any way, the Warden may well determine that consent had been reasonably refused.
(b) If the owner/occupier had consented to or permitted prospecting or exploration on his land and later refuses consent to actual mining operations, the Warden may question his bona fides and determine that consent has been unreasonably refused.

The Warden is the sole determinator of the question although it would appear that any party aggrieved by his determination may appeal therefrom to the Supreme Court (ss.147-151).

Another point of departure from the 1904 Act relates to the extent of the "consent" given. Under the 1904 Act the consent of the owner/occupier was a consent to the grant or occupation of the mining tenement. Section 34 of the 1978 Act refers to the holder "not being entitled to prospect for, explore for, or carry out mining operations for any mineral or to enter . . . without the consent in writing . . .".

The question arises as to whether an owner/occupier could give his consent on a limited or stage by stage basis. Could the owner/occupier limit his consent to prospecting or exploring for minerals and leave for later negotiation the giving of consent to mining operations? The answer would seem to be yes.

Where the owner and occupier of any private land has consented to *mining operations* being carried out under the authority of the 1978 Act on the land the consents are irrevocable and, by force of s.36, binding on the owner and occupier for the time being of the land until the expiry of the mining tenement (including any renewal thereof).

One could infer from the definition of the term "mining operations" that it does not include prospecting or exploring for minerals. The definition says:

> "mining operations" means any mode or method of working whereby the earth or any rock structure stone fluid or mineral bearing substance may be disturbed removed washed sifted crushed leached roasted distilled evaporated smelted or refined or dealt with for the purpose of obtaining any mineral therefrom whether it has been previously disturbed or not and includes —
> (a) the removal of overburden by mechanical or other means and the stacking, deposit, storage and treatment of any substance considered to contain any mineral;
> (b) operations by means of which salt or other evaporites may be harvested;
> (c) operations by means of which mineral is recovered from the sea or a natural water supply; and
> (d) the doing of all lawful acts incident or conducive to any such operation or purposes"

This inference is further supported by the fact that the term "mining" is defined to mean "Mining Operations *and includes prospecting and exploring for minerals*".

If, then, consent is limited to say prospecting or exploration, does such consent enjoy irrevocability under s.36? This is doubtful.

Part 4 — Rights to Explore on Private Land

(a) *Right of access and ancillary rights*

No mining tenement, consisting of private land only, shall be granted unless the applicant satisfies the Warden that he has lawful acceess which would enable him to prospect, explore or carry out mining operations on the private land or at a depth of not less than 30 metres from the lowest part of the surface; or where lawful access has been unreasonably refused by the owner or occupier, or both of them, that such refusal or refusals were unreasonable (s.29(1)(b)).

A mining tenement in respect of any private land

(a) shall authorise the holder of the mining tenement —

(1) *if he has the lawful access necessary* or *has satisfied the Warden that such access has been unreasonably refused* by the owner or occupier or both of them, to prospect, explore, or carry out mining operations on the surface and at any depth;

(2) to prospect etc. at a depth of not less than 30 metres from the lowest part of the surface.

(b) shall comprise a right of ingress and egress thereto and therefrom by a right of way, to be marked in the prescribed manner from the private land through any land (whether occupied as a mining tenement or otherwise) to the nearest street or road, BUT except with the written consent of the owner of any land used as a yard, garden, orchard or cultivated field — no such right of way shall be had by the holder of the mining tenement through that land. (It should be noted that the giving of such consent is discretionary and on the part of the *owner* only.) The holder cannot go to the Warden in this instance and demonstrate that consent was unreasonably withheld.[4]

(c) does not without the written consent of the *owner and occupier* authorise the tenement holder to use artificially conserved water or to fell trees or cut timber or except in connection with mining operations, to remove earth or rock

(d) does not authorise the tenement holder to impound stock or other animals belonging to or in the custody of the *owner or occupier* of land adjoining the mining tenement or to disturb stock or to prevent stock depasturing over the land the subject of the mining tenement, unless the land is fenced (s.29(2)).

It would appear that any determination of the Warden on whether access had been unreasonably refused could be the subject of an appeal by an aggrieved party to the Supreme Court (ss.147-151).

(b) *Permit to enter*

No person is entitled to enter or remain upon any private land for the purpose of Division 3 or those specified in subsection (1) of s.104 (i.e. marking off purposes) *unless* he

(a) is the owner in occupation of that private land or

(b) is authorised to do so by a permit issued by the Warden under s.30, or by any other provision of the Act, or by virtue of a mining tenement (s.28).

A person who desires to enter upon private land to search for any mineral or to mark out a mining tenement may make application in writing to the Warden for a permit to enter upon that private land (s.29(3)).

The manner and form of application are prescribed under the Regulations. The form must contain such description of the private land as in the opinion of the

Warden will enable it to be identified and such particulars as will enable the Warden to determine if the land is private land (s.29(4)).

The Warden may, upon being satisfied that an application made under s.29 *is made in good faith*, grant a permit in writing for a term not exceeding 30 days, subject to such conditions as he thinks fit (s.30(1)).

The Warden may fix a security which must be paid to him and which is held to compensate the owner and occupier of the private land for any damage likely to be caused by the permit holder.

The permit holder or his duly authorised agent must hand a copy of the permit to *the occupier* of the private land on the first occasion that the holder or his agent enters upon that land after the issue of the permit. But if the occupier is not present on that occasion, the permit holder or his agent must —

(a) on entering the land on that occasion place a copy of the permit in a prominent position on the occupier's dwelling or in a prominent position at the main entrance to the land if no such dwelling is situated on the land; *AND*

(b) in any event, within 48 hours of his first entering the land after the issue of the permit, cause a copy of the permit to be sent by prepaid registered post to the occupier at his last known place of abode or business (s.31(1)).

Where the occupier is also the owner or one of the owners no further notice other than that required above need be served on that owner or any of the other owners for the purpose of the requirement following (s.31(2)).

Where none of the owners of the private land is also in occupation, the holder of a permit granted over the private land shall cause a copy of the permit to be sent, within 48 hours of the issue by prepaid registered post to *one* of those owners at —

(a) in the case of an owner which is a body corporate — its registered office

(b) in the case of an owner who is not a body corporate — to his last known place of abode or business (s.31(3)).

The term "occupier" in relation to land includes any person in actual occupation of the land under any lawful title granted by or derived from the owner of the land.

The term "owner" in relation to any land means —

(a) the registered proprietor or in relation to land not under the Transfer of Land Act 1893 the owner in fee simple or the person entitled to the equity of redemption

(b) the lessee or licensee from the Crown

(c) the person who for the time being has the lawful control and management thereof whether on trust or otherwise, or

(d) the person entitled to receive the rent

The holder of a permit issued under the 1978 Act or his duly authorised agent is thereby authorised:

(a) to enter upon and remain upon the surface of the private land to which the permit relates

(b) to search for any mineral

(c) to detach one or more samples of any vein or lode outcropping on the surface not exceeding in the aggregate 13 kilograms (i.e. he cannot dig holes but can only remove materrial projecting about the surface)

(d) to take such other samples as may be agreed by the owner, or where the owner is not in occupation, the occupier

(e) to remove such samples for the purposes of assaying or testing the value thereof

(f) to mark out a mining tenement.

However, the permit holder or his authorised agent cannot carry out any other mining operations on or otherwise disturb the surface of the land (s.32(1)).

There are provisions enabling an applicant for a permit to appeal to the Minister where the Warden:

(a) refuses to grant an application for a permit or

(b) grants an application on conditions that are considered unreasonable by the applicant

(c) fixes a security which the applicant considers to be excessive (s.32(2) and the Regulations).

The Minister has power to dismiss an appeal or uphold it and grant the permit (s.32(3)).

As indicated, the holder of a current permit in respect of private land may enter upon that private land to mark out a mining tenement. (s.104).

The permit holder has two choices when contemplating exploration on private land; to mark out and apply for a Prospecting Licence or to apply for an Exploration Licence.

(c) *Prospecting Licence*

The Warden is empowered, on the application of any person, to grant to that person a prospecting licence ("PL"). The area cannot exceed 200 hectares and the PL must be marked out on the ground in accordance with the Regulations. However it is not necessary to conduct a survey of the area comprised within a PL unless a dispute arises, in which case the Warden or Minister may order a survey in order to settle the dispute.

No more than 10 PLs (contiguous or otherwise) may be granted to the same person without Ministerial approval (s.40(3)). Where there are "special circumstances" the Minister may on the Warden's recommendation, approve the granting of more than 10 PLs (contiguous or otherwise), to the same person provided that the number of PLs that may be held *or controlled by* any one person shall not exceed 20 (s.54). (The term 'controlled by' is not defined.) Notwithstanding the foregoing, the Minister may in "exceptional circumstances", and on the recommendation of the Warden, approve the granting of a PL, or PLs, to any person the effect of which would be to allow more than 20PLs (contiguous or otherwise) to be held or controlled by such person at any time (s.55).[5]

Within 14 days of the lodgment of an application for a PL form the applicant must serve the prescribed notice on the *owner and occupier* of the land (private or otherwise) to which the application relates and on such other persons as may be prescribed (s.41(2)).

A PL remains in force for a period of two years. The Minister has power "in exceptional circumstances" to extend the term by a further period or periods of one year. However, when a PL is surrendered, forfeited or has expired, the subject land cannot be marked off as a PL or an Exploration Licence by or on behalf of the holder or any person who had an interest within three months (s.45).

In addition to any specific conditions that may be prescribed or imposed by the Minister or the Warden, every PL is subject to the following conditions —

(a) that all minerals of economic interest discovered be promptly reported in writing by the holder to the Minister
(b) that all hoes, pits, trenches and other disturbances to the surface made while prospecting and which are likely to endanger the safety of any person or animal will be filled in together with such other holes, pits, trenches and other disturbances as the Minister directs
(c) that all necessary steps are taken by the holder to prevent fire, damage to trees or other property and to prevent damage to any property or damage to live-stock by the presence of dogs, the discharge of firearms or otherwise. (s.46).

Survey of the area of a PL is not required unless a dispute arises, in which case the Warden or Minister may order a survey in order to settle the dispute.

Once granted a PL confers the following rights —
(a) to enter and re-enter the land with such agents, vehicles and equipment as may be necessary or expedient for the purpose of prospecting for minerals
(b) to prospect for minerals and to carry out such works as may be necessary for the purpose including digging pits, trenches and holes, sinking bores and tunnels to the extent necessary for the purpose in, on or under the land
(c) to extract and remove for treatment and sale as the holder's property a prescribed amount of ore or such greater amount as the Minister may approve
(d) to take and divert (subject to the Rights in Water and Irrigation Act 1914) water from any natural spring, lake, pool or stream situate in or flowing through such land and to sink a well or bore and take water therefrom and to use the water so taken for the holder's domestic purposes and for any purpose in connection with prospecting for minerals on the land (s.48).

The holder of a PL has a right in priority for the grant of a mining or general purpose lease (s.49); and cannot, except with Ministerial consent, transfer the PL at any time during the first six months of the term.

(d) *Exploration Licence*

The Minister may on the application of any person, and following a recommendation from the Warden, grant to that person an exploration licence ("EL"), the area of which cannot be less than 10 square kilometres nor more than 200 square kilometres. Marking out of an EL is not necessary. The Warden hears the application for an EL in open court and any person is entitled to object. The Warden cannot recommend the grant of an EL unless he is satisifed that the applicant is able to effectively explore the land in respect of which the application has been made (s.57). Furthermore, before an EL may be granted over private land the Applicant must satisfy the Warden that he has lawful access to some portion of the surface of the private land or has satisfied the Warden that access has been unreasonably refused (s.29).

The manner of application is prescribed and shall include such matters as:
- the proposed method of exploration
- details of work programmes
- estimated expenditure
- technical and financial resources of the applicant
- a map clearly delineating the boundaries of the area the subject of the applicant.

Within 14 days after the lodgment of an application for an EL the applicant must serve notice of the application on the *owner and occupier* of the land to which

the application relates and on such other persons as may be prescribed (s.58(4)). Within 28 days of the Warden's recommendation for the granting of the application an applicant for an EL must lodge, with the Mines Department at Perth, some security for compliance with the conditions of the EL (if granted). Securities are generally a sum prescribed or approved by the Minister, and are payable in accordance with s.126.

An EL shall be for a term of 5 years; however the Minister may in "exceptional circumstances" extend the term by further periods of one year.

Every EL is deemed to be granted subject to the condition that the holder thereof will explore for minerals and:

(a) promptly report to the Minister all minerals of economic interest discovered;

(b) fill in all holes, pits, trenches and other disturbances to the surface of the land made in the course of exploring for minerals and which are likely to endanger the safety of any person or animal, together with such other holes, pits trenches and other disturbances as the Minister directs;

(c) take all necessary steps to prevent fire, damage to trees or other property and to prevent damage to any property or livestock by the presence of dogs, the discharge of firearms, or otherwise.

The holder of an EL cannot transfer the EL during the first year and the Minister may, at any time thereafter consent to or refuse any application for the transfer of an EL (s.64).

There are detailed provisions relating to the partial and successive surrender of areas the subject of an EL (i.e. on the expiration of the third year, one half of the area etc.) and provision is also made for the deemed surrender of any portion of the EL that has been taken up by the holder as a Mining Lease or General Purpose Lease (see s.65). The rights conferred by an EL (see s.66) are similar to those conferred upon the holder of a PL (see earlier). For example the holder of an EL enjoys a right in priority to the grant of a Mining Lease or General Purpose Lease.

The holder of an EL is obliged to keep complete records of surveys and other operations conducted in respect of the EL and is required to produce such material, upon request, for the inspection of the Minister and the Director of Geological Survey. Upon request from the Minister he is also obliged to provide information relating to surveys and other operations conducted by him, geological samples obtained in the course of those operations, and report on all work done and money expended in connection with exploration in the subject area (s.68).

Upon the surrender, forfeiture, expiry or relinquishment of the whole or any part of the El, the land affected cannot be marked out or applied for, as a PL or EL by or on behalf of the holder, or by any person who has had an interest in the EL, within a period of three months (s.69).

Following the grant of an El, and at any time after the expiration of 12 months from the date of the grant of the EL, any person may mark out and apply for a PL for gold or precious stones, or both, in respect of any part of the land the subject of the EL. Notice must be served on the holder of the EL and if he does not lodge an objection the Warden may grant the application. If the holder objects then a report is obtained from the Director of Geological Survey as to whether prospecting for gold or precious metals, or both, could be carried on without detriment to the EL holder's exploration programme. Then the application is heard

by the Warden and, if he recommends it, is presented to the Minister who may refuse or grant it. In the event the Warden refuses the application, an appeal may be made to the Minister against such refusal.

In granting the PL the Warden or the Minister may impose such conditions *as he sees fit* but the PL:

- cannot exceed 10 hectares
- authorises the holder to prospect only for gold and precious stones or both
- shall not unless the Warden otherwise directs prevent the holder of the EL from exploring for minerals other than gold or precious metals in or on the land the subject of the PL and the EL.

Part 5 — Right to Mine on Private Land

(a) *Mining Lease*

The Minister may, on the application of any person, after receiving a recommendation of the Warden grant to the person a Mining Lease ("ML") (ss.71-72). Marking out is necessary. The area of land in respect of which any one ML may be granted cannot exceed 10 square kilometres (s.73). However there is no restriction on the minimum area of a ML, nor on the number of MLs held by a person (s.72). The ML remains in force for a period of 21 years and may be renewed for successive terms (s.78).

As indicated earlier, before a ML may be granted over private land, the applicant must satisfy the Warden that he has lawful access to some portion of the surface of the private land or has satisfied the Warden that access has been unreasonably refused (s.29).

The lease or application for a ML is prescribed and should be accompanied by:

- the survey fee
- prescribed rent for the first year
- prescribed application fee
- a map clearly delineating the boundaries of the land applied for.

Within 14 days of the lodgment of an applicant for a ML the applicant must serve notice of the application on the *owner and occupier of the land* to which the application relates and on such other persons as may be prescribed.

All applications for a ML must be heard by the Warden in open court and any person may object to the granting of the application. On receipt of the Warden's recommendation the Minister may grant or refuse a ML as he thinks fit, irrespective of the Warden's recommendation and even though the applicant may not have complied in all respects with the provisions of the Act (s.75).

Apart from the covenants and conditions that are imposed by statute and as may be prescribed, each ML shall contain a provision that following a recommendation from the Warden that the lease be forfeited, by reason of a breach of any covenant or condition by the lessee, the Minister may impose a fine not exceeding $1,000 as an alternative to forfeiture (s.82).

On the granting of a ML *or at any subsequent time* the Minister may impose on the lessee reasonable conditions for the purpose of preventing, reducing, or making good, injury to the surface of the land in respect of which the lease is sought or was granted, or injury to anything on the surface of that land, or consequential damage to any other land. Furthermore, the Minister may, upon the grant of the ML, or at any subsequent time, if it is reasonable in all the circumstances so to do,

impose on the lessee a condition that mining operations shall not be carried out within a certain distance of the surface of the land in respect of which the lease is sought or was granted (s.84).

Subject to the Act a ML authorises the holder, his agents and employees to:

(a) work and mine the land in respect of which the lease was granted for *any* minerals;

(b) take and remove from the land *any* minerals and dispose of them;

(c) take and divert (subject to the Rights in Water & Irrigation Act 1914) water from any natural spring, lake, pool or stream situate in or flowing through such land and subject to that Act, to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with mining for minerals on the land; and

(d) do all acts and things that are necessary to effectually carry out mining operations in, on or under the land.

Subject to the Act, the lessee is entitled to use, occupy and enjoy the land in respect of which the ML was granted for mining purposes and owns all minerals lawfully mined from the land under the ML (s.85).

(b) *Other Leases*

There are provisions for the creation of General Purpose Leases (ss.86-90) and Miscellaneous Licences (ss.91-94) which need not be dealt with in this paper.

Part 6 — Compensation Payable to Owner or Occupier of Private Land

Section 35 of the 1978 Act provides that the holder of any mining tenement is not entitled to commence mining operations on the surface, or within a depth of 30 metres from the lowest part of the surface, of any private land unless and until he has paid or tendered to the owner and occupier the amount of compensation, if any, he is required to pay under and as ascertained in accordance with the Act or he has made an agreement with the owner and occupier as to the amount times and mode of the compensation, if any.

As was mentioned earlier in this paper one could infer that the term "mining operations" does not include prospecting or exploring for minerals. Therefore, the question arises whether the holder can commence *prospecting or exploring* (but not mining operations) for minerals on private land without first tendering or agreeing compensation. Under the 1904 Act it was provided, in s.157, that the marking off or registration of a mining tenement confers no right to mine (which term was defined to include prospecting) unless compensation has been paid or agreed. It would appear that under the 1978 Act the tender or agreement as to compensation is not a necessary prerequisite to prospecting or exploring for minerals in terms of s.35. However as s.123 of the 1978 Act provides that the owner and occupier of any land in respect of which a mining tenement has been granted are entitled, according to their respective interests, to compensation for all loss and damage suffered or likely to be suffered by them as a result of the grant of the mining tenement or the exercise of the rights conferred thereby, it is conceivable that in the event of damage or loss being suffered as a result of prospecting or exploration, the owner or occupier could be compensated under this section.

Section 123 goes on to say that the amount of compensation payable is determined by agreement between the holder of the mining tenement and the

owner and occupier or in default of agreement an amount determined by the Warden's Court on the application of the owner the occupier or the holder of the mining tenement.

It is also significant to note that under the 1904 Act (s.167) no such agreement was valid unless it was in writing, signed by the parties and filed in the Department of Mines. No such principles have been carried forward into the 1978 Act. Neither in ss.35 or 123 of the 1978 Act is there any specific requirement for an agreement *to be in writing and filed* and so, it would appear that neither the Warden nor the Minister, need be concerned as to the existence of a compensation agreement before recommending or granting any mining tenement on private land. It will be a question merely of the holder and the owner/occupier preserving their own rights and enforcing obligations as between each other.

One should note that compensation is not payable in any case in respect of the value of any mineral known or supposed to be in on or under the surface of any land to which a claim for compensation under this Act relates (s.123(1)). Therefore it would appear to be unlawful for the holder of the mining tenement to agree to pay a royalty to the owner or occupier, by way of compensation under the Act. Generally however, where the land concerned is private land, the compensation to be paid to the owner and occupier is expressed to be compensation for being deprived of the possession of, or damage to, the surface or any part of the surface of the private land and to any improvements thereon, that may arise from the exercise of the rights conferred by the holder of the mining tenement thereon or thereunder, or in respect of the severance of such land from other land of the owner and occupier, interference with rights of way and for all consequential damage (s.123(4)).

If any private land (or improvement thereon) the subject of a mining tenement is injured or depreciated in value by the exercise of any rights conferred upon the holder of the tenement or by reason of his occupation of any portion of the surface, or enjoyment of any right of way, the owner and occupier of the private land (or improvements thereon) are entitled *severally* to compensation for all loss and damage thereby sustained, and in that event the amount of compensation is determined in accordance with s.123.

If the holder of the mining tenement causes any damage to the surface of any private land the subject of the mining tenement or to any improvement thereon, not being damage already determined under Part VII of the 1978 Act, the owner and occupier of the private land or improvement are entitled *severally* to compensation for the damages sustained by each of them, and the amount of the compensation is determined in the manner provided by s.123.

It is interesting to note that when determining compensation under the 1978 Act the Warden is bound to take into consideration:

(a) any work that the person has carried out or undertakes to carry out to make good injury to the surface of the land or injury to anything on the surface

(b) the amount of any compensation received by the owner and/or occupier in respect of the damage for which compensation is being assessed and shall deduct the amount already so received from the amount that they would otherwise be entitled to receive for such damage.

Upon the hearing of an application for compensation under s.123 the Warden may order the holder for or on whose behalf the rights conferred thereby were exercised, to restore, so far as is reasonably practicable, the surface of the land

so damaged. However, before making such an order the Warden must give consideration to such matters as the geographical location of the land and its environment, the purposes for which such land was used before the commencement of mining operations and the purpose for which it is likely to be used once mining operations have ceased, the cost of restoring the surface relative to the whole of the cost of the mining operations and the profitability and the practicability of restoring the surface once the mining operations have ceased.

Consistent with the concept of being able to obtain the consent of the owner and occupier at the various stages of prospecting, exploring and commencing mining operations, s.123(8) enables the Warden to make a determination as to compensation payable in respect of any specified period and in respect of the whole or part of the total claim for compensation, if he considers it impracticable or inexpedient to determine the full amount of compensation.

The 1978 Act provides that except where, and then only to the extent agreed upon by the parties concerned, or authorised by the Warden, compensation is not payable under this Part to the lessee of land leased for pastoral purposes under the Land Act 1933:

(a) for deprivation of the possession of the surface
(b) for damage to the surface
(c) where the lessee is deprived of the possession of the surface for serverance of the land from any other land of the lessee
(d) for surface rights of way and easements.

However s.123(7) provides that where the holder of the mining tenement has caused damage to any improvements on land leased for pastoral purposes under the Land Act 1933, he is liable to pay compensation to the pastoral lessee for the damage and any damage that the lessee may, in the opinion of the Warden, suffer *as a consequence of* the damage to the improvements; and in any such case the amount of the compensation shall be determined in accordance with s.123. This provision although not relevant to the discussion on private land is an innovation when compared with the 1904 Act.

Part 7 — Transitional Provisions of the 1978 Act

(a) *Mining Tenements granted under the 1904 Act or regulations*

(i) Subsisting goldmining leases, coal mining leases and mineral leases granted under the 1904 Act are deeemed to be a ML granted under the the 1978 Act, and remain in force for the unexpired period for which they were granted or renewed under the 1904 Act. While any such granted lease is in force the holder has the right, in priority to any other person, to mark out and/or apply for a mining tenement under the 1978 Act (Provision 1(2)).

(ii) Subsisting mineral claims and dredging claims granted under the 1904 Act shall remain in force as though the 1904 Act had not been repealed for a period of two years and then expire. The mineral claim holder or the dredging claim holder may at any time while the claim is in force mark out as and/or make application under the 1978 Act for a PL or an EL or a ML in respect of a single area that is constituted by all the land the subject of each mineral claim or dredging claim and such licence or lease shall subject to the 1978 Act be granted to him (Provision 1(4)).

(b) *Mining tenements applied for (and not yet granted) under the 1904 Act or regulations*

In respect of a subsisting application for a mining tenement under the 1904 Act or the regulations (excluding applications in connection with s.276 of the 1904 Act) the applicant has, for a period of six months after the commencement date of the 1978 Act, the right to lodge, in substitution for that application an application for whichever mining tenement under the 1978 Act *most closely resembles* the first mentioned mining tenement, and the applicant shall have the same priority in respect of his application as would have been afforded him under the 1904 Act (Provision 1(10)(a)).

Until the application in substitution is lodged, the land to which the application under the 1904 Act or regulations relates is not open for mining under the 1978 Act by any person other than the applicant. If an application in substitution is not made within the proper time, the first mentioned application automatically lapses (Provision 1(10)(b) & (c)).

Clearly, problems will arise under Provision (1)(10) where, for example, the holders of a number of applications for coal mining leases or mineral claims wish to make application for a tenement which most closely resembles the tenement applied for. In terms of acreage, the tenement which most closely resembles a mineral claim or a coal mining lease is a PL. In terms of prospecting or exploration only, the same resemblance would apply. It may be that the conversion of a large number of mineral claim or coal mining lease applications to PLs will cause difficulties, bearing in mind the maximum numbers that can be held without first obtaining special approval from the Warden and the Minister. Alternatively, the applicant could convert to an EL the area of which cannot be less than 10 square kilometres, or convert to a ML which has no prescribed minimum area. In making the decision consideration would need to be given to a number of matters and particularly the obligations arising out of the mining tenement chosen.

(c) *General transitional provision*

There are other provisions in the transitional provisions that relate to the conversion of miscellaneous leases and the preservation of mortgages over mining tenements under the 1904 Act, which need not be dealt with in this paper. Importantly however, there is a specific provision in the transitional provisions to the effect that if any difficulty arises during the transition, the Governor may, by order in Council, make such modifications as may appear to him necessary for preventing anomalies, and make such incidental, consequential and supplementary provisions as may be necessary or expedient for the purpose of giving full effect to the transitional provisions. Any such modifications or provisions made by the Governor shall have the same force and effect as though they were enacted in the 1978 Act (Provision 2). In all probability, difficulties will arise with the transitional provisions, not only in relation to the private property aspects of the 1978 Act but in other respects.

Part 8 — Affecting Legislation

(a) *Town Planning and Development Act 1928* (as amended)

In a paper recently presented to AMPLA[6], reference was made to Section 20 of the Town Planning & Development Act. That Section prohibited without the consent of the Town Planning Board the grant of a lease or licence for a term

exceeding ten years except as a lot or lots. It was then considered that a lease or licence to mine on private land was illegal unless the consent of the Board was first obtained. Pursuant to the First Schedule of the 1978 Act, s.20 of the Town Planning & Development Act was amended to provide that the relevant part of s.20 did not apply to the grant of a mining tenement according to the interpretation given to that expression by s.8 of the 1978 Act.

(b) *Transfer of Land Act 1893* (as amended)

Section 68 of the Transfer of Land Act ("TLA") confers paramountcy of title upon the registered proprietor of land, subject to the statutory qualifications contained therein: *inter alia* ". . . to any mining lease or license issued under the provisions of any statute . . . notwithstanding the same respectively may not be specially notified as encumbrances on such certificate or instrument . . ."

Therefore, in the event that the registered proprietor of private land under the TLA sells land which is, for example the subject of a registered coal mining lease, without disclosing its existence, the purchaser takes the title to the land subject to the CML, by virtue of s.68.

The words "mining lease or license" are not defined in the TLA, however s.3 of the Western Australian Constitution Act has the effect that rights of occupancy of Crown Land for the purposes of prospecting for minerals can only be granted in accordance with the provisions of the 1904 Act. It seems that once the 1978 Act comes into force, all registered mining interests in land under the operation of the TLA will (prima facie) be enforceable against registered proprietors simply because they are defined or categorised in terms of leases or licenses, rather than in terms of mineral claims or prospecting areas.

(c) *State Agreements*

There are a number of agreements concluded with the State of Western Australia and ratified by the Parliament which may have some effect on a person's ability to prospect or mine on certain private land and on the position of the owner/occupier of some private land affected by such legislation. Examples of the legislation are:

(i) Collie Coal (Griffin) Agreement Act (No. 82 of 1979)
(ii) Collie Coal (Western Collieries) Agreement Act (No. 4 of 1979)
(iii) Alumina Refinery (Worsley) Agreement Act (No. 67 of 1973 and 10 of 1978)
(iv) Alumina Refinery (Muchea) Agreement Act (No. 97 of 1972)
(v) Mineral Sands (Allied Eneabba) Agreement Act (54 of 1975).

If advising a prospector or an owner or occupier of private land affected by any such legislation an examination of the legislation would be necessary as there are several instances where the 1904 Act is specifically amended. For example the coal agreements amend the 1904 Act to exclude affected private land from the definition of that term in the 1904 Act, and special provision is made for dealing with compensation payable to the owner and occupier in that instance.

PETROLEUM ACT 1967

Part 1 — What is "Private Land"?

Under the Petroleum Act the term "private land" enjoys essentially the same meaning as is attributed to it in the Mining Act 1978, and means any land

which has been, or may hereafter be, alienated from the Crown for any estate of freehold, or is or may hereafter be the subject of any conditional purchase agreement, or of any lease or concession, with or without the right of acquiring the fee simple thereof, other than for pastoral or timber purposes. Therefore the comments appearing at the beginning of this paper in respect of the various categories of private land under the Mining Act 1978 would also apply here.

Part 2 — Ownership of Petroleum in Private Land

Section 9 of the Petroleum Act provides that notwithstanding anything to the contrary contained in any Act or in any grant, lease, or other instrument of title, whether made or issued before or after the commencement of the Petroleum Act, all petroleum on or below the surface of all land within the State of Western Australia, whether alienated in fee simple or not so alienated from the Crown, is and shall be deemed always to have been, the property of the Crown.

Further, every Crown grant and lease under any Act relating to Crown land —

(a) issued before the coming into operation of the Petroleum Act shall be deemed to have contained; and

(b) issued on or after the coming into operation of the Act shall contain, if those reservations are not contained therein, be deemed to contain

a reservation of all petroleum on or below the surface of the land comprised therein, and also a reservation of the right of access, for the purpose of searching for and for the operations of obtaining petroleum in any part of the land (s.10).

Subject however to the Petroleum Act and to any rights of others, upon recovery of any petroleum by a permittee or licensee in the permit area or licence area the petroleum becomes the property of the permittee or licensee (s.120).

Part 3 — Consent of Owner and Occupier in Relation to Exploration and Mining of Certain Private Land

Section 16 of the Petroleum Act provides that a permittee (i.e. the registered holder of an exploration permit for petroleum) or licensee (i.e. the registered holder of a production licence for petroleum) shall not explore for, carry out operations for the recovery of petroleum or enter upon for that purpose any land that is comprised in the permit or licence of which he is the holder and that is

(a) private land not exceeding one-half acre in extent;

(b) used as a cemetery or burial place; or

(c) at a less distance than one hundred and fifty yards laterally from any cemetery or burial place reservoir or any substantial improvement,

unless the consent in writing of the owner or trustees as the case may be of the land has first been obtained. The terms "owner" and "trustees" are not defined.

The circumstances therefore in which the permittee or licensee is required to obtain the consent of the owner (note: not the occupier) of private land is limited to a far greater extent than those in which the holder of a mining tenement under the Mining Act 1978 is required to obtain the consent of the owner (*and* where appropriate the occupier). Nor does it appear that the obtaining of any such consent is a necessary prerequisite to the grant of a permit or a licence.

Part 4 — Rights to Explore for Petroleum on Private Land

A person is not entitled to explore for petroleum in the State except under and in pursuance of, an exploration permit ("EP") or except as otherwise provided in Part III of the Petroleum Act.

There are detailed provisions in Division 2 of Part III of the Petroleum Act leading up to the granting of an EP. Briefly,

1. The Minister may by instrument published in the Gazette invite applications (to be made within a specified period) for the grant of an EP in respect of a block or blocks specified in the instrument. (A block is a graticular section being 5 minutes of arc of latitude by 5 minutes of arc of longitude.)

2. Where an instrument is so published and no application is made within the period specified, or after consideration of the applications an EP is not granted on any of those applications or is granted in respect of some but not all of the blocks specified in the instrument, then the Minister may cause a notification to be gazetted and may at any subsequent time receive an application for the grant of an EP in respect of some or all of the blocks specified in the instrument not being blocks in respect of which an EP was granted.

3. Application for an EP must be

- in accordance with the approved form and made in the approved manner;
- in respect of not more than 200 contiguous blocks; and
- accompanied by particulars of proposals for work and expenditure, technical advice and qualifications, and financial resources available to the applicant and any other relevant matters, and a fee of $1,000.00.

4. The Minister may:

(a) by instrument in writing served on the applicant inform him:
  (i) that he is prepared to grant to the applicant an EP in respect of the block or blocks specified in the instrument; and
  (ii) that the applicant will be required to lodge a security for compliance with the conditions to which the permit if granted will from time to time be subject;

(b) refuse to grant an EP to the applicant.

5. The instrument referred to in 4(a) above must contain a summary of the conditions to which the EP is to be granted and a statement to the effect that the application will lapse if the applicant does not make a request to the Minister to grant him the EP under subsection 32(3) or the Petroleum Act and lodge with the Minister the security referred to in the instrument.

6. An applicant on whom there has been served an instrument may, within a period of one month after the date of service of the instrument or within such further period (not exceeding one month) as the Minister, on application in writing served on him before the expiration of the first mentioned period, allows:

(a) by instrument in writing served on the Minister request the Minister to grant to him the EP; and

(b) lodge with the Minister the security referred to in the first mentioned instrument.

Where an applicant on whom there has been served an instrument, and has made a request as above and has lodged the appropriate security within the applicable period, the Minister is required to grant to him an EP for petroleum in respect of the block or blocks specified in the instrument.

7. Where however the applicant fails to make a request or to lodge the relevant security within the applicable period the application lapses.

An EP may be granted subject to such conditions as the Minister thinks fit and specifies in the EP (s.43). It remains in force for a period of five years and is renewable for terms of 5 years over progressively reduced areas, in accordance with s.41. Whilst in force it authorises the permittee, subject to the Petroleum Act and the regulations and in accordance with the conditions to which the EP is subject, to explore for petroleum and carry on such operations and execute such works as may be necessary for that purpose within the permit area (s.38).

Upon discovery of petroleum in an EP area the permittee shall:

(a) forthwith inform the Minister of the discovery; and

(b) within a period of three days after the date of the discovery furnish to the Minister particulars in writing of the discovery (s.44).

In circumstances where an EP is in force in respect of a discovery block, the permittee:

(a) may; or

(b) shall if required to do so by the Minister by instrument in writing served on the permittee

by instrument in writing served on the Minister nominate a block in respect of which the permit is in force for the purpose of making a declaration under s.47 (s.46(1)).

Where a permittee who has been required by instrument to nominate a block does not, within the period of three months after date of service of instrument on him, or within such further period as the Minister on application in writing served on him before the expiration of that period of three months allows, nominate the block, the Minister may by instrument in writing served on the permittee nominate the block.

Upon nomination of the block by the permittee or the Minister he shall specify in the instrument of nomination a discovery block to form part of the location to be declared under s.47. That subsection does not prevent other discovery blocks in the permit area from forming part of the location.

Upon nomination of a block by the permittee or the Minister under s.46 the Minister shall by instrument published in the Government Gazette declare that block, and such of the blocks that immediately adjoin that block as are blocks in respect of which the permit is in force and are not included in the location, to be a location for the purposes of the Act (s.47). Establishment of a location is a means of setting aside and identifying a specific number of blocks from which a Production Licence ("PL") can be selected.

Part 5 — Right to Produce Petroleum from Private Land

A person cannot carry on operations for the recovery of petroleum in the State:

(a) except under and in pursuance of a PL; or

(b) except as otherwise provided by Part III of the Petroleum Act.

A permittee whose EP is in force in respect of a block or blocks that constitutes a location, may within the application period (i.e. 2 years and renewable for a further 2 years at the discretion of the Minister) make an application to the Minister for the grant of a PL. There are provisions which regulate the number of

blocks that may be applied for having regard to the number of blocks which constitute the location (s.50).

Section 51 of the Petroleum Act provides that an application for a licence shall be made in the approved manner together with details of proposals for work and expenditure and setting out such other matters that the applicant wishes the Minister to consider and enclosing the application fee. Where application is made for a primary licence the Minister must determine the rate of royalty in respect of petroleum recovered under the licence being a rate not less than 5% nor more than 10% of the value at the wellhead of that petroleum.

Where an application for the grant of a PL has been made the Minister may by instrument inform the applicant that he is prepared to grant him a PL in respect of the blocks specified in the application and may require him to lodge a security for compliance with the conditions to which the PL so granted is subject (s.53).

An applicant on whom there has been served an instrument may, within a period of three months from after the date of service of the instrument on him or within such further period (not exceeding three months) as the Minister on application in writing served on him before the expiration of the first mentioned period of three months allows:

(a) by instrument in writing served on the Minister request the Minister to grant to him the PL referred to in the instrument; and

(b) if the Minister has informed him that he will be required to lodge a security as mentioned in paragraph (b) of that subsection lodge that security with the Minister (s.54).

Where an applicant on whom there has been served an instrument has made a request under s-s.1 of s.54 and if the Minister has informed the applicant that he will be required to lodge a security and has lodged that security within the period applicable the Minister shall grant to the applicant a PL for petroleum in respect of the blocks specified in the application.

Whilst it remains in force a PL authorises the licensee, subject to the Act and the regulations, and in accordance with the conditions to which the PL is subject to —

(a) carry out operations for recovery of petroleum in the PL area;

(b) explore for petroleum in the PL area; and

(c) carry on such operations and execute such works in the PL area as are necessary for those purposes (s.62).

A PL remains in force subject to the Act for a period of 21 years with rights of renewal (s.63).

Subject to the Act and to any rights of other persons, upon recovery of any petroleum by the licensee in PL area the petroleum becomes the property of the licensee (s.120).

Part 6 — Pipelines and Pipeline Easements over Private Land

(a) *Petroleum Pipelines Act 1969* (as amended)

To construct and operate a pipeline (defined to mean a pipe or system of pipes used or intended to be used for the conveyance of petroleum) a person must obtain a Pipeline Licence from the Minister pursuant to the Petroleum Pipelines Act (s.6).

The Minister has power to authorise a person to enter upon *any land* within the area the subject of the authority to make surveys and preliminary investigations

in respect of the construction of a pipeline to which the licence proposed to be applied for will relate. The authorised person may do all things considered necessary for the purpose of survey and investigation. But before entry on *any land* for the purposes of s.7 the authorised person shall, if practicable, give reasonable notice to the owner or occupier of the land of his intention to enter and if required by the owner or occupier shall produce the authority under which he claims to enter or has entered the land.

The term "owner" in relation to land other than Crown Land or land owned by or vested in the Crown or a public authority includes every person who jointly or severally whether at law or in equity is:

- entitled to the land for an estate of freehold in possession
- a person to whom the Crown has lawfully contracted to grant the fee simple under the Land Act 1933 or any other Act
- entitled to receive, or is in receipt of, or if the land were let would be entitled to receive the rents and profits, whether as beneficial owner trustee mortgagee in possession or otherwise.

Any damage to the land caused by the authorised person shall be repaired as soon as possible and the land restored so far as possible to its former condition. Every person having an interest or estate in land entered upon under the authority of s.7 and injuriously affected or suffering any damage thereby is entitled to full compensation the amount to be as agreed between the person making the entry and the person claiming compensation or failing agreement to be determined by a court of competent jurisdiction (s.7(6)). There is no definition of "private land" nor indeed any definition of "land".

In making an application for a pipeline licence, amongst other details, the applicant must show the route of the proposed pipeline, the situation of any proposed pumping and compression stations etc., the land, if any, proposed to be used for the purposes of gaining access to the proposed pipeline, particulars of the land or the easements over land acquired or agreed to be acquired or in respect of which the applicant will need to acquire for the purpose of constructing and operating the proposed pipeline or gaining access to it. The application must be accompanied by particulars of any agreements entered into or proposed to be entered into by the applicant, or the acquisition by him of, or of easements over, such land (s.8).

At the time of making the application the applicant is obliged to give notice thereof to the owner and occupier of the land over which the pipeline is to be constructed.

Where a person makes an application for a pipeline licence pursuant to s.8 and the Minister is satisfied that the applicant has made provision or given security in addition to any other security required by the Act to the satisfaction of the Minister for the payment of compensation payable in respect of any land or easement over any land to be taken by compulsory acquisition and of all charges and expenses necessary for or incidental to the compulsory acquisition of the land or easement, the Minister may, after taking into account any representations made to him with respect to the proposed pipeline, grant the licence. In considering the application the Minister must have regard to the public interest, financial ability of the applicant and other matters (s.10).

In granting the pipeline licence the Petroleum Pipelines Act provides that the licence is subject to the condition that the licensee shall not commence or cause to be commenced the construction of the proposed pipeline over any part of the

licensed area unless he has first acquired all the lands in that part of the licensed area or a lease, licence or other authority over the lands acquired and registered all such easements over those lands as are necessary for him to lawfully construct that pipeline over those lands and to have the right of access thereto (s.12(3)). Pursuant to a 1970 amendment to the Act however the Minister has power to authorise construction if the licensee has acquired but cannot register any such easement.

To enable him to exercise the authority conferred on him by the pipeline licence the licensee may make such arrangements and enter into such contracts not inconsistent with the Petroleum Pipelines Act or with the licence as he considers necessary and agree with the owner of an estate or interest in land for the purchase or other acquisition of any right interest or easement in or upon the land and the terms upon which any such right or interest may be used or exercised or any such easement enjoyed (s.18). For the purpose of carrying out any function authorised by a pipeline licence or any other function necessary for the efficient operation of the pipeline in respect of which the licence is granted or necessarily incidential to the operation of the pipeline the Minister may, on the licensee's application, take under the Public Works Act 1902 (as if for a public work within the meaning of that Act) any land or any easement over any land whether for the time being subsisting or not. However, that provision does not apply unless the Minister is satisfied that the licensee after making reasonable attempts to do so has been unable to acquire the land or easement over the land by agreement with the owner. For purposes of giving effect to this provision, on the taking of the land or easement, the land or easement, as the case may be, vests in the licensee and all proceedings subsequent thereto in respect of compensation or otherwise for the purposes of compliance with the Public Works Act 1902 shall be taken against the licensee who shall be deemed to be the respondent and shall be liable in respect of the taking to the same extent as the Minister for Works would have been liable if the taking had been for the purpose of a public work (s.19(3)).

Where an easement is acquired or taken over any land a description of the easement and a notification that it has been so taken together with a plan showing the location of the easement of that land, shall if the easement is over land —

- that is under the operation of the Transfer of Land Act be sent by the licensee to the Registrar of Titles who shall record on the document of title a statement or entry
- that is not under the operation of that Act be sent by the licensee to the Registrar of Deeds who shall by memorial in the Register of Deeds duly record the notification of the easement
- that is subject to the Land Act 1933 excepting such land as is under the operation of the Transfer of Land Act be sent by the licensee to the Minister for Lands who shall be caused to be made in the appropriate register relating to the land a record of the notification of the easement.

Section 20 of the Petroleum Pipelines Act enables, by reference to the provisions of s.33A of the Public Works Act 1902, the creation of easements in gross for the purposes of construction, maintenance and use of pipelines. In order to create an easement in gross the instrument must expressly create the easement in favour of the licensee, and bear a certificate by the Minister to that effect.

(b) *State Energy Commission Act 1979*

It is of interest to note that the State Energy Commission of Western Australia is now commencing to enter private land in Western Australia to carry out

surveys and construction of works pursuant to the powers vested in it and contained in ss.28 and 29 of the State Energy Commission Act 1979 for the purpose of the construction and completion of the Dampier to Perth natural gas pipeline. Notice of entry is given in terms of s.46 of the State Energy Commission Act and upon such notice being served upon the owner or occupier the Commission may for the purposes of the Act lawfully enter onto any land premises or thing not under the control or management of the Commission notwithstanding that the Commission has not obtained the consent of the owner or occupier but except as is otherwise provided in the Act such an entry shall not be lawful unless notice has been served or such consent has been obtained. "Land" is to be read as extending to any land or to any portion of any land or to the subsoil surface or airspace relating thereto and to any legal or equitable estate right title easement lease licence privilege or other interest in over under affecting or in connection with that land or any portion strata or other specified sector of that land (whether or not that interest is an interest recognised by the common law) (s.36).

Part 7 — Compensation Payable to Owner or Occupier of Private Land

A permittee or licensee is not entitled to commence any operations on private land unless or until he has paid or tendered to the owner and the occupier the amount of compensation if any which he is required to pay under and as ascertained in accordance with the Petroleum Act or he has made an agreement *in writing* with the owner *or* occupier as to the amount times and mode of the compensation if any. Where the owner is dead or cannot be found any payment of compensation may be made to the Minister in trust for the owner (s.20). There is no requirement to file the compensation agreement with the relevant Minister.

A permittee or licensee may agree with the owner and occupier respectively of any private land comprised in the permit or licence as to the amount of compensation to be paid for the right to occupy the land. Subject to the comments below compensation to be made to the owner and occupier shall be compensation for:

(a) being deprived of the possession of the surface or any part of the surface of the private land

(b) damage to the surface of the whole or any part thereof and to any improvements thereon which may arise from the carrying on of operations thereon or thereunder

(c) severance of such land from other land of the owner or occupier

(d) rights of way

(e) all consequential damages (see s.17(1) & (2))

However in assessing the amount of compensation no allowance can be made to the owner or occupier for any gold mineral minerals or petroleum known or supposed to be on or under the land. (s.17(3))

If within such time as may be prescribed the parties are unable to agree upon the amount of compensation to be paid either party may upon a plaint in that behalf have the amount determined by the local court held nearest to the place at which the land is situated. In determining the amount of compensation a court shall take into consideration the amount of any compensation which the owner and occupier or either of them have or has already received in respect of the damage for which compensation is being assessed and shall deduct the amount already so

received from the amount which they would otherwise be entitled to for such damage (ss.17(4) and (5)).

If any private land or improvement thereon adjoining or in the vicinity of the land comprised in any permit or licence is injured or depreciated in value by any operations carried on by or on behalf of the permittee or licensee or by reason of the occupation of any portion of the surface or the enjoyment by the permittee or licensee of any right of way, the owner and occupier of the private land or improvements thereon shall severally be entitled to compensation for all loss and damage thereby sustained and the amount of compensation shall be ascertained in the same manner as is provided in s.17 of the Petroleum Act.

If while in occupation of any land comprised in a permit or licence the permittee or licensee as the case requires causes any damage to the surface of any private land comprised within the boundaries of the land the subject of the permit or licence belonging either to the same or any other owner or to any improvement on any such private land not being damage already assessed under the provisions of the relevant Part the owner and occupier of the private land or improvements shall severally be entitled to compensation for the damage sustained by each of them and the amount of such compensation shall be ascertained in accordance with the provisions of s.17 of the Petroleum Act (s.19).

It is interesting to note that there is provision in the Petroleum Act for compensation to be payable to the lessee of a pastoral lease (not being "private land" for the purpooses of that Act) for damage to improvements and for consequential damage (s.21). Compensation may be agreed and in default of agreement action may be taken before a local court.

Except where and then only to the extent agreed to by the parties or authorised by the court compensation is not payable under the provisions of the Petroleum Act to the lessee of land leased for pastoral purposes under the provisions of the Land Act:

(a) for deprivation of the possession of the surface
(b) for damage to the surface
(c) where the lessee is deprived of the possession of the surface or severance of the land from other land
(d) for surface rights of way and easements
(e) for any diminution of interference with the right of the right of the lessee to the reasonable comfort and enjoyment or the peaceful and quiet occupation of the homestead or other structure on the land
(f) for any disturbance of cattle sheep or other stock whatsoever or any damage suffered by the lessee as a consequence of the disturbance.

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FOOTNOTES

1. A forest lease held by a person pursuant to the same division may or may not be excluded from the definition depending upon the purpose for which the lease was granted. Section 40(1) of the Forests Act provides for the granting of a forest lease within a State forest "for grazing, agricultural, and other purposes not opposed to the interests of forestry".
2. No example however of such a reservation has come to the notice of the writer of the paper other than in respect of certain minerals for road making or like purposes. The form of grant prescribed by the Land Regulations of 1882 contained no reservation of minerals to the Crown.
3. *Midland Railway Co.* v. *Western Australia* (1956) 3 All E.R. 272.

4. The section talks of a 'a cultivated field'. This was a term used prior to the 1970 amendment of the 1904 Act and it would seem that (in this instance) the draftsman has not adopted the term "land under cultivation" referred to and defined in s.34.
5. There are some practical difficulties that may arise out of these provisions (for comment see Part 7 of this paper on Transitional Provisions).
6. Mining and Petroleum Legislation in Australia by D. F. Jackson, Q.C., D. P. Drummond, P. A. Keane. (*AMPLA Journal* Vol 1 1978 No. 2).