VICTORIAN MINING LEGISLATION — 125 YEARS ON

By David Bradley*

INTRODUCTION — AN HISTORICAL OVERVIEW

An early commentator on Australian Mining Law perhaps overstepped the mark by observing that 'at the time of the first discovery of gold no mining law whatever was in existence in New South Wales of which Victoria then formed a part . . .[1]

When gold was first discovered at Bathurst in the colony of New South Wales in 1849 and soon afterwards in what is now central Victoria, no specific mining legislation existed.[2] The law of the Colony of New South Wales at the time was the common law of England, modified by imperial statutes, in force as at 25 July 1828[3] in so far as they were not inappropriate to colonial circumstances.[4]

The resultant 'gold rush' challenged the suitability of the English common law to Australia. Under prevailing English law, whilst the royal metals (gold and silver) were reserved to the Crown by a prerogative which may have descended from Roman law,[5] other minerals were, unless expressly exempted, conferred with the fee simple in a grant of private land.[6]

In contrast to the Crown prerogative regarding gold and silver, the custom of miners at the time embodied the concept of an entitlement to maintain a claim of a reasonable area so long as it was worked by the miner.[7] Moreover, the application of the Crown prerogative regarding royal metals to the Australian colonies, which was asserted and reasserted in subsequent nineteenth century legislation, was not conclusively established until 1877.[8] In an attempt to suppress the rush triggered by the discoveries of gold, Governor Fitzroy asserted, by proclamation on 22 May 1851, the Crown's right to all gold discovered in the colony of New South Wales. The proclamation declared it an offence to take or mine gold without authorisation to do so.[9]

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1 H.J. Armstrong, *The Law of Gold Mining in Australia and New Zealand* (2nd edn 1901) 1.

2 M. Crommelin, 'Mineral Exploration in Australia and Western Canada' (1974) 9 *University of British Columbia Law Review* 30, 38 and L. Lloyd, *The Sources and Development of Australian Mining Law* (unpublished thesis, ANU) (1966) 14.

3 Crommelin, op. cit. 38.

4 Lloyd, op. cit. 15.

5 C.W. O'Hare, 'A History of Mining Law in Australia' (1971) 45 *Australian Law Journal* 281, 282, esp fn.21.

6 Ibid. 282.

7 J.R. Forbes, and A.G. Lang, *Australian Mining and Petroleum Laws* (2nd edn 1987) 2.

8 *Regina v. Earl of Northumberland (The Case of Mines)* (1568) 1 Plowd. 310; 75 ER 472; *Woolley v. Attorney General of Victoria* (1877) 2 App Cas 163.

9 O'Hare, op. cit. 285; Crommelin, op. cit. 38–39; Lloyd, op. cit. 17.

Victoria separated as a colony from New South Wales on 1 July 1851 and the law applicable in the Port Phillip district of New South Wales as at 2 May 1851 by virtue of an Act, 14 Vict. No.49 (NSW), became the law of Victoria.[10] On 15 August 1851, the Governor of Victoria issued a proclamation mirroring that of New South Wales of May that year. These proclamations marked the beginning of government regulation of mining in Australia which, during the period 1851–1865, has been described of one of 'constant and often bewildering, experimentation'.[11] As the search for gold centered around Ballarat and Bendigo, Victoria assumed the leading role in the development of mining law.

CAUSES OF EUREKA REBELLION

Historical observers appear to agree that one of the major causes of the Eureka Rebellion, which occurred near Ballarat in December 1854, was the licensing system which arose from the 1851 Proclamations. The 'authorisation' contemplated by the Proclamations took the form of a licence which in the first few months of regulation doubled from 30 shillings to 3 pounds per month.[12]

The licence concept was embodied in Victoria's first mining Act, 15 Vict. No.15, enacted in January 1852. It also introduced a summary procedure for the settlement of disputes between miners by the creation of the office of the Gold Commissioner.[13]

In 1853 a further mining law, 17 Vict. No.4, made provision for mining leases which afforded greater security of title than a claim under licence but, being within the discretion of the Governor, could not (even in 1853) be obtained without considerable delay and accordingly were not a convenient alternative to the licence.

The licence authorised occupation of Crown land for gold mining and prospecting, but little protection was given to the miner's title in return for the heavy licence fee. Self help was a common form of resolving disputes between prospectors.[14]

Gold Commissioners dealt summarily with disputes between miners but antagonised miners by zealously enforcing the licence requirement. It has been noted that the Commissioners and the police exercised their duties 'conscientiously' to say the least.[15] A provision in the 1852 Act which entitled Gold Commissioners to a portion of penalties recovered no doubt contributed to this fervour.

The licensing system was considered unjust not only because of the high fee charged, but also because it applied to the diggers irrespective of their success or otherwise.[16] Its imposition also diverted capital required for deep sinking and dewatering in pursuit of alluvial leads.

The attitude of the administration to the miners and the corrupt and

10 O'Hare, op. cit. 282, esp at fn.16.
11 Lloyd, op. cit. 214.
12 Forbes and Lang, op. cit.
13 Ibid. 2; O'Hare, op. cit. 286; Crommelin, op. cit. 39.
14 Crommelin, op. cit. 39.
15 O'Hare, op. cit. 286.
16 Lloyd, 225.

inefficient behaviour of the Gold Commissioners and the police (particularly with regard to the methods used to collect licence fees) have been noted amongst the major causes of the Eureka rebellion.[17]

Whilst there would seem little doubt that the licensing system was at the root of the rebellion, many other factors contributed or have been said to have contributed. These factors including the want of the franchise and the influence of Irish republican sentiments which were particularly notable in the leadership of Peter Lalor (then a 27 year old Irish engineer) and the prevalence of Irish immigrants amongst those killed at the stockade.[18] Whatever the causes, the unnecessarily provocative conduct of the police rather than the miners ultimately escalated the protest to violent confrontation.[19]

Foster, the Colonial Secretary of Victoria in 1853 and 1854, later said with the benefit of hindsight:

> The whole system of licence fees was so faulty that it was certain, sooner or later to end in disturbance. The whole body of the miners were constantly arrayed against the Government by it and it placed the police in a state of direct antagonism and unpopularity with the diggers. The evil was inherent in the system itself.[20]

Following the rebellion a Royal Commission was appointed which in 1855 recommended the abolition of the licensing system and the introduction of a new administration.[21] The Royal Commission found that the methods used to collect the licence fees produced 'mutual irritation, abuse and gross violence'.[22] The Commission listed the three major causes of the unrest as the licensing system, the inability to acquire land and the lack of political rights.[23]

THE MINERS RIGHT AND OTHER REFORMS: THE GOLD FIELDS ACTS

A number of the Commission's recommendations were implemented in the Gold Fields Act of 1855.[24]

Perhaps its most significant contribution was the recognition of the concept of the 'free miner' i.e. the recognition of a right to mine as opposed to a licence to do so. This concept soon spread to other colonies and formed the basis of nineteenth and twentieth century mining legislation.

The 1855 Act provided for the replacement of the licence by a Miner's Right which gave free entry onto Crown land for mining purposes

17 G. Serle, 'The Causes of Eureka' in *Historical Studies* (2nd edn), *Australia and New Zealand Supplement* (2nd edn,) (1965), 43; Lloyd, op. cit. 226.
18 Ibid. 54; Lloyd, op. cit. 226. Apart from those killed at the stockade a Welshman, innocent of the rebellion was shot dead by a mounted trooper for 'gross inquisitiveness'.
19 Ibid. G. Blainey, *A History of Australian Mining* (1978) 54–56; Lloyd, op. cit. 226.
20 Serle, op. cit. 43.
21 Lloyd, op. cit. 228.
22 Serle, op. cit. 44.
23 Ibid. 44.
24 18 Vic. No.37; Lloyd, op. cit. 233.

and priority in right to the first to enter.[25] Fees were reduced from 3 pounds per month to 1 pound per annum[26] and a gold export duty was introduced to match lost revenue.[27]

By section 3 of the Act, the holder of a Miner's Right was bestowed with a right:

> to mine for gold upon any of the waste lands of the Crown and to occupy (except as against Her Majesty only) for the purpose of residence in connection with the object of mining so much of the said lands as may be prescribed . . . and every such holder shall . . . be deemed in law to be the owner (except as against Her Majesty only) of the Claim which shall be occupied by virtue of such Miners Right and . . . all gold then being in and upon the said Claim shall (except as against Her Majesty) be deemed in law to be the absolute personal property of such holder.

In so providing, the 1855 Act embodied prevailing mining customs including the requirements of actual possession and continual working to prevent forfeiture of a claim.[28]

Apart from the significant reduction of fees the miner's position was not improved against the Crown — the Crown prerogative having been reasserted by the Act. The successful claimant's position against other miners, however, was significantly strengthened.[29]

In addition to establishing the Miner's Right the 1855 Act abolished the office of the Gold Commissioner who had been able to give unreasoned decisions with no right of appeal. In their place, a system of Local Courts with both legislative and judicial functions was established in each Mining District. The chairman of the Local Court was a representative appointed by the Governor but the remaining nine members were elected by local miners.[30] Professor Blainey has expressed the view that the introduction of this system was 'the high tide of Australian democracy'.[31]

The 1855 Act went a long way towards resolving problems which had given rise to the Eureka rebellion. The Act, however, was flawed in its operation and, upon the advice of three Parliamentary Select Committees, a further Gold Fields Act was introduced in 1857 which revised the structure created by the 1855 Act.

The reforms of the 1857 Act were directed chiefly towards the administration of justice and the titles system. It established District Courts of Mines and Warden's Courts (the latter had been informally established as justices of the peace pursuant to the 1855 Act) which together replaced the judicial functions performed by the Local Courts created under the 1855 Act.

Decisions of the Courts of Mines were made by judges with legal qualifications assisted by elected assessors.[32] The Courts had original jurisdiction over disputes between miners concerning title to land occupied

25 Crommelin, op. cit. 40, Forbes, and Lang, op. cit. 3.
26 Forbes and Lang, op. cit.
27 Blainey, op. cit. 56.
28 Forbes and Lang, op. cit.
29 Ibid.
30 Lloyd, op. cit. 234; Crommelin, op. cit. 40.
31 Blainey, op. cit. 57.
32 O'Hare, op. cit. 286; Lloyd, op. cit. 238.

pursuant to a Miner's Right or lease and appellate jurisdiction from decisions of the Wardens.[33]

The 1857 Act also establishing Mining Boards which replaced the administrative and regulatory role of the Local Courts. Mining Board members were elected from miners.

Further amendments to the 1857 Act were made in 1860 and 1862. The 1860 amendments enabled the grant of leases of Crown land for mining of minerals other than gold.[34]

THE MINING STATUTE OF 1865

Notwithstanding the significant developments effected by the Gold Fields Acts, problems continued to arise in the administration of the goldfields to the extent that in 1862 a second Royal Commission was appointed. The Commission reported in 1863, addressing five major issues:

Mining Tenures

The Commission criticised the lack of security afforded by the system of claims and leases as not providing sufficient encouragement to mining enterprise. It recommended that the penalty of forfeiture of a claim should be reserved as the ultimate sanction rather than as a consequence of trifling breaches which would be better punished by a fine.

The Mining Judicature

The Commission, finding the existing structure to be complex and inefficient, recommended a sweeping simplification with one tribunal in each area having jurisdiction in mining matters generally. It advocated the expanded jurisdiction of the Warden's Court to cover all mining disputes up to a certain money value. It further advocated the need for a central tribunal to hear appeals in all mining matters so as to lend a degree of consistency to the treatment of individual disputes and the interpretation of legislation.

Central Administration

The Commission also recommended the reorganisation of the Mines Department under a responsible minister. In his discussion of the Commission's recommendations, Lloyd[35] notes:

> a Mines Department . . . had in fact been established in 1860 but dissolved in the following year. The result of this dissolution had been increasing uncertainty amongst the various agencies in regard to their respective spheres of authority.

This seems prophetic in view of the complicated administration contributing to the review of the late 1980s.

33 Lloyd, op. cit. 237; Crommelin, op. cit. 40.
34 24 Vict. No.117.
35 Lloyd, op. cit. 238.

Codification of the Law

The Commission, in line with its general theme of consistency and certainty, recommended that the mining regulations be codified. To further this reform the Commission recommended the abolition of the legislative function of the local Mining Boards which had introduced by-laws which were often inconsistent.

Mining on Private Property

The Commission recognised that the Crown had not divested itself of its estate in precious metals in alienating land in fee simple. The Commission stressed the importance of a general public policy in favour of mining over the private interests of landholders. It recommended that landholders be compelled to permit entry onto their land for mining. The proposal included recommendations relating to compulsory entry permits, the registration of mining agreements in respect of private lands and the payment of compensation to landowners.

The Commission's recommendations led to the enactment of the Mining Statute of 1865. This Act, which has been described as the fertile mother of Australian mining law,[36] followed the Commission's recommendations closely except in relation to mining on private property[37] and, despite the Commission's recommendations, Mining Boards were retained with power to make by-laws for their district regarding claims. The functions of the Boards were, however, more clearly defined and by-laws were subject to central scrutiny before approval.

The mining judicature was simplified in accordance with the Commission's recommendations. Wardens Courts were given greater jurisdiction to deal with all mining disputes.[38] The Court of Mines original and appellate jurisdiction was confirmed and a further appellate tribunal, the Chief Judge of the Court of Mines was introduced. The office of Chief Judge was held by Mr Justice Robert Molesworth from its creation in 1866 until its abolition in 1883. His influence in shaping Australian mining law by his interpretation of the Mining Statute of 1865 was observed in a decision of Sir Samuel Griffith CJ,

> It is a well known fact that the mining law of Australia was practically made by the decisions of Mr Justice Molesworth and the Supreme Court of Victoria.[39]

Finally, under the 1865 Act, mining tenures were strengthened by provision for Miner's Rights of 15 years duration at a reduced fee of 5 shillings per annum. A power of assignment was conferred on the holder of miners rights.[40]

36 Ibid.

37 Legislation in relation to property was not enacted until the Mining of Private Property Act 1884 following some 25 abortive attempts to introduce appropriate legislation. Even then the legislation, while allowing mining on private land without consent, failed to allow entry for exploration without consent. The position was finally amended in the Mines Act of 1897: see Forbes and Lang, op. cit. 5.

38 Ibid. 4.

39 Griffith C.J. in *Theodore v. Theodore* (1897) 8 QLJ 76; Forbes and Lang, op. cit. 4.

40 Lloyd, op. cit. 250.

INFLUENCE OF THE MINING STATUTE

The model established by the Mining Statute of 1865 together with the 'free miner' concept introduced by the Gold Fields Acts of the 1850s exerted considerable influence on mining legislation in Australia and elsewhere in the colonies for the remainder of the nineteenth century. The 1865 Act has been regarded as 'the peculiar contribution of Victoria to the law of Australia and New Zealand.'[41]

Legislation similar to the 1865 Act was introduced in New South Wales in 1866,[42] Queensland in 1874,[43] South Australia in 1870,[44] Tasmania in 1880[45] and Western Australia in 1886.[46] In some cases, the provisions of these Acts directly reflect the wording of the Mining Statute of 1865. Where changes were made the fundamental principles of mining management and mining administration were retained. Whilst each legislature provided for an inferior court of mining similar to that of the Warden's Court and for an appellate court, in all colonies which adopted the Victorian system, except New South Wales, a system of regulation by the governor was substituted for the system of Mining Board by-laws.[47]

Outside Australia, the concept of the free miner and the miner's right, established by Victoria's 1855 Act, was adopted in British Columbia by the Gold Fields Proclamation of 1859.[48]

British Columbia had inherited a legal system similar to that of the colonies of Australia.[49] Under the 1859 Proclamation Gold Commissioners were appointed in British Columbia and given authority to investigate and settle all disputes relating to titles. The basic system created by the 1859 Proclamation remained through to the twentieth century[50] and the influence exerted by Victoria's 1855 Act on Canadian legislation remains today.[51]

Elsewhere in Western Canada, in the Yukon, where discoveries were made much later in the nineteenth century, a free miner doctrine prevailed, but at first was influenced more heavily by the United States model which gave priority to the discovery of minerals rather than the person who first entered to search for minerals.[52] Accordingly, unlike the Australian model, no security of title was available to miners at the exploration stage.

41 A.C. Castles, *An Australian Legal History* (1982) 467–468.
42 30 Vic. 8.
43 38 Vic. 8. 38 Vic. 11.
44 33 and 34 Vic. 26.
45 44 Vic. 16.
46 50 Vic. 18.
47 Lloyd, op. cit. 293.
48 G. Blue, 'Exploration Dispositions, Priority and Registration' in R. Bartlett (ed.) *Mining Law in Canada* (1984) 7; Crommelin, op. cit. 42.
49 An English Law Ordinance of 1858 provided that the laws of England should, so far as not inapplicable to local circumstance, prevail as the laws of British Columbia: Crommelin, op. cit.
50 Crommelin, op. cit. 42–43.
51 Ibid. 43.
52 Ibid.

Later, in 1898, a model adhering more closely to the British Columbian (and thus the Australian) model was adopted in the Yukon with priority given to the first to enter, locate and register a claim.[53]

New Zealand's nineteenth century mining legislation, which culminated in the Mining Act of 1926, established a system similar to that established by Victoria's 1865 Mining Statute. The Miner's Right was recognised by the Act, giving a prospector a right to prospect on unoccupied Crown land. A number of Mining Districts were also established within which Wardens' Courts were empowered to preside over mining disputes and applications for mining rights within their district.[54]

THE MINERAL RESOURCES DEVELOPMENT ACT 1990

Introduction

Against this historical backdrop the enactment in Victoria of the Mineral Resources Development Act 1990 ('the New Act')[55] must be considered.

The pre-eminence of Victoria as a leading gold producer which fostered the development of the mining legislation of the mid nineteenth century is, regrettably, not reflected in the level of gold and other mining activity in Victoria today.[56] The appallingly antiquated Mines Act 1958 ('the old Act') complicated by a century of piecemeal amendments giving rise to sometimes contradictory provisions has, however, necessitated a radical departure in form and content in the New Act.

Review Process

The new Act evolved from a process of review which commenced in February 1988 with the release by the Department of Industry Technology and Resources (DITR) as it was then known, of a paper entitled 'Review of the Mines Act 1958: Issues for Public Consultation' ('the Issues Paper'). The Issues Paper invited submissions for suggested reform of the Old Act and encouraged a considerable response. Some 360 initial submissions were received including submissions from AMPLA which was prepared by a specially convened sub-committee of the Victorian branch.[57]

These submissions resulted in the release in December 1988 of a paper entitled 'Review of the Mines Act 1958: Options For Change' ('the Green Paper') which presented options and alternatives (suggested by

53 Ibid. 44.

54 W.M. White, 'Mining Law in New Zealand Present and Future' in *Australasian Mining Symposium Auckland University Legal Research Foundation*, (1970) 24, and 26–27.

55 The Act (No.92 of 1990), had not come into force at the time this paper was written in May 1991 but is expected to be in operation prior to the conference in July 1991 at which this paper will be presented.

56 T. Thomas, 'Miners decide Victoria is not worth the wait' *Business Review Weekly* (Syd.) (14 Dec. 1990).

57 D.M. Bradley 'A Fresh Approach to Mining in Victoria' (1988) 62 *Law Institute Journal* 959.

submissions received) to the key issues for review identified in the Issues Paper.

The Victorian Chamber of Mines ('VCM') and AMPLA jointly presented a seminar at the Law Institute of Victoria in February 1989 at which speakers highlighted various policy, general legal, planning and environmental issues canvassed in the Green Paper. The AMPLA subcommittee again commented on the Green Paper in a formal submission in May 1989.

In August 1989 the Department released a White Paper entitled 'Review of the Mines Act 1958. The Way Forward: a Framework for Mineral Resources Development' ('the White Paper') which included a draft Mineral Resources Development Bill prepared in a novel 'plain English' format by the Law Reform Commission of Victoria in consultation with practitioners specialising in the resources area including myself.

A Mineral Resources Development Bill prepared by parliamentary counsel but based upon the LRC draft was introduced into the Victorian Parliament in November 1989. The Bill was subsequently withdrawn and a replacement Bill of the same title was introduced in May 1990. The resulting New Act was assented to on 18 December 1990 but is not yet in force.[58] At the time of writing this paper (May 1991) a reliable source[59] within the Department of Industry and Economic Planning — the successor in title to DITR — had recently stated that the regulations were likely to be finalised and accordingly, the Act be proclaimed, in July 1991.

The resulting legislation, whilst by no means beyond criticism, is an immeasurable improvement (indisputably in form and, on balance, in content) on the old Act. The initial work by the LRC did make the important initial contribution of breaking the mould in respect of the old Act and setting out to build a new legislative model, but the early LRC drafts required considerable reworking before the standard reached in the new Act was obtained.

Major Areas Of Reform

DRAFTING STYLE

Whilst the industry remains critical and suspicious of several of the reforms in the new legislation[60] the drafting style has not, to my knowledge, been criticised, nor should it be. Anyone familiar with the provisions of the Old Act (if indeed familiarity is possible) cannot help but admire the layout and text of the New Act.[61]

58 The New Act, however, provides for the repeal of s.66A of the Old Act (Eductor Dredge Licences) from 1 Nov. 1990.

59 The 'reliable source' wishes to remain anonymous.

60 Thomas, op. cit. 63.

61 For those with an insatiable appetite for detail regarding the operation of the Old Act, I have previously examined the provisions of the Old Act in some detail together with a comparison of an early draft of the New Act: see D.M. Bradley, 'Mining Title Issues in Australia', BLEC Seminars on Current Mining Law (1989).

Unlike the early LRC drafts[62] the New Act has dispensed with radical drafting innovations but retained the clear layout.

The radical innovations included:

- a novel 'decimal' numbering system: sub-clause 803.1 for example should be compared with paragraph 85(2)(b);
- the peculiar boxed text (an example of which is found at the start of Part 8 in the schedule annexed to this paper) which was intended to serve as a guideline to interpretation but, unlike marginal notes in conventional legislation, was also intended to be taken into account in interpretation;
- the deliberate absence of a central definition provision in favour of definitions 'as near as possible to the term itself'; and
- the absence of a numbering system for paragraphs.[63]

The New Act retains a 'plain English' approach but does not often make the mistake of clarity at the expense of accuracy. No doubt some fine tuning and perhaps considerable reworking will be required in order to effect the transition to the new system brought into operation by the New Act. Nevertheless it stands as a laudable piece of drafting.

TITLE SYSTEM

Titles — Old

The AMPLA submission of August 1988 observed that the old Act provided for at least 12 different forms of mining tenement as well as the Miner's Right[64] and called for a reduction in the number and type of mining tenements to three: exploration licence, mining lease and a miscellaneous purposes licence (for ancillary rights such as provision of water and power). An early VCM submission similarly pressed for a reduction to two titles: an exploration title and a mining or production title.

The AMPLA submission recommended the abolition of the Miner's Rights as an anachronism and the assumption of the Miner's Right claim by a reduced area mining lease. It argued that the leased area licence,

62 Part 8 of the LRC draft which was annexed to the White Paper is extracted and annexed to this paper.

63 See Cl.803 of the draft annexed for example.

64 These original tenements identified comprise:
- Miners Right;
- Miners Right Claim;
- Mining Lease;
- Development Lease;
- Prospecting Area Licence;
- Exploration Licence;
- Searching Permit;
- Tailings Removal Licence;
- Tailings Treatment Licence;
- Leased Area Licence;
- Mining Area/Purposes Licence;
- Waterline Licence; and
- Eductor Dredge Licence.

This overlooks authorities pursuant to s.46A and 46B (Tourism Authorities).

mining purposes licence and waterline licence could all be assumed into a miscellaneous purposes licence. Tailings treatment and removal licences could be assumed within a mining lease if sensible provision was made resolving uncertainties as to the status of 'tailings' as private chattels or as fixtures to land. Interim titles such as the development lease, prospecting area licence and searching permit could be abolished if the administrative delays which had led to their creation were removed. The eductor dredge licence would of course fall by the wayside with the abolition of activities authorised by those licences on the commencement of the New Act in accordance with prevailing government policy.

Titles — New Titles

The New Act adopts the AMPLA/VCM suggested model by reducing the number of tenements to an exploration licence and a mining licence.[65]

(A) Exploration Licence

The exploration licence is a tenement authorising exploration as defined in the New Act. The tenement is to be granted for a period of two years over an area of between one and 500 graticular sections. Provision is made for a three month moratorium after expiration and for progressive reduction in area on renewal.[66] Similar provisions were contained in the Old Act: sub-sections 514(2) and (4) and 519(1A) and (1B).

(B) Mining Licence

A mining licence may be granted for a period of not greater than 20 years (but renewable for further periods of 20 years) and for an area not greater than 260 hectares without consent.[67]

It remains to be seen from the form of licences to be granted whether anything will turn on the appellation 'licence' rather than 'lease'. Sub-sections 70(3) and (4) provide that a licence, on registration, confers on the licensee a proprietary interest in the land subject to the licence for the purpose of assisting the licensee to exercise the rights and discharge the obligatons under the licence. These provisions would appear to be aimed at giving comfort to tenement holders having regard to the reduction in status from lease to licence.

(C) Claims

The Act picks up on the AMPLA recommendation regarding claims by making provision for special treatment for mining leases of an area of less than five hectares. These special mining licences may be granted over a prior exploration licence without the holder's but with the Minister's consent and special provision is made for the number and spacing of the

65 Bradley, *Law Institute Journal, op. cit.* 961.
66 See ss.13, 28 and 30 respectively.
67 See ss.14 and 32.

claims.[68] Moreover, Part 4 (which provides for the establishment of the Mining and Environment Advisory Committee) makes provision for one of the seven appointed members to be a representative of 'the interest of the sector of the mining industry holding licences covering land of five hectares or less' (i.e. the Prospectors Association).

A crucial difference exists between this special mining licence and the Miners Right claim and that is that the first is a discretionary title whilst the second was an 'as of right' title deriving its origins from the 'free miners' system developed as a consequence of the Eureka rebellion.[69] Professor Crommelin has, however, observed that as registration appears to have some investing effect in Victoria there is room for doubt as to the extent to which the Miners Right claim under the Old Act could be described as a 'possessory title'.[70]

Professor Crommelin has observed:

> From the standpoint of management of natural resources, the 'free miner' regime is based upon a critical assumption: that mining is the preferred land use. Free entry upon land for mining purposes can only be justified if mining is necessarily of greater social value than any alternative land use. During the second half of the 19th century and perhaps even the first half of the 20th, this assumption passed without challenge.
>
> Once made, however, the challenge led invariably to a decline in the significance of possessory title.

His article includes a comparison of the status of 'claims' in the various Australian States. Only the Tasmanian claim is said to be a truly possessory title for minerals, the right and entitlements pursuant to claims in other jurisdictions having been withered down to some extent.

AMPLA's first submission called for the abolition of the Claim and its assumption to a Mining Lease. It observed:

> Miners Rights Claims are the only tenements which can be obtained against the Crown as of right and that, in itself, is a rarity in Australia today. They are difficult to administer, particularly in relation to the enforcement of rehabilitation obligations. Claims are in a privileged position compared with other forms of tenure. It is recommended that they be replaced with Mining Leases, which could be for a short term over a small area (to accommodate the small miner) as the applicant requires. This would place complete control of the industry in the hands of the Minister.[71]

Michael Hunt has noted:

> Since the gold rushes in New South Wales and Victoria, the policy aims of governments have changed dramatically. In the early gold rush days government policy behind implementation of a licence system was 'a tax on the unsuccessful digger forcing him back to his farm or forge'.
>
> Government policies are now, as the Queensland government has said, to promote 'conditions conducive to the growth and viability of the minerals and energy industries'.[72]

68 Section 16 and ss.25(1)(c)(i) and (ii).
69 See Old Act, s.7(2).
70 Crommelin, 'Mining and Petroleum Titles' in (1988) 62 *Australian Law Journal* 863, 865–866. The distinction between possessory and administrative titles is discussed in Professor Crommelin's article. See also M. Hunt, 'Government Policy and Legislation regarding Mineral and Petroleum Resources' (1988) 62 *Australian Law Journal*, 841.
71 Crommelin, *Australian Law Journal*, 865.
72 Hunt, op. cit. 842–843.

Questions may be raised by the mining industry as to the extent to which the New Act reflects an intention to promote the growth and viability of the industry. Michael Hunt's observations on changing government policy, however, go a long way to explaining the need for a possessory title to placate aggrieved diggers following the Eureka rebellion and its irrelevance today. The vast bulk of the mining industry which adds wealth to the Victorian and national economies has an eye to operating on a scale and for a duration which does not lend itself to possessory titles. Its concerns are not with ministerial discretion but the manner in which that discretion may be exercised particularly after grant of title so as to affect the security of title.[73]

(D) Tailings

The problem with tailings is addressed in section 10 which, in perhaps unfortunate terms,[74] attempts to deem tailings part of the land on which they are situated thereby obviating the need for a special tailings tenement. Whilst this amendment accords with AMPLA's recommendations it would be preferable for the provision to expressly deem tailings to form part of the land irrespective of whether they would at law be considered fixtures to the land thereby overcoming the present confusion regarding the status of tailings at law.

The definition of 'tailings' in section 4 of the Act will require amendment as it refers to material produced in the course of doing work under a licence not thereby contemplating historically discarded tailings which form a large part of tailings treatment activities in Victoria.

(E) Other Authorities

In addition to the exploration and production tenements the New Act makes provision for miner's rights, tourist fossicking authorities and tourist mine authorities.

- Miners Rights
  Under the New Act,[75] the Chief Administrator must grant an application for a miner's right to an applicant unless that applicant in the Chief Administrator's reasonable belief is likely to abuse the right. In leaving some room for ministerial discretion this has reduced the status of the miner's right from an as of right entitlement to a lesser right.
  The rights exercisable pursuant to the miner's right may also have undergone a change. Section 55 of the New Act entitles the holder of a Miners Right 'to *search* for minerals' and section 58 precludes the use of equipment (other than non-mechanical hand tools), the use of

73 The issue of resource security has been recently highlighted by the Final Report of the Resource Assessment Commission in its Kakadu Conservation Zone Inquiry (1991) and consideration was given to the issue in the Final Report of the Industries Commission Inquiry into Mining and Minerals Processing (1990).

74 'Tailings are to be treated as part of the land on which they are situated and minerals in them are owned by the Crown . . .'

75 Section 57.

explosives, the removal or damage of flora and the disturbing of an aboriginal place in carrying out searching activities. 'Search' is defined in a circulatory fashion to mean 'search for minerals using no equipment for the purposes of excavation other than non-mechanical hand tools'.[76]

Pursuant to the Old Act a miner's right authorised the holder to '*prospect* for minerals using hand held equipment . . . and to retain as personal property any minerals collected in the course of prospecting in the manner authorised . . .'. The use of explosives or of machinery that involved disturbance to the land was prohibited.[77]

Prospectors will be concerned that the New Act does not expressly entitle them to retain the fruits of their labour. Moreover, a serious question arises as to whether a right to 'prospect' (which is defined in the Old Act inclusively to include 'all operations conducted for the purpose of discovering or establishing the presence or extent of mineralisation or of a mineral') contemplates a broader range of activities than 'searching' particularly when the Old Act expressly provided for the retention of minerals recovered.

- Tourist Fossicking Authorities

  The tourist fossicking authority is available in terms identical to the miner's right except that the Act contemplates the holder and 'any person accompanied by the holder'[78] and acting under his supervision[79] carrying out searching activities. Section 62(2) is a rather ill conceived provision which requires the holder of a tourist fossicking authority 'must make sure that a person who searches for minerals under that authority' does not do so in a prohibited fashion. A penalty is prescribed for failing to 'make sure'. It is submitted that in this case the draftsman of the New Act has adopted 'plain English' (or at least mono-syllablic English) at the expense of certainty. Is the holder of the authority absolutely responsible for the conduct of an accompanying person or would reasonable steps to ensure compliance exonerate the holder from responsibility?
- Tourist Mine Authorities

  The tourist mine authority is governed by sections 63 to 67 of the Act. These provisions contemplate authority to conduct a 'tourist mine'. The Minister has discretion to refuse an application. The provisions seem rather conceptually embryonic.[80]

Transitional Provisions

Section 129 and Schedule 2 provide that mining tenements and authorities under the Old Act have effect as if they were corresponding tenements and authorities under the New Act and make provision for

76 Section 4.
77 Old Act, s.15.
78 Section 59(1).
79 Section 62(2).
80 For the purposes of comparison reference should be made to ss.46A and 46B of the Old Act.

applications for issue or renewal of a former title to be dealt with as if they were applications for issue or renewal of a corresponding new title. Sub-clause 2(10) of Schedule 2 enables the holder of a former title to apply for a conversion to a corresponding new title. Having regard to the deeming provisions referred to above this would appear unnecessary. Curiously sub-clause 2(11) provides that an application for conversion is a matter of Ministerial discretion.

A question remains whether, under the transitional provisions, where an existing tenement is converted to a new Licence under the New Act the tenement holder must also apply for and obtain an approval of its work plan and, in the case of a mining licence, an authority to commence work or whether it is deemed, by virtue of the operation of the transitional provision, to have already obtained that position. An argument that clause 1(1) of Schedule 2 would avoid the necessity of obtaining such approvals is not conclusive.

Priority

The rationalisation of the number and types of titles under the New Act has enabled simplification of the priority position.

Under the Old Act, the general position was that applications are to be assessed on the basis of the date of marking out except where (as in the case of an exploration licence) no marking out is required in which case applications are assessed on the date of lodgment of application or, where received on the same day, are regarded as having equal priority and assessed on their merits.[81]

The New Act[82] provides that the Minister must determine the application in accordance with the date of receipt except where applications are received on the same day and then in accordance with the Minister's opinion of their relative merits. This is a departure from and, in my view, not an improvement over the old scheme. In effect, if applications are received on the same day the Minister is no longer required to consider both on their merits but may implement an order of priority based on his initial impression of their merits.

Procedure for Grant

(A) Objections

Section 24 of the New Act makes provision for objections to grant of a licence.

(B) Substantial Compliance

Sections 25 and 26 contain some special provisions regarding grant including s.25(3) which corresponds to ss.75 and 76 of the Old Act by providing that the Minister may exercise his discretion in favour of a

81 The general position with regard to priority of applications is dealt with by ss.70A, 345 and 515(1A) and (1B) of the Old Act.

82 Section 23.

grant in the event of substantial compliance and may refuse to grant notwithstanding compliance. Sub-section 25(4), however, goes further by requiring actual compliance in cases where noncompliance would be likely 'to affect adversely any person's rights under this Act or the regulations or to result in any person being deprived of information necessary for the effectual exercise of those rights'.

(C) 3 Month Time-limit

The New Act also contains a rather half-hearted attempt to impose a time-limit of three months within which the Minister must determine an application for a licence. The provision is flawed in several respects.

First, the three month period runs from the date upon which the applicant is notified that his application has priority rather than the date upon which the application is lodged even in circumstances where the applicant is immediately entitled to priority upon lodgment. Whilst in that case the Chief Administrator would be obliged, pursuant to s.15(3) to notify the applicant of priority 'on the receipt of an application', no time limit is prescribed for such notification.

Secondly, rather than providing an incentive to comply with the time-limit, s.15(6) enables the Minister to decide that an application cannot be determined within the time-limit in which event he is obliged only to notify the applicant before the time-limit expires and state his reasons for that decision. Sub-section 26(7) rather ridiculously provides an applicant with a right to apply to the Victorian Administrative Appeals Tribunal for a review of the Minister's decision under s.26(6). It is hard to imagine that even the most pugnacious and self-defeating Licence applicant would further delay matters by seeking a review of a decision that the Minister was unable to comply with a time-limit particularly in circumstances where notification of that inability may be made at the end of that time-limit.

Thirdly, to the extent that the time-limit does provide an incentive for the Department to process licence applications promptly, with one exception (see s.40(4)), it is not accompanied by a corresponding provision requiring strict time-limits to be observed to ensure that all necessary approvals are obtained, the work plan approved and in the case of a mining licence, an authority to commence work granted so as to enable the licence to take effect.

The mining industry may consider it somewhat of a political 'pea and thimble' trick to prescribe a time limit which carries no sanctions, may be varied by an exercise of ministerial discretion and, in any event, only governs the grant of a licence which, under the new regime, as discussed below, is only one step in obtaining approval to commence operations.

Authority to Work

Part 3 of the New Act deals with work under a licence. Notwithstanding grant of a licence, an exploration licensee cannot commence work until a work plan is approved and certain other conditions specified

in ss.39(4) and 43(1) are met (these relate to public liability insurance, rehabilitation bond and obtaining all necessary consents).

A mining licensee is subject to similar restraints and in addition must obtain and register an authority to commence work before commencing any work pursuant to the licence.[83] The New Act, however, provides that the Chief Administrator must grant an authority to commence work in circumstances similar to those prescribed for commencement of work under an exploration licence and accordingly, very little appears to turn on the authority other than a further delay in obtaining Departmental approval to carry out mining work.

Security of Tenure

(A) Forfeiture and Cancellation

The Old Act made provision for forfeiture whereby the holder of a miner's right could apply to the Minister seeking forfeiture of a mining tenement held by another person on the basis that the tenement holder had failed to comply with the expenditure or labor convenants of the tenement.[84]

In addition the provisions of tenement instruments may expressly contemplate cancellation by the Minister for breach of conditions of the tenement.[85] Section 79A of the Old Act further enabled the Minister to cancel a licence if the licensee does not commence to use bona fide the land comprised in the licence within 12 months of the date of grant or fails to comply with a condition or provision to which the licence is subject.

Express provision for forfeiture has deliberately been omitted from the New Act.[86] During the review process, the view was often expressed that the concept of forfeiture was anachronistic and that the ability to cancel tenements should rest solely with the Minister and not with third parties. This view evidences a misconception of the working of the forfeiture provisions and overlooks the fact that those provisions enabled a policing of the legislation by interested third parties. Ultimate decision-making regarding forfeiture was reserved for the Minister who could refer the matter to the Mining Warden to hold a public enquiry concerning the alleged breach.

On the assumption that forfeiture has been successfully abolished a serious question would arise as to the ability of the Department to police serious breaches without the assistance of motivated would be tenement holders. The New Act, however, contains provisions for cancellation of Licences[87] and instruments creating Licences should include provisions enabling termination for breach. Grounds for cancellation under the New

83 Sub-section 42(1).
84 See Old Act, Part I Div. and ss.83 and 84.
85 See for example Cl.28 of the scheduled form of mining lease in sch.9 of the Mines (Mining Titles) Regulations 1983 (Vic.).
86 See, for example, Victoria, Parliamentary debates, Legislative Assembly, 29 May 1990, 24–27 esp. at 25.
87 Section 38.

Act include failure to substantially comply with the Act or regulations or any conditions to which the Licence is subject.

Sub-section 25(7) requires the Minister to refuse an application for a similar type of licence upon grant of a licence and accordingly extinguishes unsuccessful applications pending at the time of grant. There does not appear, however, to be a provision precluding further application during the currency of the licence. It would appear therefore that a well timed information to the Minister advising of a breach accompanied by an appropriately worded application for licence may have the same effect as a forfeiture application under the Old Act.

(B) Broad Grounds for Cancellation

In addition to the grounds for cancellation mentioned above, the New Act also enables a Minister to cancel a licence, *inter alia*, for endangering the public or an employee on or near the land covered by the licence. This provision[88] should be criticised for the underlying policy which would theoretically enable a minor industrial accident or 'near accident' to result in the cancellation of a Licence which may form the basis of a significant resource project. I can see no reason why the issues of safety and resource security should be dealt with together.[89]

Other provisions of the cancellation power reflect the fact that grant of a licence precedes authority to commence work and encourage prompt action on the part of the licensee to obtain all necessary consents and authorities.

(C) Variation

In addition to the power of cancellation, section 34 of the New Act enables the Minister to 'vary a Licence or vary or suspend a condition of a Licence or add a new condition' but not to vary the period for which the licence has effect. This broad power is afforded to the Minister where the Minister considers it necessary for the protection of the environment or the rehabilitation or stabilisation of the land to which the licence applies and in any other circumstances that are prescribed. A similar provision was included in the Old Act[90] but in my view the power given is too wide.

It is one thing to remove the last vestiges of possessory titles and to bring all tenements and authorities within the discretion of the Minister. Once a tenement is granted, however, it should operate as a contract between the tenement holder and the state, only variable with the consent of the tenement holder or in exceptional circumstances. While s.34 of the New Act requires the Minister to only act 'after consultation with the Licensee' no indication is given whether this process of consultation is intended to import principles of natural justice or indeed give rise to an argument that the opportunity to be heard which would ordinarily be

88 Sub-paragraph 38(1)(b)(iv).

89 The law already provides appropriate criminal and tortious remedies for endangering 'the public or an employee'.

90 See Old Act, ss.78A and 514(14).

available to an affected licence holder is restricted to this process of consultation.

No provision is made for compensation to the affected miner and, unlike the provisions relating to agricultural land[91] no provision is made for an assessment of the benefits to Victoria of the mining project over the perceived environmental concerns.

Dealings

(A) Transfer of Licences

The New Act provides[92] that a licence (other than an Exploration Licence during its first year) may be transferred by an instrument approved by the Minister and not otherwise and precludes transfer of an exploration licence during its first year. The Minister must be satisfied that the proposed transferee complies with the provisions of s.15(6)(a) to (d). A transfer 'has no effect' until approved by the Minister and registerd.[93]

It is interesting to note that it is the transfer and not the instrument of transfer which has 'no effect' unless registered. This gives rise to an argument, supported by observations made in the *Swan Resources* case[94] that the provisions of an instrument effecting a transfer other than those which relate to the assignment of the interest may remain enforceable notwithstanding the absence of approval.

Moreover, the New Act does not appear to prescribe a period in which approval to transfer must be sought and, by providing that the transfer is of 'no effect' rather than void for want of approval within a time-limit, it would appear open to the tenement holder or transferee to seek approval at any time. The regulations may well have something to say in this regard.

Also of significance is the fact that the provision relates only to transfer of a licence and does not govern a sub-licensing, a mortgage or a transfer of an equitable interest (for example by way of declaration of trust) in the licence. This is in contrast to the provisions of the Old Act[95] and to the position in other States.[96]

Perhaps the conditions of instruments creating the licences will deal with these aspects but it would be preferable if the Act itself contained clear provision in this regard.

In my experience, the Department has on several occasions expressed the view that the existing provisions of the Old Act do not preclude declarations of trusts of interests in mining tenements and are not otherwise concerned with creation of equitable interests. Thus while pro-

91 Sub-section 15(10).
92 Section 33.
93 For a critique of government policy in regulating transfers see Hunt, op. cit. 841 and 859.
94 *Swan Resources Limited v. Southern Pacific Hotel Corporation Energy Pty Ltd* [1983] WAR 39. See also Crommelin, 'Mining and Petroleum Titles', op. cit. 875–6.
95 See, for example, ss.362(1) and (3) in relation to transfer of mining leases.
96 See, for example, s.107(1) of the Mining Act 1973 (NSW).

vision is made for the registration of instruments creating, assigning or affecting interests in licences,[97] the Department may well maintain their view that for example a declaration of trust in respect of mining tenements pursuant to a joint venture does not require ministerial approval in order to take effect provided the instrument is registered. The new registration system is discussed below.

A serious question arises as to whether a mining licence under the New Act may be mortgaged. The early drafts of the bill by the Law Reform Commission, picking up Departmental concerns regarding the practice of 'real-estating' mining tenements (i.e. making application for tenements with a view to resale purely for profit without further exploration or development) experimented with absolute prohibitions on mortgages on the assumption that default provisions in mortgages could be used as a way of avoiding the transfer provisions.[98] This overzealous approach would appear to have been based in a misconception of the nature of a mortgagee's usual powers in default. A sale by a mortgagee pursuant to an exercise of a power of sale could remain subject to an approval requirement without the necessity of prohibiting or even regulating mortgages.

The resulting New Act appears to have omitted all reference to mortgages[99] and leaves open the question whether a mining tenement under the New Act may be mortgaged. Again the conditioning of instruments of licence may throw some light on the matter but it should be dealt with expressly in the legislation.

(B) Transfer of Applications

Whilst the Old Act expressly allows transfer of the whole or any part of an interest in an application for a tenement with ministerial approval[100] the New Act prohibits transfer of an application in any circumstances.[101] The prohibition again stems from concerns regarding 'real-estating'. Without expressing a view as to the moral, economic or administrative implications of the practice of real-estating the prohibition on transfer of applications (to the extent that it is at all effective) punishes both 'genuine' explorers and miners and 'real-estators' alike.

Elsewhere the New Act[102] requires an applicant for a licence to satisfy the Minister that he:

(a) is a fit and proper person to hold the licence; and
(b) genuinely intends to do work and to comply with (the) Act; and
(c) has an appropriate programme of work; and
(d) is likely to be able to finance the proposed work and rehabilitation of the land.

97 Sub-paragraph 69(2)(a)(xiv).
98 The prohibition was not included in the Draft annexed to the White Paper but see ss.222.1 of that Draft.
99 This is in contrast to the Old Act: see, for example, s.362(3) which expressly excludes 'bona fide mortgage charge or encumbrance in the ordinary way of business' from the operation of the approvals requirement.
100 Sub-section 70(1).
101 Section 17.
102 Sub-clause 15(6).

In my opinion, this provision would provide the Minister with an adequate discretionary power to preclude grant of applications to would be 'real-estators'. Swift procedures for approval and refusal of applications would undermine the ability of 'real-estators' to vend applications.

Registration

With the exception of mining leases and development leases which could be registered at the Land Titles Office under the provisions of the Transfer of Land Act 1958 (Vic.),[103] no formal provision for registration of tenements is made under the old system. The Department maintained informal registers which provided details of the registered holder and dealings but for which there was no statutory guidance.

The New Act[104] remedies this situation by making provision for the establishment of a Mining Register and sets out a list of registrable documents including licences, compensation agreements, approved instruments of transfer and 'instruments for creating, assigning or affecting interests in or conferred by licences'.[105] Presumably this last category is intended to include interests created by way of joint venture or mortgage. The absence of a specific reference in this regard is confusing. Section 70 of the New Act provides that documents which fall within that category are 'ineffective' for creating any interest in the licence until registered. This will no doubt result in a broad interpretation being given to the provision by intending interest holders. In this context reference should be made to the *Swan Resources* case.

Section 71 of the New Act appears to go further still by providing that:

> A purported creation or assignment of or an interest in, or conferred by, a licence, and any purported dealing affecting an interest in, or conferred by, a licence, has *no effect* until an *instrument in an approved form evidencing* the creation, assignment or other dealing is registered (emphasis added).

The reference to 'approved form' is alarming if the provision is to be read as requiring the instrument *effecting* the transaction to be in an approved form. The provision would, however, appear to allow a separate instrument *evidencing* the transaction to be registered in which case a duplication of documentation would be necessitated by s.71. The position may well be clarified by regulations under the New Act.

Section 74(1) makes provision for public access to the register. The provisions of Part 6 do not provide for the extent to which documents lodged for registration will be publicly available or whether the publicly available information will be limited to that recorded in the register pursuant to s.69(2)(b).

Mining licences are not to be registrable pursuant to the provisions of the Transfer of Land Act.[106] The registration system which is created by

103 Old Act, s.78A(5) and 93(1)(i) and Mines (Mining Titles) Regulations 1983, r.312.
104 Part 6.
105 See para. 69(2)(a).
106 See cl.29 of schedule 1 to the New Act.

the New Act does not provide for caveats which could be lodged against a registered mining lease or development lease pursuant to the Transfer of Land Act.[107]

The registration system must be criticised in failing to take the positive step in creating a system of title by registration and indefeasibility akin to that created by the Transfer of Land Act.[108] While working in a negative way to deem unregistered interests and instruments of no effect, in failing to provide for indefeasibility in respect of registered interests the New Act significantly diminishes the effectiveness of the register in assisting prospective purchasers or others concerned to establish with certainty title to tenements by examining the register.

Resolution of Land Use Conflicts

OWNERSHIP OF MINERALS

The New Act[109] expressly provides that all minerals are owned by the Crown except where a minerals exemption[110] is current or where property in minerals is passed to a licensee after separation from the land.[111] This broadly reflects the position under the Old Act since 1982 when a provision was introduced to expropriate to the Crown all minerals irrespective of the date upon which the land on which the minerals was situated was alienated from the Crown.[112] The intention of that amendment was to put an end to the historical discrepancies regarding minerals other than gold and silver on private land alienated before the Crown first sought to reserve those minerals through legislation and reservations from grants of Crown land in the late nineteenth century.[113]

AVAILABLE LAND

The New Act provides that certain land is 'exempt' so as to be unavailable for the grant of a licence or other authority under the Act[114] and for a licensee to be precluded in certain circumstances from carrying out any work pursuant to the licence in respect of certain excluded categories of land.[115]

This system is consistent with the existing system under the Old Act.[116] The categories of exempt land have, however, been widened to specifically exempt land within a national park, wilderness park, or state park under the National Parks Act 1975 (Vic.)[117] and certain other

107 See *Transfer of Land Act* 1958 (Vic), ss.89–91.
108 Ibid. ss.40 and 42–44.
109 Section 9.
110 See Old Act, ss.293 and 292A.
111 See New Act, s.11.
112 The provision is s.291 of the Old Act and was introduced by s.45(2) of Act Number 9936.
113 See *supra*, fn.36.
114 See New Act, ss.6 and 7.
115 See New Act, ss.44 and 45.
116 See Old Act, Part I Div. I (exemption) and s.301 (excluded land).
117 Sub-section 6(b).

categories of land which may have formed the basis of an exercise of discretion to exempt land are now specifically exempted.[118]

In relation to excluded land, ss.44(1) to (3) and (8) require a licensee to obtain consent of certain specified managers and custodians of Crown land before commencing work. Sub-sections 44(4) to (7) (inclusive) provide that consent must not unreasonably be withheld, impose time-limits upon the land manager or custodians in granting or refusing consent, construe silence as consent and require reasons for refusal of consent to be given. Provision is made for application to the Administrative Appeals Tribunal for review of a decision to refuse consent or to subject consent to conditions.[119]

Section 45 of the New Act precludes a licensee from carrying out work within 100 metres laterally or below certain traditional categories of excluded improved land. The categories of excluded land have been extended to include reference to buildings listed on the Register of Historic Buildings, the Register of Government Buildings, the Register of the National Estate and buildings specified as notable buildings or buildings of significance in a planning scheme together with any land within the 'curtilage' of the building. 'Curtilage' is undefined.

The prohibition from work on excluded land is not absolute. Consent of the relevant landowner, manager or custodian may, in some cases be obtained so as to enable work. In other circumstances, the Minister is empowered to authorise work notwithstanding the absence of consent.[120]

PRIOR TENEMENT

Under the Old Act, due to the large number of tenements and authorities the position regarding the need to obtain consent from prior tenement holders was confused.[121] The reduction in the number and types of titles under the New Act has greatly simplified this procedure. The New Act now provides that an applicant for a mining licence over land that is the subject of an exploration licence must obtain the written consent of the exploration licence holder or in the case of applications for mining licences of less than five hectares (the new 'claim') the consent of the Minister may be obtained in lieu of the exploration licence holder's consent.[122]

The New Act precludes the grant of a licence (of any kind) over land that is covered by a mining licence and precludes grant of an exploration licence in respect of land already covered by an exploration licence.[123]

It would appear that a miner's right can be granted over land subject to a licence but does not entitle the holder to search on land subject to a mining licence.[124] The holder of a tourist fossicking authority requires the

118 New Act s.6.
119 Sub-section 44(9).
120 See s.46(1).
121 See Bradley, 'Current Mining Law', op. cit. 9 and 10.
122 New Act, s.15(8) and s.16.
123 Ibid. s.25(1)8(a) and (b).
124 Ibid. s.55(1).

consent of a mining licensee to search for minerals on an area subject to the mining licence[125] and it would appear that a tourist mine authority can only be granted in respect of land subject to a licence held by a person other than the applicant with the consent of that other person.[126]

PRIVATE LAND

Marking Out

Whilst the new legislation does not go so far as to adopt submissions that marking out requirements be dispensed with absolutely it requires the consent of the owner or occupier of the subject land or failing that an authority in writing from the Chief Administrator before an applicant may enter land for the purpose of marking out.[127] The Act further requires an applicant to lodge a prescribed security against the risk of personal injury or damage to the property of the owner or occupier of land before the Chief Administrator may grant an authority to enter land.[128]

Agricultural Land

In an effort to placate the demands of farmers represented by the Victorian Farmers Federation (who sought an absolute veto over mining on agricultural land), the New Act requires an applicant for a mining licence over 'agricultural land' (which is defined in section 4 to mean private land that is used primarily for various specified agricultural purposes) to lodge a statement of the economic significance of the proposed work at the time of making application. The statement must contain an assessment of the benefits to Victoria of the proposed work including employment and revenue considerations and apportion the economic significance between any properties that are in different ownership.[129] In the event that the owner disputes a statement, the New Act provides for the appointment of an independent 'expert' (appointed by the president of the Australian Institute of Valuers and Land Administrators) to determine whether there would be greater economic benefit to Victoria in continuing agricultural use or carrying out the proposed work.

The Governor in Council after considering the report of the expert is to make a final and binding decision.[130] Provision is made for the information to be retained in confidence by the owner or occupier and its professional advisors.[131] The provisions are limited to applications for mining licences.

These provisions are somewhat naive in that they appear to assume that the proposed mining use would necessarily be inconsistent with the

125 Ibid. s.59(1)(b).
126 Ibid. s.64(2).
127 Ibid. s.19–21.
128 Ibid. s.22.
129 Ibid. s.15(10) and (13).
130 Ibid. s.15(11) and 12.
131 Ibid. s.15(14)–(19) inclusive.

continuation of the agricultural use. This may be a factor which an expert would take into consideration.

Moreover, the capacity of a land valuer to determine a comparison of economic feasibility between mining and agricultural use is questionable.

Another obvious shortcoming is the lack of any specific direction as to the period of use which should be taken into consideration in determining the relative merits of the alternate uses or whether the fact that after mining activity the land may be rehabilitated to agricultural use is to be taken into consideration.

Certainly an express 'farmer' veto would restrict mining even further but one would expect in almost all cases that the owners or occupiers of agricultural land will, if properly advised, dispute the economic benefit in the miner's statement of economic significance. The provision enables the expert to award costs against the applicant or the owner which may to some extent limit entirely unfounded challenges by farmers.

It seems inequitable that, unlike many other decisions pursuant to the New Act, the decision of the Governor in Council is expressed to be 'final and binding' with no right of appeal to the Administrative Appeals Tribunal or otherwise. Administrative law remedies available against the Governor in Council may, however, afford an appropriate remedy.[132]

Compensation to Private Land Owners

Part 8 of the New Act makes provision for compensation in terms roughly comparable to the provisions under the Old Act.[133]

Three new heads of compensation have been added:

- Loss of amenity
- Loss of opportunity to make planned improvements and
- Decrease in market value.[134]

In addition moving expenses may be payable in appropriate cases and the total amount of compensation may be increased by a solatium of up to 10 per cent 'for intangible and non-pecuniary disadvantages that are not otherwise compensable'.[135]

The New Act reasserts that compensation is not payable for the value of minerals in or under the surface of the land.

In the event that the parties cannot reach agreement on the issue of compensation, the matter may be determined by the Land Valuation Board of Review or the Supreme Court pursuant to Part 10 of the Land Acquisition and Compensation Act 1986 (Vic.). This is consistent with the procedure under the Old Act.

Some rather clumsily worded provisions appear to be directed towards ensuring that a landowner retains compensation notwithstanding

132 See *Re Toohey; Ex parte Northern Land Council* (981) 439 and *FAI Insurance Ltd v. Winneke* (1982) CLR 342.
133 Old Act, Part II Div. IV.
134 New Act, s.85(1)(e)–(g).
135 Ibid. s.85(2)(a) and (b).

subsequent sale of the land but that the licensee is not liable to pay compensation, in the event of a change of ownership, to the new owner.[136]

Where a determination is brought pursuant to the Land Acquisition and Compensation Act, the New Act provides for the licensee to pay its own costs and the costs of the other party except where the other party is not the owner or occupier of the land or has been frivolous or vexatious or otherwise acted unreasonably. This is harsher than the present position.

A final criticism of the compensation provisions is that, unlike the Old Act, there is no provision for notice to be given by a licensee to the landowner and for a time-limit to run from that notice during which the parties are to agree to compensation or, failing which, the matter should be determined pursuant to the Land Acquisition and Compensation Act. This would appear to be an oversight by the draftsman. The present procedure under the Old Act is quite workable.[137]

Other

Other concessions to farmers are to be found in ss.109 and 115 which, respectively, reverses the onus of proof in any action for negligence against a licence holder and deems the licensee to be the occupier for the purposes of occupier's liability and the law of negligence. Both provisions, but particularly the reverse onus provision, appear unnecessarily broad and unduly weighted against miners. Section 109, for example, applies to any proceedings where a question arises as to whether an accident was contributed to by the negligence of a licensee. It is not expressly confined to mining matters nor is it confined to accidents involving landowners.

PLANNING

The New Act expressly excuses the holder of an exploration licence from any requirement under the Planning and Environment Act or any planning scheme to obtain a planning permit in respect of certain categories of minimally disruptive exploration activities.[138]

The Old Act precludes the grant of a mining tenement[139] unless, *inter alia*, a permit has been granted for the work under the mining tenement pursuant to the Planning and Environment Act or the Responsible Authority under that Act advises the Department that a permit is not required for the purposes of that Act.

The effect of this cross reference is that where a permit is required the applicant for a mining tenement may seek a planning permit or, if a current planning scheme prohibits the proposed activity (as is commonly the case) the applicant may seek an amendment to the planning scheme pursuant to the procedures provided by that Act.

Apart from the significant exclusion of certain exploration activities referred to above, the New Act broadly follows the existing procedure.

136 Ibid. s.85(4) and (5).
137 Old Act, ss.307 and 523 regarding notice requirements.
138 New Act, s.43(3).
139 Old Act, s.512D and 512H.

A significant difference is that, under the scheme adopted by the New Act, a licence is granted before the question of planning approval arises whereas under the Old Act planning approval was a prerequisite to grant. This is in accordance, *inter alia*, with the AMPLA recommendations that the question of planning approval should relate to activities carried out on land rather than questions of entitlement to possession of land.

An amendment is proposed to the provisions of the Planning and Environment Act to deem the Minister responsible for the administration of the New Act to be a 'Planning Authority' and accordingly be in a position to initiate amendments to planning schemes so as to facilitate mining. The New Act does not expressly provide for this, but s.49(1)(a) provides that one of the functions of the Mining and Environment Advisory Committee (to be established under the New Act) is to advise the Minister regarding amendments to planning schemes relating to exploration or mining.

This system goes some of the way towards providing the 'one stop shop' system demanded by the mining industry pursuant to VCM submissions. Suggestions that the Minister should also stand in the shoes of the Responsible Authority (i.e. in most cases, the municipal council) for the purposes of issuing permits were not adopted.

It is, no doubt, the intention under the New Act that an Authority to Commence Work will not be granted unless planning approval has been obtained. Sub-paragraph 42(2)(a)(iii) requires an applicant to obtain all 'the necessary consents and other authorities required by or under this or any other Act' before the Chief Administrator may grant an Authority to Commence Work but does not contain express reference to necessary approvals pursuant to the Planning and Environment Act.

In an article appearing in the AMPLA Bulletin,[140] Christensen examined the operation of planning requirements in conjunction with the Old Act and ventured to suggest arguments against the application of planning controls to mining. It would appear that to the extent that any of those arguments hold water they are equally valid pursuant to the system adopted by the New Act. In these circumstances perhaps it would be best for miners that the New Act does not make express reference to the necessity of obtaining planning approval pursuant to the Planning and Environment Act.

OTHER

The New Act[141] requires the Chief Administrator to notify a specified representative of the aboriginal community of the lodgement of a licence application.

Dispute Resolution and Appeals Procedures

140 N.S. Christensen, 'Planning vs. Mining in Victoria — How can they be made compatible?' (1983) 3 *AMPLA Bulletin* 50–55.

141 New Act, s.18.

WARDEN

Part 11 of the New Act makes provision for the office of the Mining Warden to remain substantially as it existed under the Old Act which is confined to investigation of disputes and making recommendations to the Minister in a role which is more analogous to that of an Ombudsman than a judicial role.

The judicial office of the Warden in Victoria was abolished in 1969.[142] At that time the Warden's judicial functions were transferred to the mines jurisdiction of the Courts of Petty Session (now the Magistrates' Court).

Various provisions are made in the Old Act for the jurisdiction of the Magistrates' Court, the County Court and the Supreme Court in certain mining matters. An examination of these provisions was included in the AMPLA submission.[143] One of those recommendations (somewhat reminiscent of the recommendations of the Royal Commission of 1862) was that the office of the Mining Warden be elevated to a judicial function consistent with the practice in all other states and the Northern Territory with a power to hear and determine mining matters assuming the mining jurisdictions of the Magistrates' and County Courts.

The New Act makes no reference whatsoever to the jurisdictions of the Magistrates' and County Courts but fails to invest the Warden with any judicial function. It would appear that the Magistrates' and County Court jurisdictions have been extinguished so that, apart from the powers of the Warden to make recommendations to the Minister, mining disputes are now determinable in accordance with the ordinary jurisdictions of the various courts.[144]

Under the New Act, the Warden must investigate disputes arising under the Act other than disputes for which recourse to a court, a tribunal or an expert (other than a Mining Warden) is expressly provided for under the Act.

The Warden now has discretion to make an award of costs.[145] Under the Old Act, the Wardens powers were limited to awarding costs against a complainant who acted vexatiously or frivolously.[146]

OTHER TRIBUNALS

Various provisions of the New Act provide for decisions to be referred to the Administrative Appeals Tribunal in, the event of a dispute,[147] section 15 provides for the referral of disputes regarding use of agricultural land to an expert.

142 Mines (Abolition of Courts) Act 1969 (Vic.).

143 Old Act, ss.126, 186, 188 and 190, County Court Act 1958; section 207: Magistrates' Court Act 1989, and see also ss.261, 280–282A, 286, 287 and 326.

144 County Court Act 1958, (Vic.), s.52B which states that the Court has the jurisdiction conferred on it by the Mines Act 1958 is to be repealed by the operation of cl.3 of Sch.1 of the New Act.

145 New Act, s.104.

146 Old Act, s.109A.

147 See, for example, New Act, ss.26(7) (three month rule) and 44(9) (Refusal of consent to work on occupied land).

Administration: Mining and Environment Advisory Committee

Part 4 of the New Act makes provision for the establishment of the Mining and Environment Advisory Committee. The functions of the Committee include advising the Minister regarding amendments to planning schemes and work authorisation and investigating, reporting and making recommendations to the Minister on any matter referred to it by the Minister. Its powers include a power to 'obtain information from a licensee in any form appropriate to the Committee's operations'. Powers of this nature are normally accompanied by appropriate procedures and sanctions. It is not clear how the Committee would enforce this power.

The Committee is to be made up of seven members comprising:

- the Chief Administrator of the Department or his delegate;
- a nominee of the Minister for Conservation Forests and Lands;
- a nominee of the Minister for Planning and Environment;
- a representative of 'the sector of the mining industry holding Licences covering land of 5 hectacres or less' (i.e. 'prospectors');
- a representative of the Victorian Chamber of Mines;
- a representative of the Victorian Farmers Federation; and
- a representative of environmental interests.

Participants in the mining industry may be dismayed to see that only one of seven is a representative of commercial mining. Section 53 of the New Act makes it clear that decisions of the Committee may be put to a vote. In the circumstances recommendations of the Committee may be problematical.

CONCLUSION

The extent to which the New Act will provide a model both in form and content for other jurisdictions remains to be seen. The economic significance of Victoria's contribution to mining no longer confers upon Victorian legislation a centre stage position.

While I have made some major criticisms of the legislation in terms of policy and in some cases feasibility of new systems adopted, the overall impression of the legislation is unavoidably positive due to the fresh approach taken to the drafting and conceptual issues confronting those responsible for the evolution of the new legislation.

No doubt teething problems will be experienced in the transitional stage which may require amendments from time to time. This, of course, is the inevitable consequence of severing the ties with the historical millstone that was the Old Act.

APPENDIX

PART 8
COMPENSATION

A miner must either purchase, or pay compensation for, private land affected by mining. No work can be commenced until the land is purchased or a compensation agreement is entered into. Where the parties are unable to agree on compensation, a determination can be made by a Land Valuation Board of Review established under the *Valuation of Land Act* 1960.

Compensation agreements

801 A licensee who has negotiated compensation agreements with the landowner and occupier of the land affected by work must register them in the mining register.

Compensation hearings before a Land Valuation Board of Review

802 If a compensation agreement has not been reduced despite reasonable attempts to negotiate one, or if the licensee does work that is not covered by the compensation agreement, the land owner, the occupier or the licensee may apply to a Land Valuation Board of Review established under the *Valuation of Land Act* 1960 for a decision on whether compensation should be paid and, if so, the amount and how it is to be paid.

802.1 A decision of the board is enforceable in the Magistrates' Court as if it were an order of that court.

802.2 Unless the other party has been frivolous or vexatious or has otherwise acted unreasonably, the board may make an order that the licensee pay the costs of the other party.

802.3 Section 29 of the *Valuation of Land Act* 1960 does not apply to hearings under this Act.

What is compensation payable for?

803 Compensation is payable for —
deprivation of possession of the surface of the land
damage to the surface of the land
damage to improvements on the land
severance of the land from other land of the owner or occupier
acquisition and use of any rights of way, easements or ancillary facilities
any other damage caused by works
loss of amenity including reaction and conservation values
loss of opportunity to make *planned improvements**
loss of resale value, and
*financial loss.***

803.1 The amount of compensation may be increased by way of a solatium of up to 10% of the total assessed, by an amount which is reasonable to compensate the claimant for intangible and non-pecuniary disadvantages not otherwise covered.

803.2 A compensation agreement does not affect the availability of civil remedies for negligence or other causes of action not covered by the agreement.

* *Planned improvements* are improvements for which a planning or building permit was applied for before the licence is granted.

** *Financial loss* is loss suffered as the natural and direct consequence of the approval of the work proposal or the carrying on of work.

When is compensation not payable

804 Compensation is not payable for:

- the value of minerals in the land covered by the licence
- any loss that has previously been compensated for, or
- any loss suffered more than three years before compensation is claimed from the licensee.

Who is compensation payable to?

805 Compensation is payable to a land owner and occupier of land affected by mining work.

805.1 If both the owner and occupier are to receive compensation, the total amount of compensation (apart from any solatium to be paid under section 803.2) must not exceed the amount which would have been payable if the same person owned and occupied the land.