REGISTRATION OF MINING TITLES IN VICTORIA

*by Susan MacCallum**

The Mining Act 1958 (Vic.) and the Regulations[1] envisage a system under which mining tenements will be registered in a certain manner. The purpose of this article is to examine the registration provisions and to analyse the effects of registration of two mining tenements, the claim and the lease. It should be noted that there are no provisions for registration of the exploration licence, the large scale exploration title, or of the prospecting licence. Nevertheless, the Mines Department keeps a record of all exploration licences issued and an interested party can check this "register".[2]

1. The Claim

(a) Rights flowing from the claim

Despite the fact that the miner's right has been widely regarded for several decades as an anachronism and wholly unsuitable to present day large-scale mining activities, the possession of a miner's right remains a prerequisite to the acquisition of a mining claim in Victoria.[3] Sub-section 15(1) of the Mines Act 1958 (Vic.) authorises the holder of a miner's right " . . . to prospect for gold and minerals . . . and to peg out a claim in conformity with the regulations".[4] However, a miner's right does not authorise the conduct of mining operations that involve the disturbance of land by machinery or explosives.

The claim itself is said to confer on the owner an exclusive right to conduct mining operations on the land held under the claim and to apply for a mining lease of that area.[5] Nevertheless, the claim holder cannot conduct mining operations involving the removal from the land of more than one tonne of soil, gold and minerals unless the Minister consents in writing.[6] Further, the holder of a claim has no right to transfer his interest,[7] and the claim will automatically lapse where application is not made for a lease within twelve months of the registration of the claim.[8] A claim is also subject to the requirement that the claim must be worked for not less than eight hours in any period of fourteen days.[9]

These restricted rights and more stringent obligations of the holder of a miner's right and the owner of a claim came into force in 1975.[10]

(b) Registration provisions

Section 17 of the Mines Act 1958 makes it compulsory to register a claim. Application for registration must be lodged with the Mining Registrar within fourteen days of the claim being pegged out.[11] The application must be accompanied by a map or accurate sketch showing the position of the land applied for.[12] The Mining Registrar must register the claim upon receipt of due application for registration of the claim.[13] It appears that the Mining Registrar does not have any discretion as to whether or not to register once he has received a due application. He issues a Certificate of Registration and enters full particulars of the claim in a book called The Mining Register.[14]

The Mining Register, or the Claims Register Book as it is called in the Mines Department, is situated in the Victorian Mines Department in Melbourne. Before 1975, claims could be registered by any of the district mining registrars and there was no central register in which all claims were recorded. The Claims Register Book contains the following details of each claim: the registration number, the nature of the claim, for instance sinking and driving, the extent of the claim, the situation, the date of registration, the name of the holder and the miner's right number and expiry date.[15] A person may inspect the Mining Register on payment of a fee of two dollars.[16]

(c) Rights flowing from Registration of the Claim and the Effect of Registration

Before the Mines (Amendment) Act 1975, registration of a claim was not compulsory. However, strong inducements to register were offered. Under the old sub-section 18(1), only the owner of a registered claim could divide the interest into shares, and only the owner of a registered claim could assign or encumber or create any interest in such a claim.

Although the Mines Act itself, as amended, has no provision similar to the old sub-section 18(1),[17] regulation 14 of the Mines (Miners' Rights) Regulations 1975 states that the pegging of a claim confers *no* rights unless the claim is registered.

The vital question is whether or not regulation 14 is valid. Paragraph 93(1)(mc) of the Act gives the Governor in Council power to make regulations prescribing the method of registration of claims. Although paragraph (mc) gives the power to establish a register of claims, it is doubtful if it gives the power to set out in the regulations, the effect of registration or the consequences of non-registration. Regulation 14 does purport to set out a consequence of non-registration and in view of this, its validity is open to doubt. If regulation 14 is invalid it seems that the holder of a claim will be able to exercise the rights conferred by sub-section 15(1) before registration and will clearly have title before registration.

However, if regulation 14 is considered to be valid, two further questions arise as to the effect of registration. First, the issue as to whether title to the claim arises upon pegging out or upon registration must be analysed and secondly, the question as to whether registration guarantees title must be examined.

Prior to 1975, the position was that title to a claim was acquired by pegging out the land and not by registration.[18] Can regulation 14 have altered the position? On the one hand, it can be argued that the pegging of the land is still the device by which title is gained, but that no rights can be exercised under that title until the claim is registered. On the other hand, it can be said that registration of the claim now constitutes title to the claim. The latter statement is based on the concept that if a person has title, he should be able to exercise rights pursuant to that title.

It has long been the practice of the Victorian legislature, and others, to encourage registration of mining claims by denying the holder of the claim various rights. In moving the Mining Law Amendment Bill in 1864, the Minister of Mines, Mr. Sullivan, stated that although registration would not be made compulsory under the amendment, certain privileges would attach to registration. He thought that these privileges would " . . . probably induce the owners of every claim of value to register it".[19] It is possible that regulation 14 is a mere extension of this principle: instead of some rights not being exercisable until after registration, no rights are exercisable until after registration. If this is the interpretation given to regulation 14, title to the claim still arises upon the pegging out of the land.

The distinction above is probably of little practical significance. Even if title to the claim arises before registration, the title is of little value if no rights are exercisable thereunder. If a claim were transferable, the question of the date of acquisition of title would assume some importance. However, sub-section 19(1) specifically prohibits the transfer of a claim.

Once registration of the claim does occur, a question arises as to whether registration guarantees title. Can the holder of a claim be divested of title whilst still the registered holder of the claim? By regulation II of the Mines (Miners' Rights) Regulations 1975, when a claim has been unworked for a period of six consecutive weeks, it is deemed to have been abandoned.[20] However, unlike a number of other States which have detailed provisions relating to forfeiture of a claim and cancellation of registration of a claim, the Victorian legislation contains no such provisions.[21] If a claim is deemed to be abandoned, it is suggested that title to the claim is lost at that time despite the fact that the claim holder may remain on the register book as the registered holder of the claim. *Otter Explorations v. Evill*[22] was a case decided under the Mining Act 1904 (W.A.). X, the holder of a miner's right, pegged out a claim and registered it. Under section 41, a claim was deemed to be abandoned when the claim holder ceased to be the holder of a miner's right. X ceased to be the holder of a miner's right. Despite the fact that X still appeared on the register as a registered claim holder, title to the registered claim had been lost by virtue of the abandonment. Registration did not operate to ensure the continued existence of the claim.[23]

2. The Mining Lease

There are two types of mining lease which can be acquired in Victoria. Section 36 of the Mines Act 1958 provides for "Gold Mining Leases" and section 37 provides for "Mineral Leases". Within twelve days before making an application for a lease, the applicant must mark out the land in accordance with regulation 6 of the *Regulations Relating to Mining Leases*. He must also comply with with other directions as to posting of notices in regulation 6. The application for the lease must then be filed in the Department of Mines, Melbourne within twelve days of the marking out.[24]

When the application is received in the leasing section of the Mines Department, it is referred to the drafting section. The lease is noted on the relevant Lot Plan and the number of the Lot Plan goes back to the leasing section. Usually the lease must be surveyed too.[25]

Provision is made for the transfer of the application,[26] and for the lodgment of objections to the application.[27] The Governor in Council decides on the recommendation of the Minister, whether or not to grant the application: he has an absolute discretion in the matter.[28]

(a) Dealings with the lease

An applicant for a lease has a right to transfer, assign or underlet his interest if he has the consent of the Minister.[29] The procedure to be followed in obtaining the consent of the Minister is set out in regulation II. Strangely, there is no express provision in the Mines Act 1958 prohibiting the holder of a lease from transferring, assigning or underletting the lease, or his interest in the lease, without the consent of the Minister.[30] Regulations 50-54 clearly infer that a transfer cannot be effected without ministerial consent. For example, regulation 50 sets out the manner in which an application for consent is to be made. However, there is no regulation specifically prohibiting the transfer of any interest in the lease without ministerial approval. In any case, it is very doubtful if any of the powers to make regulations, set out in sub-section 93(1) of the Mines Act 1958, would support a regulation prohibiting transfer without ministerial approval.

Nevertheless, all the forms of mining lease set out in the regulations contain a covenant by the lessee not to transfer, sublet, part with possession, mortgage, charge or encumber the mine and premises or any part thereof without the consent of the Minister first had and obtained. Thus, the lessee may transfer but he is *contractually* bound to obtain ministerial consent before dealing with the lease.

(b) Registration Provisions

Paragraph 93(1)(i) of the Act gives the Governor in Council power to make regulations prescribing the manner in which mining leases are to be registered and the fees to be paid upon registration. Although such a power clearly gives the capacity to establish a register of mining leases, it is decidedly less clear that a power exists to set out in the regulations the precise workings of a registration system. For instance, it is

doubtful if paragraph 93(1)(i) gives power to prescribe the effect of registration or the consequences of non-registration of mining leases.

It is unnecessary to pursue this distinction for the regulations do not purport to establish a separate and discrete system for the registration of mining leases. This should be compared to the position in several other States.[31] The only provisions in the Victorian regulations relating to registration are regulations 40 and 54. Regulation 40 states that the Secretary of Mines must forward the executed lease to the Registrar of Titles for registration. Regulation 54 provides that each transfer, sub-lease, mortgage or encumbrance of a lease, or any portion of the premises prescribed therein shall be registered in the office of the Registrar of Titles. There are no provisions setting out the way in which registration is to be effected at the Titles Office or the effect of registration.

Obvious questions then arise as to why the Titles Office is the venue for registration and as to how the 'registration' is effected there. The short answer to both questions is that mining leases granted by the Crown in Victoria come under the operation of the Transfer of Land Act 1958 (Vic.), that is, the Torrens system of land registration.

Unalienated Crown land may be alienated by way of Crown grant and by section 8 of the Transfer of Land Act 1958 (Vic.), all land alienated by the Crown after 1862 comes under the operation of the Act. The definition of land in section 4(1) states that land "includes any estate or interest in land". Clearly the definition is not an exclusive one[32] and in *Chirnside v. Registrar of Titles* [33] the Full Court held that mines and minerals are included in the meaning of the word "land" in Victoria.

In that case, the registered proprietor of the land (and of the mines and minerals in the land), transferred his land but excepted to himself all mines and minerals lying under the land. The transfer was held to be registrable. Further, it was held that the transferor was entitled to have a separate certificate of title in respect of the mines and minerals and to have subsequent dealings in the mines and minerals entered on the register in the usual manner. In holding that a separate certificate of title should issue in relation to the mines and the minerals, the Full Court relied upon the definition of "land" in section 4 of the Transfer of Land Act 1915 (Vic.). The definition at that time included "hereditaments" and the Full Court took the view that the ownership of mines and minerals was covered by the word "hereditaments"[34] Although the word "hereditaments" no longer specifically appears in the definition of land, the current broad and general definition, "including any estate or interest in land" includes mines and minerals.

As the definition of land includes "mines and minerals", the Crown may alienate the mines and minerals quite separately. When the Governor-in-Council decides to grant a mining lease to a particular applicant, a Crown grant of the minerals for a term of years is issued to the lessee. By sections 27 and 28(1), the Crown grant, in the form of the mining lease, is registered by the Registrar of Titles. The mining lease is given a volume and folio number. Registration of a Crown grant takes place when the Registrar notifies the volume and folio number of the Register Book in which it is entered.[35] The original Crown grant, that is the mining lease, is filed in the Register Book and the duplicate is returned to the Mines Department with the volume and folio number and date of registration marked on it.[36] The lessee is entitled to obtain possession of the duplicate mining lease from the Mines Department. Where the mining lease is over private land there is no notification of the lease on the certificate of title of that land.

The Victorian system of registration of mining leases is unique in Australia. However, if in the other States a mining lease is capable of being treated as a Crown grant for a term of years, then it can be argued that it should fall under the operation of the Torrens system of land registration. In all States, any Crown grant made after the commencement of the relevant Torrens legislation must be under the operation of the legislation. Further, it appears that the definition of land in each Torrens statute includes "mines and minerals"[37] Nevertheless, there is a proviso to the general proposition that mining leases should be treated as Crown grants in the other States. In those States where the relevant Mining Act establishes a quite separate and distinct system for the registration of mining leases, it is suggested that the mining lease may fall outside the operation of the Torrens system. The provisions in the relevant Act setting up the system of registration of mining leases may be regarded as an implied repeal *pro tanto* of the Torrens provision requiring *every* Crown grant to be under the operation of the Torrens legislation. This is clearly the case in New South Wales.

Where the provisions relating to the registration system are contained only in the regulations, it is suggested that the regulations cannot be regarded as an implied repeal of the relevant Torrens provision. This is the case in Queensland and South Australia. In Western Australia and the Northern Territory, the position is unclear because there are provisions relating to registration in the respective Acts and regulations.

(c) Rights flowing from Registration and the Effect of Registration

As the mining lease is effectively registered under the Transfer of Land Act 1958 (Vic.), all the consequences of registration under the Torrens system of registration are applicable.[38] Several specific areas must be examined in more detail.

First, the time of acquisition of title requires consideration. Under the Torrens system, title is acquired by registration.[39] Nevertheless, sub-section 29(2) of the Transfer of Land Act 1958 (Vic.) provides that in the case of a Crown grant, registration dates back to the date of the grant. Therefore, once the mining lease has been registered, title flows from the date of the execution of the lease.

The question as to when a lessee is divested of title is more complex. By section 55 of the Mines Act, a lease may be declared void by the Governor in Council for breach of the covenant relating to expenditure of

money or of the labour covenant. Sub-sections 95(1) and 95(2) provide that if the lessee breaches any of the conditions of the lease, the lease is voidable at the option of the Governor in Council. Sub-section 80(1) provides that once a notice of declaration that the lease is void has been published in the Government Gazette, " . . . all right title and interest under the lease of the lessee . . . shall cease and determine both at law and in equity". The Crown can repossess the land as if the lease had not been made (s.80(2)).

A problem arises if, after the lease has been declared void, the lessee remains as the registered proprietor of a leasehold estate. Does the lessee retain title despite the language of sub-section 80(1) of the Mines Act?

The situation is an illustration of the type of problem which can be encountered when there is one Act dealing with mining titles generally and another Act dealing with their registration. If there is an inconsistency between the Acts, general principles of statutory interpretation must be applied in order to determine which Act prevails. In this instance, reliance could perhaps be placed upon the rule, *generalia specialibus non derogant* (where there is a conflict between the general and specific provisions, the specific provisions prevail). The provisions in the Mines Act with respect to extinguishment of title are clearly the more specific. Nevertheless, the *generalia specialibus* rule is observed far less strictly in the interpretation of provisions in separate enactments than in the case of the interpretation of provisions in the one Act. The reason for this is that the draftsman may not have considered the effect of the inconsistent Acts. It is suggested that the question of any inconsistency between the Mines Act and the Transfer of Land Act was not one which was considered by the draftsman. The principles of statutory interpretation do not provide a definite answer to the problem and thus it is unclear which Act would prevail.

Perhaps a simple answer to the problem is that there is no inconsistency between the Acts. By sub-section 29(3) of the Transfer of Land Act 1958, the Registrar has the power to cancel the registration of a Crown grant where the Crown is entitled to the fee simple. Once the lease is declared void the Crown is entitled to the full fee simple and there appears to be no reason why an application to the Registrar for cancellation of registration of the Crown grant (mining lease) should not be successful.[40]

The second area which must be examined is the issue of dealings with or in the mining lease. In order for a dealing to be registered on the Crown grant, it must of course be in registrable form. The Transfer of Land Act 1958 (Vic.) sets out the form which transfers, sub-leases and mortgages must take.[41] The transferee, sub-lessee or mortgagee must produce the duplicate mining lease[42] so that the Registrar can enter a memorandum of the dealing on it.[43] By sub-section 33(1) of the Transfer of Land Act 1958 (Vic.), every instrument is registered when a memorandum has been entered in the Register Book on the relevant Crown grant.

Sub-section 40(1) of the Transfer of Land Act provides that "no instrument until registered . . . shall be effectual to create . . . or pass any estate or interest or encumbrance in on or over any land under the operation of this Act." Registration constitutes title. Nevertheless, in *Barry v. Heider*,[44] the High Court held that a provision such as sub-section 40(1) did not exclude the creation of equitable interests which were unregistered. Isaacs J. took the view that an equitable interest could be created by a transaction behind the instrument. On the facts before his Honour, the equitable interest was created by the agreement to sell and the sub-section 40(1) provision, applying as it does to instruments, was inapplicable. Clearly the Torrens system, by setting up a caveat system and by allowing for the deposit of declarations of trust, envisaged the creation of equitable interests. Thus, where a mining lessee enters into a contract to sell the lease and executes a transfer, the prospective transferee does have an equitable interest in the mining lease before registration.[45]

A person holding an equitable interest in the mining lease may lodge a caveat under sub-section 89(1) to prevent the registration of further dealings until the caveator has been notified and had an opportunity to assert his interest. A caveat lodged in these circumstances operates in exactly the same way as caveats lodged pursuant to equitable interests in fee simple estates.

Finally, although the principle of indefeasibility of title applies, it must be determined how far the principle extends with respect to the mining lease. The principle will operate in the following circumstances. If the holder of a mining lease, A, enters into a contract to sell the lease to B (who thereby obtains an equitable interest) and subsequently A transfers the lease to C who registers the transfer, C will not be subject to B's equitable interest. Further, indefeasibility of registered title operates on a wider scale and cures inherent defects in title. For instance, assume that A the registered holder of a lease, forges the relevant ministerial consent to a transfer and then assigns the lease to B who becomes the registered holder of the lease. B then obtains valid ministerial consent and assigns the lease to C who becomes registered. In turn, both B and C obtain indefeasible titles to the lease. If a person registers a void instrument and has not been fraudulent,[46] he will obtain an indefeasible title.[47]

Clearly, the situation of registration of a document of transfer or mortgage without ministerial consent could only arise in the case of administrative error. In practice, an instrument effecting a transfer or a mortgage would only be registered when produced with the written ministerial consent.[48]

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FOOTNOTES

1. Regulations Relating to Mining Leases; Mines (Miners' Rights) Regulations 1975.
2. The absence of legislative backing for this registration system makes it doubtful whether the registration system for exploration licences has any legal significance at all. Clearly, registration cannot confer title to an exploration licence.

3. *Mines Act 1958* (Vic.), s.15(1)
4. *Ibid*
5. S.18(1)
6. S.18(2)
7. S.19(1)
8. S.19(2)
9. Mines (Miners' Rights) Regs., reg.12
10. Mines (Amendment) Act 1975 and Mines (Miners' Rights) Regs. 1975
11. S.17(1)
12. Mines (Miners' Rights) Regs., reg. 7(1)
13. S.17(2)
14. Mines (Miners' Rights) Regs., reg. 7(2)
15. Interview with the Assistant Registrar of the Department of Mines on 21st April 1977
16. Mines (Miners' Rights) Regs., reg. 16
17. However, s.304 must be noted. It states that the holding of a miner's right confers no right of entry upon private land in respect to which compensation is payable unless, *inter alia*, payment, tender or agreement has been certified on the certificate of registration by the owner of the land. Therefore, in relation to private land, the owner of the claim (if he is in fact the owner at that stage) cannot even enter into possession of the claim until it has been registered.
18. See *Seal v. Bebro* (1879) 5 V.L.R. (M.) 4; *East v. Galvin* (1899) 21 A.L.T. 125, 148; *Kenda v. Andrea* (1966) 115 C.SL.R. 519, 523. Cf. *Moore v. White* (1873) 4 A.J.R. 17.
19. *Victorian Hansard*, Vol. IX Part 1, 566
20. See also regs. 10(2), 12 and 12
21. E.g. see Mining Act 1968-1979 (Qld), ss.16L, 16M, 160
22. [1977] A.C.L.D. 530
23. Cf. the position in Queensland, See MacCallum, "Registration of Mining Tenement in Queensland" (1980) 11 *University of Queensland Law Journal* 175, 180-181
24. *Regulations Relating to Mining Leases*, (Vic.), reg. 7 and 9
25. Interview with Assistant Registrar, Department of Mines, 21st April 1977
26. Lease Regs., regs. 11, 11A, 11B, 11C and 11D
27. Lease Regs., reg. 20
28. S.35; Lease Regs., reg. 37
29. S.70(1)
30. See however s.362(1) which provides that it is unlawful ". . . to transfer assign underlet or part with all or any of the lands demised under any mining lease . . . ". This subsection appears in a division relating to tribute agreements. At most it prohibits the transfer of "the lands demised". It does not prevent a lessee from transferring, assigning or underletting an *interest* in the lease.
31. See e.g. Mining Act 1973 (N.S.W.), ss.105-109
32. Robinson, S., *Transfer of Land in Victoria* (1979), 106
33. [1921] V.L.R. 406
34. Francis, C. *Torrens Title in Australia* (1972), Vol. 1, 100
35. Transfer of Land Act 1958 (Vic.), s.19(2)
36. Interview with Mr. John Dells, Titles Office, 15th October 1981
37. See Francis, C. *op. cit.* 100
38. See generally Sackville & Neave, *Property Law Cases & Materials* (1981, 3rd ed.) 360-432
39. Transfer of Land Act 1958 (Vic.), s.40(1)
40. See *Matt v. Peel* (1871) 2 V.R. (M.) 27 which lends support to the view that registration will not ensure the continued existence of the lease if it has been declared void.
41. Transfer of Land Act 1958 (Vic.), Sixth, Eleventh and Thirteenth Schedules
42. A consent signed by the Minister will usually have to be produced too. See *supra* and *infra*.
43. Transfer of Land Act 1958 (Vic.), s.36(2)
44. (1914) 19 C.L.R. 197
45. See fn. 47. Even if such a contract constitutes a breach of the covenant against assignment without consent, it is suggested that an equitable interest may still pass to the purchaser. See *Massart v. Blight* (1951) 82 C.L.R. 423. Cf. *In re Blue Bird Mines* (1942) 44 W.A.L.R. 85.
46. See *Wicks v. Bennett* (1921) 20 C.L.R. 80; *Assets Co. Ltd. v. Mere Roihi* [1905] A.C. 176
47. *Frazer v. Walker* [1967] A.C. 569
48. Interview with Mr. J. Dells, Titles Office, 15 October 1981. Questions as to when and how the covenant against assignment *without* consent is breached are outside the scope of this article. Briefly, however, it is suggested that an agreement to transfer, sublet or mortgage and thus part with an interest (equitable) in the lease would not be a breach of the covenant. The covenant does not appear to prohibit the passing of an "interest" in the lease.