MINING AND PETROLEUM TITLES — STAMP DUTY ASPECTS: ARE THEY LAND FOR THE PURPOSES OF THE LAND-HOLDING PROVISIONS?

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INTRODUCTION

Two trends throughout Australia can be identified in the area of stamp duties. First, the various States and Territories are moving towards more uniformity and, secondly, the tax base is being gradually broadened and strengthened. It is no longer true to say that stamp duty is a tax on instruments, nor that duty can be minimized or eliminated by 'forum shopping' between States.

The land-holding provisions are an example of both of these trends. In November 1986, the New South Wales Minister for Finance announced the introduction of 'legislation to prevent avoidance of the full duty payable on change of ownership of property through the device of the sale of company structures which own the property'.

The business community had for a long time been aware that considerable stamp duty could be saved by transferring shares in a land-rich company rather than by transferring the land itself. This was the result of the disparity between the rates of duty applying to marketable securities and real property. Also, if the purchaser was prepared to take control of the company with existing encumbrances this reduced the value of the shares and therefore further reduced the stamp duty payable.

The legislation foreshadowed by the Minister for Finance imposed duty on the transfer of majority interests in land-rich companies as if the land itself had been transferred thereby removing any stamp duty incentive for dealing with the shares only. Duty was imposed on the transaction itself (rather than on any relevant instruments) by requiring a statement to be made and lodged with the duty payable.

The Victorian Government had already attempted, unsuccessfully, to introduce provisions during 1986 but by mid-1988, Victoria, Western Australia and Queensland had all introduced provisions. The remaining States and Territories followed suit and by May, 1990 all States and Territories had provisions in place. While the provisions from jurisdiction to jurisdiction are similar, they are not identical and so reference must always be made to the relevant legislation. A good example of the disparity in provisions is offered by the way 'land' and 'real property' has been defined in each of the provisions, and this has particular ramifications for mining companies which, in the normal case, have

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conferred upon them statutory interests in land which fall short of ownership in fee simple.

The purpose of this paper is to bring together in one place the definitions of 'land' and 'real property' that apply in each State and Territory and to discuss these in the context of the various mining interests created under the Mining and Petroleum legislation in each State and Territory. As will be seen from the discussion which follows, a consistent result from jurisdiction to jurisdiction cannot be assumed. Included also, is a short discussion of what constitutes a fixture in the context of mining operations as this will often impact on whether the land/asset ratios have been satisfied and on the amount of duty payable. Finally, some issues of valuation for the purposes of the provisions are dealt with in light of the recent decision of the Western Australian Supreme Court in *Nischu Pty. Ltd v. Commissioner of State Taxation (WA).*[1]

References to legislation in this paper are to the following:

Queensland:	Mining Act 1968 (the '1968 Act') Mineral Resources Act 1989 (the '1989 Act') Petroleum Act 1923 Stamp Act 1894 (the 'Qld SD Act')
New South Wales:	Mining Act 1973 Petroleum Act 1955 Stamp Duties Act 1920 (the 'NSW SD Act')
Victoria:	Mines Act 1958 Petroleum Act 1958 Stamps Act 1958 (the 'Vic SD Act')
South Australia:	Mining Act 1971 Petroleum Act 1940 Stamp Duties Act 1923 (the 'SA SD Act')
Western Australia:	Mining Act 1978 Petroleum Act 1967 Stamp Act 1921 (the 'WA SD Act')
Northern Territory:	Mining Act 1980 Petroleum Act 1984 Taxation (Administration) Act 1978 (the 'NT SD Act')
Tasmania:	Mining Act 1929 Stamp Duties Act 1931 (the 'Tas SD Act')
Australian Capital Territory:	Mining Act 1930 Stamp Duties (Marketable Securities) Determination 1989 (the 'ACT Determination')

1. (1989) 90 ATC 4391.

OUTLINE OF LAND-OWNING CORPORATION AND TRUST PROVISIONS

Overview of the Provisions

All States and Territories impose ad valorem stamp duty at conveyance rates on acquisitions of substantial interests in certain unlisted corporations and unit trusts which own (either directly or indirectly) land. The provisions were introduced to prevent the loss of State government revenues resulting from taxpayers dealing in the shares or units of land-owning entities (which attracts duty at the rate of 0.6 per cent of the net value of the shares or units) rather than in the land itself (which attracts duty at the highest marginal rate of 5.5 per cent of the gross value of the land).

The provisions in all Australian jurisdictions (other than the Australian Capital Territory) are broadly the same except that the New South Wales and South Australian provisions use different concepts and terminology and impose separate duty on acquisitions of a 'land use entitlement' in an entity. In Queensland and Western Australia, acquisitions of units in certain unit trusts are chargeable with stamp duty on a different basis.

It is important to note at the outset that these provisions apply even though no instrument may be brought into existence to effect or evidence the acquisition.

Broadly speaking, where a person acquires a majority interest, or acquires an interest which results in the person having a majority interest, or having a majority interest acquires a further interest, in a 'landholder' ('designated landholder': New South Wales), that person must prepare and lodge for assessment of duty a statement containing certain prescribed information relating to the acquisition. Under the Queensland provisions, the obligation to prepare and lodge the statement falls not only on the person acquiring the interest but also on the entity in which the interest is acquired and certain land-owning subsidiaries of that entity. In the case of Western Australia, a corporation in which the interest is acquired and which is incorporated outside Western Australia is required to prepare and lodge the statement.

In simplified terms, the statement is chargeable with ad valorem stamp duty at conveyance rates on the proportion of the unencumbered value of the real property in the relevant jurisdiction owned by the entity which equals the percentage interest acquired in the entity.

The concept of acquisition is defined widely to include:

— the purchase or gift (New South Wales, Queensland and South Australia), allotment or issue of any share or unit;
— the variation, abrogation or alteration of any right attaching or pertaining to any share or unit; or
— the redemption, surrender or cancellation of any share or unit.

In general terms, an entity is entitled to land not only where the entity itself is entitled to land but also where any 'downstream' entity is entitled to land. The provisions of most jurisdictions (other than New South Wales and South Australia) provide that an entity is deemed to be

entitled to land to the extent that a subsidiary is entitled to that land. 'Subsidiary' is defined to include subsidiary companies of the entity and certain companies and trust arrangements in which the entity has an interest. The New South Wales and South Australian provisions are different in that the entity is entitled to land if the actual owner of the land and all interposed entities in the chain of ownership were wound up and the entity would, by virtue of chain of ownership, be entitled to participate in a distribution of property of the actual owner. An entity is taken to be entitled to land if it is beneficially entitled to the land, or in the case of New South Wales and South Australia, if it owns the land beneficially.

For the purposes of the provisions, a person acquires a majority interest in a land-owning entity if the person acquires an interest in the entity that would entitle the person, if the entity were to be wound up after the shareholding was acquired, to participate (otherwise than as a creditor) in the distribution of the property of the entity to an extent greater than 50 per cent of the value of the property distributable to all the holders of interests in the entity.

Furthermore, a person acquires a further interest in a land-owning entity if the person has a majority interest in the entity and in acquiring the majority interest the person was required to prepare and lodge a statement relating to that acquisition, and acquires another interest in the entity that would entitle the person, if the entity were to be wound up after the interest was acquired, to participate further (otherwise than as a creditor) in a distribution of the property of the entity.

Central to the application of the provisions is the concept of 'landholder' or 'designated landholder'. In general terms, a landholder or designated landholder is an unlisted company or private unit trust scheme that is entitled to land wherever located, the encumbered value of which comprises 80 per cent or more of the unencumbered value of all its assets (other than certain excluded assets which may be used to artificially lower the land to assets ratio below the threshold) and of which $1,000,000 or more is located in the relevant jurisdiction. The applicable provisions in each jurisdiction are set out below.

Queensland

The Queensland provisions apply to a corporation that is:

— a corporation other than a corporation shares in the capital of which are listed on a recognised stock exchange, within the meaning of the Securities Industry (Queensland) Code, or a corporation shares in the capital of which are listed on a prescribed stock exchange; and

— a landholder within the meaning of s. 56FL(2) of The Stamps Act 1894-1990 (Qld).

The expression 'corporation' has the same meaning as in the Companies (Queensland) Code. The Queensland provisions apply to any corporation irrespective of its place of incorporation.

Section 56FL(2) provides that a corporation is a landholder for the purposes of the prescribed provisions [ss. 56FA-56FD] if at the time of a relevant acquisition:

— it is entitled to land in Queensland or it is entitled to land in Queensland as a co-owner, or both, and the full unencumbered value of the land or land in which it is a co-owner, or both, is not less than $1,000,000, and the full unencumbered value of all land to which the corporation is entitled, whether in Queensland or elsewhere, is 80 per cent or more of the full unencumbered value of all property in which it is entitled other than property directed to be excluded by sub-section (4) [certain liquid assets, short-term loans and loans to related persons]; or
— it is entitled to land in Queensland (excluding land to which it is deemed to be entitled under subsection (6) [land to which a subsidiary of the corporation is entitled] or it is entitled to land in Queensland as a co-owner, or both, and the full unencumbered value of the land or land in which it is a co-owner, or both, is not less than $1,000,000 and the full unencumbered value of all land to which the corporation is entitled (excluding land to which it is deemed to be entitled under sub-section (6)) whether in Queensland or elsewhere, is 80 per cent or more of the full unencumbered value of all property to which it is entitled (excluding property to which it is deemed to be entitled under subsection (6)) other than property directed to be excluded by subsection (4) [certain liquid assets, short-term loans and loans to related persons]).

The term 'land' is defined in s. 56FA(1) to include:
— any estate or interest in land but does not include the interest of a mortgagee in land;
— anything fixed to the land that is or purports to be the subject of ownership separate from the ownership of the land; and
— a mining tenement within the meaning of the Mining act 1968-86.

A general definition of 'land' has also recently been introduced as s. 2C of the Qld SD Act and is to commence operation from the date that section 1.11 of the Minerals Resources Act, 1989 commences operation. At the same time sub-paragraph (c) of s. 56FA(1) will be repealed. The new s. 2C provides as follows:

> 2C. Mining claims, leases etc (1) In this Act, unless the contrary intention appears, property, land and real property includes:
> (a) mining claims;
> (b) mineral development licences; and
> (c) mining leases,
> as defined in the Mineral Resources Act, 1989
> (2) For the purposes of this Act, property, land or real property which comprises or includes a claim, licence or lease referred to in subsection (1), is to that extent to be taken to be situated where the land to which that claim, licence or lease relates is situated.

New South Wales

The New South Wales provisions will apply only in the case of an acquisition of a relevant interest in a 'designated landholder'.

The expression 'landholder' is defined in s. 99A(1) of the Stamp Duties Act, 1920 (NSW) to mean a private company or a private unit trust scheme.

'Private company' is defined to mean a company (other than a company the shares of which are listed on a recognised stock exchange) whether or not it is incorporated in New South Wales:

— which is entitled to land in New South Wales; or
— which carries business wholly or partly in New South Wales.

There is also a complex definition of 'private unit trust scheme' in s. 99A(1).

Section 99A(1) defines 'designated landholder' to mean a landholder which is entitled to land:

— the unencumbered value of which (not including the unencumbered value of land the subject of a land use entitlement) comprises not less than 80 per cent of the unencumbered value of all its assets, not including assets consisting of [certain liquid assets, short-term loans and loans to related persons]; and
— the unencumbered value of which, insofar as the land is in New South Wales, is not less than $1,000,000.

The expression 'land' is defined in s. 99A(1) to mean any estate or interest in land, whether the land is situated in New South Wales or elsewhere, but does not include the estate or interest of a mortgagee, chargee or other unencumbrancee in the land.

In addition, s. 3(1) of the NSW SD Act defines 'land' to include a stratum, being a part of land consisting of a space or layer below, on, or above the surface of the land, or partly below and partly above the surface of the land, defined or definable by reference to improvements or otherwise, whether some of the dimensions of the space or layer are unlimited or whether all the dimensions are limited.

Section 21(1) of the Interpretation Act 1987 (NSW) provides that in any Act or instrument 'land' includes messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein. The word 'estate' is defined to include interest, charge, right, title, claim, demand, lien and encumbrance whether at law or in equity.

Notwithstanding the definition of land in the Interpretation Act 1987 (NSW), the reference to land in the New South Wales provisions would in any case include leasehold interests and lesser interests in land.

Victoria

The Victorian provisions apply to:

— a corporation, other than a corporation shares in the capital of which are listed on a recognised stock exchange within the meaning of the Securities Industry (Victoria) Code; and
— a landholder within the meaning of s. 751(2) of the Stamps Act 1958 (Vic).

The expression 'corporation' has the same meaning as in the Companies (Victoria) Code. Consequently, the Victorian provisions extend to companies incorporated outside Victoria.

By s. 75N(3) of the Vic SD Act, the provisions, as they relate to corporations, apply to 'private unit trust schemes' as defined.

Section 751(2) of the Vic SD Act provides that a corporation is a landholder for the purposes of [subdivision (7)] if at the time of the relevant acquisition:

(a) it is entitled to real property in Victoria and the unencumbered value of the real property is not less than $1,000,000 or it is entitled to real property in Victoria as a co-owner of the freehold or of a lesser estate in the real property and the value of the whole of the freehold or lesser estate is not less than $1,000,000; and

(b) the value of all real property to which the corporation is entitled whether in Victoria or elsewhere, (other than primary production land) is 80 per centum or more of the value of all property to which it is entitled, other than property directed to be excluded by sub-section (4) [certain liquid assets, short-term loans and loans to related persons] but including primary production land.

The term 'real property' is defined in s. 75(1) of the Vic SD Act to include any estate or interest in real property.

Importantly, the Victorian provisions do not apply to an acquisition of an interest in a corporation or private unit trust scheme relating to property if a conveyance of the property to the person would have not been liable to duty under Heading VI in the Third Schedule to the Victorian Act (s. 750(a)). Heading VI applies to conveyances of real property, and real property is defined in s. 63(1) for the purposes of the Third Schedule to include any estate or interest in real property.

A separate head of duty (Heading VIII), however, applies to impose duty on transfers and assignments of leases and it is, therefore, arguable that dealings in leasehold interests (other than Crown leaseholds to which s. 66 of the Vic SD Act applies) are not covered by Heading VI. It follows that acquisitions of interests in entities entitled to leasehold interests in land are not caught under the Victorian provisions. The Comptroller of Stamps accepts this view.

It is to be noted that mining leases, transfers or assignments of mining leases and agreements for the right to enter upon or occupy and use any land for mining purposes are exempted from duty under Heading VIII (exemption (1)). Furthermore, the Comptroller of Stamps does not regard the transfer or assignment of a mining lease to be a conveyance of real property or an interest in real property under Heading VIII. As a practical matter, acquisitions involving mining leases and other mining interests in land would appear to be outside the scope of the Victorian land-holding provisions.

South Australia

The South Australian provisions apply to a 'private company' or 'private scheme'.

'Private company' is defined in s. 91(1) of the Stamp Duties Act, 1923 (SA) to mean a company incorporated under the Companies (South Australia) Code or a corresponding law in force in another State or a Territory none of the shares of which are listed for quotation on a recognised stock exchange within the meaning of the Securities Industry (South Australia) Code. The expression 'private scheme' is also defined.

Section 94(1) provides that the relevant acquisition will be dutiable if the private company or scheme is, at the time of the acquisition, entitled to real property:

— the unencumbered value of which comprises not less than 80 per cent of the unencumbered value of all property to which it is entitled, whether in South Australia or elsewhere (other than property referred to in subsection (5) [certain liquid assets, short-term loans and loans to related person]); and
— the unencumbered value of which, insofar as the real property is situated in South Australia, is not less than $1,000,000.

The expression 'real property' is defined in s. 91(1) to include any estate or interest in land (including a mining tenement), whether the land is situated in South Australia or elsewhere, but does not include the estate or interest of a mortgagee, chargee or other encumbrancee in land or any interest arising by virtue of a warrant, writ or lien.

The expression 'mining tenement' is defined to mean a right, permit, claim, lease or licence under the Mining Act, 1971 (or the Petroleum Act, 1940).

Western Australia

The Western Australian provisions differentiate between companies incorporated in Western Australia (Division 2) and corporations incorporated outside Western Australia (Division 3).

Section 76AI of the Stamp Act 1921 (WA) provides that Division 2 applies to a company if:

— shares of the company are not listed on a recognised stock exchange or are listed on a prescribed stock exchange; and
— it is a landholder within the meaning of section 76AI(2).

The expression 'company', which is defined in terms of the definition in the Companies (Western Australia) Code, is limited to companies incorporated within Western Australia.

Section 76AF(1) provides that Division 3 applies to a corporation if:

— it is:
  (i) a body corporate formed or incorporated outside Western Australia, not being a body corporate that is:
    (A) within paragraph (c) to (f) of the definition of 'corporation' in the Companies (Western Australia) Code [co-operative housing societies, building societies and credit unions]; or
    (B) a subsidiary, within the meaning of section 76AI(4), of a company to which Division 2 applies; or
  (ii) a company that would be a subsidiary, within the meaning of section 76AI(4), of a body corporate referred to in subparagraph (i) if that body corporate were a company.
— shares of the corporation are not listed on a recognised stock exchange or are listed on a prescribed stock exchange; and
— it is a landholder within the meaning of section 76AP(2).

Section 76AI(2) provides that a company is a landholder for the purposes of Division 2 if at the time of the relevant acquisition:

— it is entitled to land situated in Western Australia and the unencumbered value of the land is not less than $1,000,000,or it is entitled to land situated in the State as a co-owner of the freehold or of a lesser estate in the land and the value of the whole of the freehold or lesser estate is not less than $1,000,000; and
— the value of all land to which the company is entitled, whether situated in Western Australia or elsewhere, is 80 per cent or more of the value of all property to which it is entitled, other than property directed to be excluded by subsection (3) [certain liquid assets, short-term loans and loans to related persons].

Section 76AP(2), which defines a landholder for the purpose of Division 3, is identical with section 76AI(2).

The expression 'land' is defined in section 76(1) of the WA SD Act to include:

- a mining tenement;
- any estate or interest in land; and
- anything fixed to the land including anything that is, or purports to be, the subject of ownership separate from the ownership of the land.

The expression 'mining tenement' is also defined to mean:

- a mining tenement held under the Mining Act 1978 (being a mining tenement within the meaning of that Act or the Mining Act 1904; and
- a mining tenement or right of occupancy continued in force by s. 5 of the Mining Act 1978.

Section 5 of the Interpretation Act, 1984 (WA) provides that references to 'land' in any Act includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over the land. The word 'estate' in relation to land includes any legal or equitable estate or interest, easement, right, title, claim, demand, charge, lien, or encumbrance in, over, to, or in respect of the land.

Northern Territory

The Northern Territory provisions are substantially the same as the Victorian provisions. For the reasons discussed in relation to the Victorian provisions above, acquisitions of interests in entities entitled to leasehold interests and lesser interests in land would not appear to be caught under the Northern Territory provisions.

Tasmania

Section 35(1) of the Stamp Duties Act, 1931 (Tas) provides that a reference to a landholding corporation is a reference to a corporation:

— shares in the capital of which are not listed on a recognised stock exchange within the meaning of the Securities Industry (Tasmania) Code; and
— which, at the date of a relevant acquisition, it and any of its subsidiaries:
  (i) are together entitled to real property in Tasmania and the unencumbered value of the real property is not less than $1,000,000; and

(ii) the value of all real property to which the corporation and any of its subsidiaries are entitled whether in Tasmania or elsewhere, is 80 per cent or more of the value of all property to which they are entitled excluding property referred to in subsection (2) [certain liquid assets, short-term loans and loans to related persons].

The expression 'corporation' has the same meaning as in the Companies (Tasmania) Code. Therefore, the Tasmanian provisions are not restricted to companies incorporated within Tasmania. By section 33(5), the provisions apply equally to a 'private unit trust scheme'.

The references to 'real property' include an estate or interest in real property.[2]

Australian Capital Territory

The Australian Capital Territory provisions operate on a different basis from those of the other jurisdictions. In the first place, there is no obligation to create a separate statement in respect of the acquisition of an interest in a land-owning entity. Duty is chargeable on the transfer instrument or the return required to be lodged in respect of a transfer registered on a register outside the Australian Capital Territory. Secondly, the Australian Capital Territory provisions apply where there is a transfer of any interest in an entity in the Australian Capital Territory. The provisions do not include the threshold concept of $1,000,000 land and 80 per cent real estate assets; nor are they limited to acquisitions of majority interests.

The Australian Capital Territory provisions were originally contained in the Stamp Duties (Marketable Securities) Determination, 1987 but this determination was subsequently revoked and replaced by the Stamp Duties (Marketable Securities) Determination 1989 (ACT). Broadly speaking, ad valorem stamp duty at conveyance rates is imposed on the transfer of shares in companies and units in unit trusts where the company or unit trust holds land in the Australian Capital Territory. There is no guidance as to the circumstances in which an entity 'holds' land.

Paragraphs 5 and 7 of the ACT Determination provide that the stamp duty payable on an instrument of transfer to which s. 44 of the Stamp Duties and Taxes Act, 1987 (ACT), or on the registration of an instrument of transfer to which s. 50 of the Act applies, of a share or a unit (other than an unlisted public unit) that is not listed for quotation in the official list of an Australian stock exchange or a prescribed stock exchange is the aggregate of:

— the amount of stamp duty that would be payable under section 17 of that Act (which imposes duty on certain instruments of conveyance) on a transfer at market value and by a document to which that section applies of any land that is to be deemed to have been transferred; and

2. See Tas SD Act, s. 3(1).

— an amount calculated at the marketable securities rate of the amount remaining after deduction from the unencumbered value of the shares or units of the market value of any land that is to be deemed to have been transferred.

For the purposes of paras 5 and 7 of the ACT Determination, where the transfer involves unlisted shares in the capital of a company that holds (or, by virtue of para. 10 of the Determination, is to be deemed to hold) land situated in the Territory, the transfer of those shares is deemed to have involved the transfer of a proportion of the land that is held (or to be deemed to be held) by the company in the Territory, the value of which bears the same proportion to the total value of the land that is held (or to be deemed to be held) by the company in the Territory as the amount of the paid up capital of the company that has been paid up in respect of the shares transferred bears to the total paid up capital of the company. Similar deeming provisions apply in the case of units in a private unit trust scheme that holds (or is deemed to hold) land in the Australian Capital Territory.

The ACT Determination defines 'land' to mean land held in fee simple, under a Crown lease or under any other lease. By contrast the Stamp Duties (Marketable Securities) Determination 1987 contained no definition of 'land' but the operative provisions were expressed to apply to all 'interests in land'.

Section 14 of the Interpretation Act 1967 (ACT) defines 'land' to include messuages, tenements, and hereditaments, corporeal and incorporeal, of any tenure or description whatever may be the estate or interest therein. It is apparent, however, that this definition cannot be imported into the Determination to extend the meaning of the definition of land.

'Crown lease' is defined in the Act to mean a lease of land granted by or in the name of the Commonwealth. 'Lease' is also defined to include a sub-lease and an agreement for lease or a sub-lease.

Unless the interest in ACT land held by the entity is freehold or leasehold, it appears therefore that the Australian Capital Territory provisions have no application to a transfer of shares or units in the entity.

Papua New Guinea

To date, no landholding provisions have been introduced into the Stamp Duties Act (PNG). However, Papua New Guinea recently followed the lead of Australian States and introduced 'Claytons contract' provisions (i.e. anti-avoidance provisions aimed at transactions not made by dutiable instruments). The possibility that the Government will move in the same way to introduce landholding provisions cannot be ruled out.

It is noted that transfers of mining tenements and prospecting licences are generally liable to ad valorem duty (of up to 5 per cent of the consideration) under item 15 ('Transfers or Assignments of Leases of Land in the Country') of Schedule 1 of the Stamp Duties Act, unless they are exempted by Exemption (3) to that item (in which case they are liable to nominal duty only under Item 15A).

Exemption (3) applies to transfers or assignments of leases where the consideration consists solely of an obligation to perform work pursuant to a work commitment arising out of a Prospecting Authority under the Mining Act or the Petroleum Act.

MINING TENEMENTS

Introduction

In this section of the paper, the application of the land-holding provisions to various categories of mining tenements will be considered.

In Western Australia, Queensland and South Australia the question is considerably simplified (not surprisingly perhaps, in the Revenue's favour) by the specific inclusion of mining tenements in the definition of 'land' for the purposes of the provisions. The only issue will be whether the particular mining interest is within the definition of 'mining tenement' for the purposes of the Mining Act in each of those States.

In the remaining States and Territories it is necessary, however, to determine whether a particular estate or interest recognized under the Mining Acts creates an entitlement to land or real property for the purposes of the Stamp Duties legislation.

Specific Provisions Including Mining Tenements

QUEENSLAND

Section 56FA(1) of the Queensland SD Act defines 'land' for the purposes of the land-holding provisions to include a 'mining tenement' within the meaning of the Mining Act 1968-1986. A general definition of 'land' has also recently been introduced as s. 2C of the SD Act.[3] That section expressly includes within the meaning of 'land' any mining claims, mineral development licences and any mining leases under the Mineral Resources Act 1989.

The definition of 'mining tenements' in the 1968 Act, however, remains relevant until the Mineral Resources Act 1989 becomes operative. It provides as follows:

> "Mining tenement" — Land that is:
> (a) comprised in a mining lease;
> (b) subject to an application for a mining lease recommended by the Minister;
> (c) subject to an application for a mining lease which application has not been disposed of by the Minister (by recommendation or rejection);
> (d) taken up and occupied for any mining purpose by virtue of a licence or other authority issued or granted under any other Act relating to mining;
> (e) comprised in a right of way taken up, occupied, held, used or enjoyed under this Act or any other Act relating to mining;
> (f) the subject of a mining claim or an application therefore;
> The term does not include land that is comprised in the area specified in an authority to prospect, for so long as that authority subsists;

3. See supra for the text of this definition.
4. Section 7(1).

Therefore, both a mining claim and a mining lease will be treated as 'land' but an authority to prospect (under the 1968 Act) and a prospecting or exploration permit (under the 1989 Act) will not be included unless such authorities are otherwise 'land' for the purposes of the SD Act. Perhaps surprisingly applications for mining leases would be treated as amounting to an 'interest in land' for so long as the 1968 Act remains in force but would not appear to be caught once the 1989 Act and s. 2C of the SD Act come into operation. It is interesting to note also that s. 1.11 of the 1989 Act expressly provides that the grant of a prospecting permit, mining claim, exploration permit, mineral development licence or mining lease under that Act does not create an estate or interest in land. This would appear to preclude any argument that a prospecting permit or exploration permit (although excluded from the definition of land in s. 2C) may nevertheless be an estate or interest in land for the purposes of the land-holding provisions.

WESTERN AUSTRALIA

The definition of 'land' in s. 76(1) of the WA SD Act also includes 'a mining tenement'.

'Mining Tenement' is defined to mean:

> (a) a mining tenement held under the Mining Act, 1978 being a mining tenement within the meaning of that Act or the Mining Act, 1904; and
> (b) a mining tenement or right of occupancy continued in force by section 5 of the Mining Act, 1978;

The definition of 'mining tenement' in the WA Act reads as follows:

> "mining tenement" means a prospecting licence, exploration licence, mining lease, general purpose lease or a miscellaneous licence granted or acquired under this Act or by virtue of the repealed Act; and includes the specified piece of land in respect of which the mining tenement is so granted or acquired.[5]

Thus the only rights not caught by the legislation are those under a permit to enter and, as this is only a short term right (30 days) to prospect and mark out a tenement, its exclusion is of no practical significance.

SOUTH AUSTRALIA

Section 91(1) of the SA SD Act includes a mining tenement in the definition of 'real property'. 'Mining tenement' is defined to mean:

> a right, permit, claim, lease or licence under the Mining Act, 1971 or the Petroleum Act, 1940,

thereby catching most forms of mining interests. For example, a mining claim will be treated as 'real property' even though the SA Act does not confer on the holder of a mining claim any right to retain minerals recovered in the claim area.

It should be noted also that while mining claims (and other mining tenements) located within any of these three jurisdictions are included

5. Section 8(1).

within the provisions of the relevant State, the definitions do not purport to include mining tenements created under interstate legislation. This means that for the purposes of determining whether a particular company or unit trust holds 'land' comprising a sufficient percentage of total assets to make it a land-holder for the purposes of the Queensland, Western Australian or South Australian land-holdings provisions, mining claims under other Mining Acts (and which are not otherwise an estate or interest in land) can be ignored.

OTHER PROVISIONS — NEW SOUTH WALES, VICTORIA, NORTHERN TERRITORY, TASMANIA AND AUSTRALIAN CAPITAL TERRITORY

Overview

In States and Territories other than Queensland, Western Australia and South Australia it is necessary to determine whether the various types of mining interests amount to an entitlement to land for the purposes of the land-holding provisions. As will be apparent from the outline of the provisions in the first section of this paper 'entitlement to land' is a key term for stamp duty purposes.

The provisions in each State and Territory provide that an entitlement to land includes an entitlement to an estate or interest in land.[6] The ACT provisions define 'land' more narrowly to mean:

> land held in fee simple, under a Crown lease or under a lease other than a Crown lease.

Therefore, except in the case of the ACT, it is necessary to decide whether a particular right granted under the various Mining Acts amounts to an estate or interest in land. In the ACT the question will be whether a mining claim amounts to a lease.

In Queensland, Western Australia and South Australia this question may also become relevant where the particular licence is not a 'mining tenement' within the extended definitions but may still be an estate or interest in land.[8]

In the case of Victoria and Northern Territory, although the provisions are extended to apply to estates or interests in real property, duty appears to only be imposed on transactions which come within the conveyance head of duty. This means that leasehold or lesser interests in land would not normally be within the scope of the land-holding provisions in Victoria or the Northern Territory.

6. See definitions of 'land' or 'real property' in Qld SD Act, s. 56FA(1); NSW SD Act, s. 99A(1); Vic SD Act, s. 75(1); WA SD Act, s. 76(1); SA SD Act, s. 91(1); NT SD Act, s. 56C(1) and Tas SD Act, s. 3(1).
7. ACT Determination, Item 1.
8. Cf. comments made in relation to 1989 Qld Act, s. 1.11, supra.

Mining Claims

The legislation in each State and Territory (other than Western Australia) recognizes the 'mining claim'.[9] Mining claims do not exist in Western Australia.

Although the rights conferred by a mining claim differ under the various Mining acts in some respects, a mining claim generally confers an exclusive right to prospect and mine for minerals within a claim area, to remove minerals and to erect buildings and other structures for mining purposes within that area.[10] In South Australia alone, a mining claim does not confer any right to sell or dispose of minerals recovered within the claim area.[11]

The nature of a mining claim was considered by the High Court in *Adamson v. Hayes*[12] in the context of the Mining Act 1904 (WA) which at that time defined a claim as 'the portion of land which any miner shall lawfully have taken possession of and be entitled to occupy for mining purposes'. Section 273 deemed every mining tenement (which included a claim) to be 'chattel interest'. Both Barwick CJ and Stephen J commented that a mining claim conferred statutory rights, including the right to work and obtain minerals, but did *not* create an interest in land under general law.[13] This decision was followed in *Pioneer Concrete (WA) Pty. Ltd v. Cooper Sand Supplies (1975) Pty. Ltd*[14] where Wickham J. characterised a mineral claim under the WA Act as 'a licence merely to exploit the privileges of the holder of the mineral claim' (at 364).[15]

On the basis of the authorities, therefore, a mining claim, at least in the normal sense, would not amount to an estate or interest in land. Nor, in the absence of a grant of exclusive possession in land, would a claim amount to a lease. Therefore mining claims appear to be outside the scope of the land-holding provisions in each of those states and territories which do not specifically include mining tenements.

As discussed earlier, a mining claim would be included for the purposes of the land-holding provisions in Queensland and South Australia in view of the inclusion of 'mining tenements' in the definition of 'land' and 'real property' respectively in those provisions. As there is no provision for mining claims under the WA Act, the question does not arise in the WA SD Act.

Prospecting, Exploration Licences and Permits to Enter

The various Mining Acts provide for a wide variety of licences to enter upon land for the purposes of exploration. The rights conferred by

9. For the definitions of mining claim in the various States and Territories, see s. 7(1) (Qld); s. 3(1) (Vic.); Mining Regulations 1972, reg 6 (SA); s. 4(1) (NT); s. 2(1) (Tas.); s. 5 (ACT).
10. See s. 16L (Qld); s. 37(1) (NSW); s. 18 (Vic.); s. 25 (SA); s. 87 (NT); s. 16(1) (Tas.); s. 12 (ACT).
11. Section 25(3) (SA).
12. (1973) 130 CLR 276.
13. (1973) 130 CLR 276, 291 per Barwick CJ and 314 per Stephen J.
14. [1981] WAR 359.
15. [1981] WAR 359, 364.

these licences differ slightly and licences may also be issued subject to additional powers or restrictions.

Generally, however, three broad categories of licences can be identified:

— **Prospecting Licences** which allow a right of entry upon a limited area of land for a term, to prospect and, in most cases, to remove small quantities of minerals for sampling and testing purposes (e.g. s. 65 Lease Area Licence, s. 325 Prospecting Area Licence Vic; s. 40 Prospecting Licence, s. 56A or s. 70 Special Prospecting Licence WA; s. 15BA Retention Licence, s. 13 Prospector's Licence Tas).

— **Exploration Licences** which usually grant an exclusive right to prospect within an area for the group of minerals in respect of which the licence has been granted and also usually allow samples to be extracted and removed for testing. In Queensland and the ACT Authorities to Prospect are granted rather than exploration licences. The 1989 Queensland Act will introduce exploration permits. The rights attaching to these authorities and permits are, however, broadly equivalent.[16]

— **Permits to Enter** which authorise entry onto private land for the purposes of searching for minerals.[17]

The definition of 'mining tenements' in each of Western Australia, Queensland and South Australia have been discussed previously. In Western Australia a permit to enter is not included within the land-holding provisions but, as noted above, this is not of any practical significance. In Queensland, authorities to prospect and exploration permits are excluded from the definition of 'mining tenements' under the 1968 Act. Nor will there be an interest in land under the new s. 2C or at general law given s. 1.11 of the 1989 Act. The South Australian land-holding provisions would appear to apply to all forms of licences and permits.

In States other than Queensland, Western Australia and South Australia, it is necessary to determine whether the various types of licences amount to an estate or interest in land. In Queensland this question may also become relevant where the particular licence is not a 'mining tenement' but may still be an estate or interest in land. As noted, in view of s. 1.11 of the 1989 Queensland Act, it appears that a licence or permit granted under that Act will not be an interest in land in any event.

Generally, licences of the type described above will not confer any right to exclusive possession of the area over which they are granted. The rights are usually conferred for a special and limited purpose only. To the extent to which this is true of a particular licence and no right to take and remove minerals is conferred, it is well settled that the licence grants rights of a personal nature only and does not give any interest or estate in the underlying land.

16. See s. 17 and Part 5 of 1989 Act (Qld); Part IVA (NSW); Part V (Vic.); ss. 57-70 (WA); s. 16(1) (NT); s. 15B (Tas.); and s. 14(1) (ACT).
17. See s. 112 (Qld); s. 28 (WA) and s. 70 (Tas.).

So, for example, in *Cudgen Rutile (No. 2) Pty. Ltd v. Chalk*[18] the Privy Council concluded that an authority to prospect under the Queensland Act was merely a statutory entitlement to take possession of the land and prospect. Similarly, in *Wade v. NSW Rutile Mining Co. Pty. Limited*,[19] Windeyer J expressed the view that a permit to enter under the NSW Act conferred no estate or interest in land, and in *Stow v. Mineral Holdings (Australia) Pty. Limited*[20] a special prospector's licence under the Tasmanian Act was held not to pass any property. It merely made it lawful to do something which otherwise would be trespass.[21]

However, where the licence is coupled with a grant in the nature of profit á prendre i.e. a right to take something out of the soil, an interest in land may be created. Such was recognised by Herron ACJ and Manning J in *Ex parte Henry; Re Commissioner of Stamp Duties*:

> a licence to dig minerals, coupled with a grant to carry them away, is more than a mere licence, it is profit á prendre, an incorporeal hereditament lying in grant and is capable of assignment.

It appears that a licence which also granted a right to take minerals from the soil could be an interest in land to which the landholding provisions would apply. However, a right to take a limited quantity of minerals for sampling and testing purposes only would probably not be sufficient to create an interest in land (such has been implicit in a number of judgements — for example in *Wade v. NSW Rutile Mining Co. Pty. Ltd,* and *Stow v. Mineral Holdings (Australia) Pty. Ltd*). However, where some mining (i.e. more than is necessary for testing purposes) is permitted the position may be more uncertain.

Mining Leases

It is clear that a leasehold interest is an interest in land and that the grant of exclusive possession of land would ordinarily give rise to a leasehold. Also, as discussed above a licence coupled with a grant in the nature of a profit á prendre (i.e. to take something out of the soil) also constitutes an interest in land. However, a right to use land, without exclusive possession, does not confer an interest in the land.[23] Nor does a right to mine but not to take away the results.[24]

The various Mining Acts create a number of categories of 'leases' to prospect for and to mine and extract minerals.[25] While in most cases these grant exclusive rights *to mine* in respect of the minerals to which the lease

18. [1975] AC 520.
19. (1971) 121 CLR 177, 189-191.
20. [1975] Tas SR 25.
21. [1975] Tas SR 25, 29-50; as to the nature of a bare licence, see also *Wood v. Leadbitter* (1895) 153 ER 351 and *Commissioner of Stamp Duties (NSW) v. Yeend* (1929) 43 CLR 135, 245.
22. [1963] NSWR 1079.
23. *ICI Alkali (Australia) Pty Ltd v. FCT* (1976) 11 ALR 324; and *Radaich v. Smith* (1959) 101 CLR 209.
24. *Webber v. Lee* (1882) 9 QBD 315.
25. See s. 25 (Qld); ss. 65 and 95 (NSW); s. 35 (Vic.); ss. 71-85 and 87 (WA); s. 37 (SA); s. 25(1) (Tas.) and s. 20 (ACT).

relates they do not usually grant exclusive possession of the land to which the lease relates.

The statement was made in *Gowan v. Christie* that:

> What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.[26]

The cases emphasise that the particular terms of the lease must be examined carefully to determine the substance and form of the transaction. However, the general view to emerge seems to be that, at least where there is a legal right to exclusive possession conferred upon the lessee, a mining lease is a lease at general law. In any event, a mining lease would generally constitute a profit á prendre and thereby confer an interest in land regardless of whether it amounted to a lease at general law.[27] The exception would be a mineral lease which did not entitle the holder to remove the minerals, which would seem to amount to a bare licence only.

The land-holding provisions in each State and Territory (other than the ACT) include within the meaning of 'land' or 'real property' an estate or interest in 'land' or 'real property' as appropriate.

When the land-holding provisions in NSW were first introduced 'land' was defined in s. 99A as meaning land whether situated in New South Wales or otherwise. It did not expressly include an estate or interest in land. This led to the vexed question of whether the meaning given to the word 'land' in s. 21(1) of the Interpretation Act, 1987 (NSW) (which is intended as a guide to interpretation only) should be 'read into' s. 99A. If so, the term 'land' would include all estates or interest in land. Many apparently unintended results would have followed — for example the interest of a mortgagee in land would have been included. However, if the definition in s. 21(1) did not apply the land-holding provisions would not have applied to leasehold interests.

The definition of 'land' in s. 99A(1) was subsequently amended to mean:

> any estate or interest in land, whether the land is situated in New South Wales or elsewhere, but does not include the estate or interest or a mortgagee, chargee or encumbrancee in land.

This removed any doubt that leasehold interests were brought within the provisions and also removed any argument that grants in the nature of profit á prendre are not caught.

The definition in the ACT SD Act is more limited. It only applies to land held in fee simple or by way of Crown or other lease. It is possible,

26. (1873) LR 3 Sc & Div 273, 283 per Lord Cairns. The relevant cases are discussed at some length in J.R.S. Forbes and A.G. Lang, *Australian Mining and Petroleum Law* (2nd edn 1987) para. 995 and E.W. Wallace, 'Stamp Duty Aspects of Mining Interests and Transactions' (1980) 2 *AMPLA LJ* 4.
27. *Unimin Pty Ltd v. Commonwealth* (1974) 22 FLR 299; *Emerald Quarry Industries Pty Ltd v. Commissioner of Highways* (1976) 14 SASR 486; *ICI Alkali (Australia) Pty Ltd v. Commissioner of Taxation* (1979) 53 ALJR 220.

therefore, that a grant with a profit á prendre which does not grant exclusive right to possession will not amount to a lease at general law and therefore be outside the scope of the provisions.

As discussed above, the provisions in each of the Queensland, South Australian and Western Australian SD Acts make it clear that mining leases are 'land'. In New South Wales and Tasmania a mining lease which is a lease at general law or a profit á prendre will also be brought within the provisions. In Victoria and Northern Territory, the position is less clear. If the view is taken that s. 750 (in Victoria) and s. 56U (in Northern Territory) operates to exclude leasehold and lesser interests altogether, the provisions will not have any application to mining leases. This will have the effect of excluding mining leases when calculating duty, and also for the purposes of determining the threshold matters of whether the company or trust has the requisite value of real property and if it represents a sufficient proportion of assets so as to render it a landholder.

Agreements for Sale of Mining Interests

If a company enters into a contract for the purchase of a mining lease and, prior to completion of the contract, a majority of the shares in the company are transferred, do the landholding provisions apply to assess duty on the value of the lease?

The land-holding provisions extend in all States and Territories (with the possible exception of the ACT) to beneficial estates or interests in land. As it has been concluded that some forms of mining tenements will confer an estate or interest in land, the question arises as to whether a contract for the sale or purchase of an interest which is, or is deemed to be, an interest in land, effects a change in a beneficial ownership of that interest. There are three possibilities:

— that between exchange of contracts but before completion the vendor has disposed of beneficial ownership in the tenement to the purchaser;
— that both the vendor and purchaser will have a beneficial interest until completion; or
— neither the vendor nor purchaser will have a beneficial interest.

Where an uncompleted contract is capable of specific performance, the purchaser obtains a beneficial interest in the property the subject of the contract. The vendor would also seem to retain an interest in the land for the purposes of the land-holding provisions.[28] However, it appears that it will, so far as a purchaser is concerned, be the value of the interest i.e. the value of the rights obtained under the contract, which will be relevant for the purposes of the provisions (both as to calculation of duty and as to determining whether the criteria for a landholder has been satisfied) and *not* the value of the tenement to which it relates. A contract to purchase for an arm's length price, so far as a purchaser is concerned, would arguably only be worth an amount equal to

28. *KDLE Pty Ltd (in Liq.) v. Commissioner of Stamp Duties (Qld)* (1983) 155 CLR 288; see also Hill, *Stamp Duties in New South Wales* para. 99A/8 and NSW Revenue Ruling SD 111.

the deposit paid. So far as the vendor is concerned, it appears that he would be entitled to reduce the value of the land held by him to take into account the uncompleted contract particularly where the purchase price is payable over a period of time.[29]

Where there is a condition precedent to the formation of the contract (such that specific performance is not possible) it appears that the purchaser does not obtain any beneficial or other interest in the subject of the contract. So, for example, a contract which contains a condition precedent that approval of the Minister to the transfer be obtained would not seem to transfer any beneficial interest in the property to the purchaser.

In those jurisdictions which have 'of no force' provisions of the wider type to render the entire instrument without ministerial approval of no force for any purpose, there is, in our view, a strong argument that until Ministerial approval to the transaction has been obtained, neither party would be in a position to specifically enforce the contract. Hence the beneficial interest in the property the subject of the contract would remain with the vendor. Until ministerial approval has been obtained and the contract becomes unconditional, no beneficial interest would be conferred on the purchaser.

TENURES UNDER STATE PETROLEUM ACTS

Introduction

Whether the different types of tenure which exist under the State Mining Acts are an interest in land has been considered above. It will be seen that the types of interest available under the State Petroleum Acts create even greater uncertainty.

Each state has a separate Petroleum Act, except for Tasmania and the ACT where petroleum is dealt with under relevant mining legislation. The Petroleum Acts broadly follow the state Mining Acts in providing for two main types of tenure. They are:

- Authorities to Prospect/Exploration Permits; and
- Petroleum Leases, Production Titles (which will be referred to as Petroleum Titles).

Authorities to Prospect and Exploration Permits

An interest in an Authority to Prospect will not be an interest in land for the same reasons as discussed above in the context of the Mining Acts. An Authority to Prospect does not create any interest in land itself. Nor does it confer any right of exclusive possession. It is simply a statutory right to enter upon land for the specific purpose of prospecting, making lawful that which would otherwise be trespass. The holder of an Authority to Prospect in most jurisdictions does not have an automatic right to a production title so it cannot be argued that there is an interest contingent upon the discovery of prospective quantities of petroleum.

29. See NSW Revenue Ruling SD 4 where the NSW Commissioner of Stamp Duties acknowledges this possibility in another context.

The better view is that the case of *Allgas Energy Limited v. Commissioner of Stamp Duties*[30] is not authority for the proposition that an Authority to Prospect is an interest in property. It must be acknowledged, however, that there has been considerable academic debate as to the correct ratio of this case. Certainly, as a matter of practice the Commissioner of Stamp Duties in Queensland has consistently taken the view that the holder of an Authority to Prospect has no proprietary interest.

In the Queensland, South Australian and Western Australian SD Acts the definition of land for the purpose of the landholding provisions in those jurisdictions expressly includes mining tenements granted under each state's Mining Act. In both Queensland and Western Australia, it would seem that the clear intention of the legislature has been to exclude Authorities to Prospect Petroleum from the definition of land. In South Australia, however, 'mining tenement' is defined to include a 'right, permit, claim, lease or licence' under both the Mining Act 1971 and the Petroleum Act 1940. A petroleum exploration licence granted under the Petroleum Act would therefore be included for the purposes of the landholding provisions. For all States, apart from South Australia, however, it would appear that an Authority to Prospect would not be an interest in 'land' or 'real property' at general law.

Production Titles

Production titles cause a real problem. It has already been noted that 'land' or 'real property' is either not defined or is not defined exhaustively in each State's landholding provisions. It is therefore necessary to consider whether a production title would embody an interest in land according to general law concepts. Wallace, suggests that production titles may not be a lease at common law. He states that:

> the major aim under a production title is to produce and sell petroleum which was the property of the Crown subject to the payment of a royalty calculated according to a fixed percentage of the wellhead value of production. The title is transferable. It is *not corporeal* in nature, since it does not include any present entitlement to any physical part of the land. The production title gives a right to produce petroleum.

Although the form of onshore grants in New South Wales, Victoria and Queensland resemble and use the word 'lease' this is not conclusive. It can also be argued that by analogy with *Henry's case*[32] that a production title should be treated as a lease. In *Henry's* case a deed granting to a syndiate a licence to operate an existing mine and win coal therefrom partly in consideration of a per tonne royalty was characterised as a lease for purposes of the NSW SD Act. However, the analogy is not strong, and the decision in *Henry's* case may be regarded as turning upon the extended definition of 'lease' existing in the New South Wales legislation.

With production titles another important distinction exists. The essential character of a production title is a statutory right to conduct the

30. (1979) 10 ATR 593.
31. Wallace, op. cit. (emphasis added.)
32. *Ex parte Henry; Re Commissioner of Stamp Duties* [1963] NSWR 1079.

activity of producing petroleum in a defined area. The fact that possession of land may be given to enable this activity to be carried on will often be incidental rather than fundamental to the carrying out of the activity. With mining tenements the reverse may be true. In short, a production title is about producing petroleum, not occupying land and arguably should be taken out of the traditional conception of a lease.

This point appears to have been picked up by the legislatures in Queensland and Western Australia. These states specifically include mining tenements under their Mining Acts within the definition of land. There is no corresponding inclusion, however, of petroleum leases or production titles granted under the Petroleum Acts in those States. Nor does the new s. 2C of the Queensland Stamp Duty Act, which deems certain types of tenure under the new Mineral Resources Act, 1989 to be land, go on to make reference to petroleum leases under the Petroleum Act. Arguable, these provisions should be construed in accordance with the maxim *expressio unius est exclusio alterius*. This means that the express mention of one thing is the exclusion of another. In other words, if the Parliament intended petroleum leases to be treated as an interest in land they would have said so. This maxim is, however, always applied sparingly and cautiously by the Courts and it will not assist in those states where there has been no attempt to list items included in 'land' or 'real property'.

In South Australia, alone, specific reference is made to petroleum interests. 'Real property' is defined for the purposes of the landholding provisions to include 'mining tenements', which is in turn defined to mean a 'right, permit, claim, lease or licence' under the Mining Act, 1971, or the Petroleum Act, 1940.[33] It is clear, therefore, in South Australia that a petroleum production licence granted under the Petroleum Act is to be included within 'real property' under that State's landholding provisions.

The ACT provisions are restricted to 'land in fee simple, under a Crown lease or under a lease other than a Crown lease'.[34] If the view is taken that production title under the Mining Act, 1930 (which extends to petroleum) does not amount to a lease at general law, the ACT Determination will not apply to such titles.

Assuming that petroleum leases are not leases at general law the battle is not over. They may well be a profit á prendre. Petroleum leases do not allow the lessee to enter upon land and remove product. Wallace suggests that petroleum leases are profits á prendre in an analysis contained in the article already cited. In doing so, he refers to the Canadian case of *Berkheiser v. Berkheiser*[35] in which the Supreme Court of Canada held that a petroleum lease 'despite its form and terms, conferred on a lessee a profit á prendre for a certain time'. It does not seem that petroleum leases confer a right to enter upon defined land coupled with a licence to remove the defined product. A profit á prendre is also

33. See s. 9(1) (emphasis added).
34. ACT Determination, para. 1.
35. [1957] SCR 397.

traditionally regarded as a caveatable interest for real property purposes.

The strict legal position is therefore uncertain. Arguably, in Queensland and Western Australia the *expressio unius* rule should be applied to exclude from the definition of land for stamp duty purposes any form of tenure under the Petroleum Acts in those States. In New South Wales, Victoria, Tasmania and Northern Territory this argument would not be available and the question would turn upon the general law. Grounds exist for distinguishing petroleum Production Titles from mining leases, assuming the latter would constitute a lease at common law, which is by no means certain. However, it is thought that the argument that petroleum leases create a profit á prendre is not easily overcome. Only in South Australia is the position certain by virtue of an express statutory inclusion.

FIXTURES

Landholding provisions in two States specifically refer to 'anything fixed to the land' forming part of it.[36] In other jurisdictions the same conclusion in reached by operation by the general law concerning fixtures. In the context of the mining industry the issue of what constitutes a fixture can be crucial. This is because major items of equipment, such as demountable houses, conveyor belts and processing lines can be fixtures and thus part of land. The inclusion of such items may push a company's land interest beyond the 80 per cent asset ratio. Also, if the company is already a landholder the inclusion of fixtures will add to the ad valorem liability when the shares are acquired. It can therefore be very important to properly characterise doubtful items.

Background on Law of Fixtures

There is a considerable amount of case law on what does and does not constitute a fixture. However, many of the cases are old — being decided fifty years ago or more — and so some caution may be warranted before applying these to the question of whether something is 'fixed to land' for the purposes of the stamp duties legislation. Subject to that reservation, some broad criteria is listed below:

— A fixture is a thing once a chattel which, at law, has become land through having been fixed to land.
— The question whether a chattel has become a fixture depends upon whether it has been fixed to land and, if so, the object and purpose of that annexation.
— If a chattel is actually fixed to land to any extent, by any means other than its own weight, then prima facie it is a fixture. The burden of proof is upon anyone who asserts that it is not.
— If a chattel is not fixed to land but is kept in position by its own weight, then prima facie it is not a fixture: the burden of proof is upon anyone who asserts that it is (*Holland v Hodgson* LR 7 C.P. 328 at 335).[37]

36. See s. 56FA(1) Qld and s. 76(1) WA SD Acts.
37. *Holland v. Hodgson* (1872) LR 7 CP 328, 335.

— The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period of time[38] or whether it has been fixed with the intent that it shall remain in the position only for some temporary purpose.[39]
— If an object has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached this supplies strong evidence that a permanent fixing was intended.[40]
— Where an article is affixed by the owner of land, though only affixed by bolts and screws, it is to be considered as part of the land. This is especially so where the object of setting up the article is to enhance the value of the premises to which it is annexed.[41]
— Whether or not the object is a chattel or a fixture is a question of fact to be determined by a Court on the circumstances of that particular case.[42]

Some potentially contentious items of relevance to the mining industry warrant separate attention:

Demountable Housing

In *Stephen v. Bell*[43] Dwyer J held that a timber and corrugated iron dwelling house on a mining lease was not permanently annexed to the soil and was not intended to be. The dwelling house was held to be a chattel. In his judgment, Dwyer J noted that:

> it is custom on the goldfields for houses built of wood, iron and other such materials, which are easily dismantled, to be treated as moveable and as articles apart from the land and severable from the soil.

This conclusion is supported by the other remarks of Griffiths CJ in *Reid v. Smith*, where he said that, although the dwelling house in that instance was a fixture:

> in the case of a manager's house, erected on a gold mining lease the same conclusion might not necessarily follow.[44]

Although in *Reid v. Smith*, the Court held that a house resting on its own weight on piers was a fixture, in that case the house was erected pursuant to a covenant contained in a lease between the plaintiff and the defendant. The Court held that it could be inferred from the lease that the intention was that any dwelling house put on land should be considered annexed to the freehold. It may be otherwise, for example in the modern gold mine where all plant and housing may be erected within a space of

38. Ibid.
39. *Vaudeville Electric Cinema Ltd v. Muriset* [1923] 2 Ch 74, 87.
40. *Holland v. Hodgson* (1872) LR 7 CP 328 and *Spyer v. Phillipson* [1931] 2 Ch 183, 209-210.
41. *Holland v. Hodgson* (1872) LR 7 CP 328, 339.
42. *Reynolds v. Ashby & Sons* [1904] AC 460.
43. (1934) 37 WALR 52.
44. (1906) 3 CLR 656, 668.

months and removed again within as short a period as one year depending on the life of the mine.

In *Billings v. Pill*[45] the Court held that an army hut was a chattel which had been erected for a purely temporary purpose and did not become attached to or form part of the realty and it was a chattel capable of being stolen.

Assuming demountable housing has not been fixed to the land or if fixed, has been fixed merely to steady it, the housing would not be fixtures as:

— the housing would be placed on the land for a purely temporary purpose, hence the description 'demountable';
— it would be contemplated that the housing may be removed and re-enacted elsewhere;
— removal of the housing from the land would not cause greater injury to the land or the housing.

Conveyor Belts

Where a conveyor belt is fixed to the land prima facie, it would be considered to be a fixture.[46] Usually a conveyor belt is bolted in some manner to the land where it is situated and will be connected to a fixed electric power source.

A series of cases have established that as between a mortgagor and a mortgagee, machinery fixed to the land by means of bolts and screws ceased to be chattels and become part of the land.[47]

In the *Commissioner of Stamps (WA) v. Whiteman Ltd*,[48] the High Court considered the question of whether certain machinery, which was bolted to concrete bases, covered by a shed and used for making bricks from clay, were fixtures forming part of the land for the purpose of assessing stamp duty on a transfer of that land. Rich ACJ noted that:

> . . . when the clay is exhausted, the machinery will be moved from its present position, but in the meantime it is affixed to the land and is essentially being used for the better enjoyment of the land . . . the object being to use the machinery for transforming clay found on the land into bricks.[49]

His Honour referred to the statement by Lord Lindley in *Reynolds v. Ashley & Sons* where he said:

> the purpose for which the machines were obtained and fixed seems to me unmistakeable; it was to complete and use the buildings as a factory. It is true that the machines could be removed if necessary but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as moveable chattels.[50]

45. [1954] 1 QB 70.
46. *Holland v. Hodgson* (1872) LR 7 CP 328.
47. *Walmsley v. Milne* (1859) 7 CB (NS) 115; *Matthew v. Frazer* 2 K & J 536; *Longbottom v. Berry* (1869) LR 5 QB 123; *Holland v. Hodgson* (1872) LR 7 CP 328 and *Hobson v. Gorringe* (1897) 1 Ch 182.
48. (1940) 64 CLR 407.
49. (1940) 64 CLR 407, 411.
50. *Reynolds v. Ashby & Sons* [1904] AC 460, 472.

In *The Commissioner of Stamps (WA) v. L. Whiteman Ltd*, the Court held that the machinery was affixed to and became part of the land.

In *Great Fitzroy Mines Ltd. v. Commissioner of Stamps*,[51] the Full Court of the Supreme Court considered whether certain machinery and plant used in mining operations were fixtures and whether the value of the fixtures were correctly included by the Commissioner of Stamps in the value of property passing under a transfer of freehold lands, the leases and mining leases.

In that case, it was held that the machinery and plant in question distributed over the lands, some being bolted to the ground and some concreted to the ground, were fixtures.

In *Horst Wilhelm Litz v. National Australia Bank Ltd*[52] in reaching a conclusion as to whether the conveyor belt was a fixture, the Court thought it relevant to consider:

- whether the conveyor belt could be readily moved from one location to another on the mine;
- whether removal of the conveyor belt off the mine would require its complete dismantling and loading onto vehicles; and
- the length of time and expense involved in dismantling, removal and reassembling the conveyor belt.

Where a conveyor belt is fixed to the ground and it is intended that it remain in that position for a substantial period of time, the conveyor belt will be a fixture because:

— the object it serves will be to enhance the beneficial enjoyment and production of the land as a mine[53] and;
— removal of the conveyor belt would be likely to cause some injury to the land and the conveyor belt.

The valuation of fixtures which do form part of the land will not usually pose any special valuation difficulties. However, the same cannot be said of valuing mining and petroleum tenements, which are dealt with in the next section of this paper.

VALUATION ISSUES

Introduction

If an interest can be considered an interest in land the next issue is what value is to be placed upon that interest. This is really a matter to be addressed by valuers and the following commentary simply raises some of the more important issues. Preparing valuations at the best of times is an art rather than an exact science. The task confronting valuers in the area of mining and petroleum interests is more difficult than in most other areas.

51. [1913] St R Qd 161.
52. Unreported, Supreme Court of Qld, 1986.
53. *Reynolds v. Ashby & Sons* [1904] AC 460; and *Commissioner of Stamps (WA) v. L. Whiteman Ltd* (1940) 64 CLR 407.
54. 90 ATC 4391, 4395 citing *Spencer v. Commonwealth* (1907) 5 CLR 418.

General Principles

In the recent case of *Nischu Pty Ltd v. Commissioner of State Taxation (WA)* the Court confirmed as a basis of valuation for mining property the general principle that:

> the true value is the price that would be payable by a willing but not anxious vendor to a willing but not anxious purchaser after proper negotiations between them had been concluded.

Further, the hypothetical purchaser must be taken to be perfectly acquainted with the land and to have knowledge of all known mining information, whether publicly available or not, in determining the hypothetical value of the land.

Valuing authorities to prospect and exploration permits is a inherently speculative exercise. The paper by R D Butler highlights many of the variables which make the task so difficult.[55] Valuation guidelines have been prepared by the Mineral Industry Consultants Association and these are reproduced as an Appendix to this paper. These guidelines are now a little dated and it is undersood that they are currently being reviewed. It is important to note that the matters raised therein are guidelines only, being representative of some of the more important factors to be addressed. More recent guidance can be found in National Companies and Securities Release No. 149, 1990 (dealing with Expert Reports on Mining Properties) and in the Australian Code for Reporting on Identified Mineral Resources and Ore Reserves (Appendix 17 to the Australian Stock Exchange Listing Rules). One approach is to value exploration rights principally by reference to geological prospectivity and then by application of financial modelling techniques to a net present value. However, Butler wisely caveats that:

> every mineral or petroleum deposit is unique, and even deposits which superficially appear to be very similar may prove to be vastly different in value, due to a minor quirk of nature!

He continued:

> It is thus something of a 'tall order' to expect geological consultants to place a strict value on a raw grass roots prospect.

Some of the more common variables he points to in the valuation of 'grass roots' petroleum exploration permits include:

- comparable geology to areas known to contain valuable deposits;
- significant but unexplained geophysical or geochemical anomalies;
- results available from previous exploration;
- marketability of the prospective product; and
- environmental sensitivity and logistical factors.

This list is not exhaustive.

Interestingly, the Commissioner of Taxation has made some pertinent observations in relation to valuation of 'grass roots' or 'wildcat' prospecting rights in the context of valuing those interests for capital gains

55. R.D. Butler, 'The Valuation of Mining And Petroleum Exploration Tenements' [1984] *AMPLA Yearbook* 400.

purposes in Ruling IT 2378. This ruling seems to suggest that relatively low values should be adopted for all authorities to prospect, even those considered to be highly prospective, where deposits remain unproven.

Valuation of Authorities to Prospect

It has been concluded that, generally, Authorities to Prospect will not be an interest in land (with the possible exception of South Australian Authorities and those in Western Australia falling within the definition of mining tenement in the WA Act). Accordingly the need to value these under the landholding provisions for the purposes of calculating duty will not often arise. An interesting question is whether they will be an interest in property generally for determination of the 80 per cent ratio of land to other property. Certainly it has been the practice of the Commissioner in Queensland to regard authorities to prospect as not being property for purposes of assessment of *ad valoreum* duty on their conveyance or transfer.

Does this mean that he will, consistent with this, take the view that authorities to prospect are not property in determining whether the 80 per cent ratio has been exceeded? The answer is not clear.

Finally, it should be noted that in valuing authorities to prospect two other matters ought to be considered. First, in some jurisdictions there are strong prohibitions against profiteering from the sale of interests in authorities to prospect under the relevant mining legislation. This may have an affect on valuation. Secondly, in some instances it would appear that 'the minimum work commitment set out in the instrument of grant is frequently used as a measure or indication of the value of the exploration right. The obligation to spend money is metamorphosised into the value of [the] asset'.[56] This approach is available to revenue authorities.

Valuation of Mining and Petroleum Leases

The valuation of mining and petroleum leases would appear to be a little easier, particularly if production has commenced and reserves are fully defined. Many of the factors mentioned above will, however, apply with equal force. The most reliable valuation will be possible where reserves are well defined, the production parameters such as mining and metallurgical characteristics are well researched and development and production has been planned in detail. Even so, account must also be taken of future events with the potential to influence profitability, for example, commodity price fluctuations and new technologies which may reduce the cost of extracting, processing or transporting the product. Other factors to be considered include the diminishing nature of mining and petroleum reserves, expenditure commitments under the lease itself, land rehabilitation commitments, compensation to land owners, changes in taxation including state royalties and freight charges, etc.

After a cash flow has been predicted then comes the task of bringing that cash flow back to a net present value. Clearly this is a matter to tax the

56. S.R. Lacher, 'Commentary on Valuation of Exploration and Petroleum Tenements' [1984] *AMPLA Yearbook.*

professional skills of valuers. Given the intricacies, one should not lose sight of the fact that recent evidence of comparable sales may in the end be the best indicator of what a hypothetical purchaser would be prepared to pay for the property in question. If such evidence is available then it is certainly the approach preferred by the Court.[57]

A final point to note is that in Queensland the facility exists for a party to seek the Commissioners determination as to the value of the land under s. 56FC(1) of the Queensland Stamp Duties Act.

Mining Information

One important recent issue is the value to be placed upon mining information owned by a company in examining the 80 per cent of all property ratio. Where as a result of a share transfer there has been a change in the majority interest subsisting in underlying property which includes both a mining tenement and mining information this can be critical. In arriving at a value for the tenement (i.e. the land component) it is necessary to assume a hypothetical willing but not over anxious purchaser of the tenement has temporary access to all available relevant mining information affecting the tenement. The hypothetical purchaser must be treated as fully informed in arriving at the true market value.

It is not, however, assumed that the purchaser acquires or is to be given permanent access to all mining information in the possession of the potential landholding company as hypothetical vendor. This information has its own separate value calculable by reference to the cost of replicating that information. When the total value of underlying company property is considered a component referable to mining information should be isolated. By deducting this component from the proposed total value of the mining property the amount which is left to be attributed to mining tenements or other interests in land may not exceed the 80 per cent threshold.

This is what happened in the *Nischu* case. In *Nischu*, shares in a company which was a joint venturer were sold and the Commissioner for State Taxation sought to apply the landholding provisions of the Stamp Act (WA) to the acquisition of the shares. The acquirer of the shares (Nischu) acquired an underlying undivided interest in joint venture property including a mining tenement and mining information. This underlying interest in joint venture property was the only property of the company.

The Court was required to consider whether 80 per cent or more of the company's property was made up of 'land'. The Court decided to first determine the total market value of the property of the company. It did this by turning to comparable historical evidence. In 1987, an equivalent participation interest in the same joint venture has been sold for $24 million dollars.

In determining the value of the tenement (being the 'land' component), the Court thought it necessary to isolate a separate value for the mining information and to deduct this from the $24 million total. The

57. See *Nischau* 90 ATC 4391, 4398.

Court accepted the value for mining information would exceed $5 million by reference either to the costs of replicating that information or paying to purchase it. By accepting this separate value for information it was impossible for the land component to exceed 80 per cent of the total value of the company property.

Whilst recognising that information is not of itself property, the Court considered that documents and other things containing the information were property. Importantly, the Court accepted that information did not adhere to or subsist in the tenement, but in the documents. The tenements could not be effectively and properly operated without access to the information and accordingly the Court concluded that:

> the hypothetical vendor and purchaser would have regard to the cost of regenerating or acquiring the important information that would not otherwise be available to the purchaser after the sale. This cost would cause the parties to reduce the price that would otherwise be appropriate for [the] land.[58]

The practical significance of this case should be borne in mind. The appeal resulted in a stamp duty saving of approximately $1m. in a $24m. transaction. Advisers should consider allocating a value to mining information in the contract (although this may have tax implications).

APPENDIX

GUIDELINES

VALUATION OF VENDOR INTERESTS TO MEET STOCK EXCHANGE LISTING REQUIREMENTS FOR MINING COMPANIES

Introduction

Implicit in the action of raising risk capital to further test and evaluate a mineral property is the recognition that its value or worth cannot be determined until the testing and evaluation is completed. The vendor is selling a property of uncertain value and the purchaser is taking some risk that the property will prove to be of value.

The interests of both vendor and the company preparing the prospectus to test and evaluate the property may be best served by offering the vendor a royalty on or a percentage of future profits rather than a large cash consideration from the float. A compromise might be reached where the vendor takes a relatively small initial cash payment; vendor shares with restricted saleability, or other consideration by which the amount payable to the vendor is linked to successful production from the property.

58. Ibid., 4397.

Guidelines

The following guidelines are suggested to Members of MICA when commenting on the vendor's consideration, particularly for inclusion in the prospectus of a new company.

1. Where the consultant feels unable to arrive at a specific value for a property, he may express his view as to the reasonableness (or otherwise) of the consideration.
2. The real value of the prospect is the price an arm's length buyer is willing to pay.
3. A consultant should decline to endorse either directly or by implication a vendor consideration which seems unreasonable to the consultant.
4. An agreement by a reputable company to spend exploration funds on a prospect should add value to that prospect. If a property is valued by bids from a number of independently advised organisations, this would clearly indicate a market value.
5. Where title exploration has been carried out on a prospect, its value is its 'exploration potential'. There is likely to be a wide divergence of opinion among consultants concerning the exploration potential of a 'grass roots' prospect. If comparisons are drawn with known or adjacent deposits to put the prospect in perspective, extreme care should be taken not to mislead the general public for whom the report is intended.
6. In some joint-venture arrangements the incoming partner is offered a half-interest if he matches the previous expenditure of the title-holder. This basis of previous expenditure could be expanded for use in valuing the prospect, but consideration should be given to the relevance of the previous expenditure in terms of the new company's objectives. In particular, the value of previous workings should be assessed carefully.
7. If the prospect has a proved ore reserve the valuation should take into account all the factors used in making a feasibility study, such an extraction costs, location, markets and other factors affecting profitability. All such assessments should be realistic and be carried out by professionals with knowledge in these fields.
8. If there has been a history of production from the prospect, the consultant should summarize that production and give the reasons for the cessation of mining. The changed conditions warranting the re-opening of the mine should be explained.
9. Prospective tonnages and grades from a hypothetical deposit should not be quoted for valuation purposes in a prospectus. If the consultant proposes a large exploration budget to prove a deposit, it is unwarranted to foreshadow precise tonnages and grades before the exploration has started.
10. The viability of the prospect should be assessed in terms of the geological forecasts being correct. This will call for reference to disciplines other than geological ones. If the prospect measures up to the yardstock of viability then such items as past and future expenditure and those mentioned in paragraph 6 are applicable.

11. A listing of important references or information sources should be included in the valuation. Indications should be given as to the time the consultant has spent on the field inspection of the prospect and to the number of professionals involved.
12. In assessing the prospect, a consultant should have regard to the following points:
    (a) Correlation of past records with field observations with regard to tonnage and grade of previous production;
    (b) Differing standards of assaying;
    (c) Possibility of high grading in previous production;
    (d) Accuracy of old plans and sections;
    (e) Accuracy of borehole locations;
    (f) In-ground value of contained metal should not be quoted with any inference that this relates to the profitability;
    (g) Beware of the 'good address'. Reference to adjacent commercial operations or discoveries should be treated with caution;
    (h) Existing plant and equipment must be assessed as to its relevance for future possible production and valued accordingly.

These are guidelines only and it is the responsibility of the consultant in each instance to arrive at a value appropriate in all circumstances. Not all of the principles set out above will necessarily apply in every case. The Mineral Industry Consultants Association does not accept liability for any loss or damage which may arise from any persons using or acting in reliance on these guidelines.

23 March, 1983

[Source: Reprinted from Appendix to 'The Valuation of Mining and Petroleum Tenements' [1984] AMPLA Yearbook 400 by R.D. Butler at 406.]