

ARTICLES

DEALINGS WITH MINING TITLES UNDER THE MINING ACT 1978 (WA): PART 2 – THE EFFECT OF REGISTRATION & CAVEATS

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1. INTRODUCTION

The aim of this article is to review the operation of the dealings provisions under the *Mining Act* 1978 (WA) in order to understand their legal effect both before and after the reforms being effected by the *Mining Amendment Act* 1996 and the *Mining Amendment Act* 2004. The article also explains developments in the judicial interpretation of the provisions and the effect of the reforms on those judicial views.

Part 1 of this article, published in the previous issue of this journal,

- (1) gave a general comparative description of how the systems of dealings and registration function under resources legislation and Torrens legislation;
- (2) reviewed briefly the types of issues that arise from the operation of resources dealings systems in respect of governmental control and security of title; and
- (3) analysed the legal operation of the reformed provisions governing the requirements of form, governmental consent to and registration of dealings, with particular emphasis on what security of interest a party may obtain pending satisfaction of those requirements.

Part 2 will:

- (4) analyse the legal operation of the reformed provisions governing the effect of registration of mining titles and the lodgement of caveats to protect interests in them.

In particular, Part 2 asks what security of interest a party obtains upon registration of a dealing or lodgement of a caveat. At the conclusion of this Part, we summarise the legal operation of the reformed registration provisions discussed in this Part and conclude with some reflections on the general effect of the reforms overall and the potential future reform of the dealings provisions.

2. EFFECT OF REGISTRATION: INDEFEASIBILITY ?

In reviewing the requirements for consent and registration we have been concerned mainly with the procedures for making a transfer of or dealing with title and the effects of failing to comply with the requirements. We turn now to look at the positive effects of the registration system. In particular, we need to enquire to what extent, if any, registration of a transfer or dealing gives an

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indefeasible right to the interest claimed. This enquiry is conducted with the features of the Torrens system in mind, even though a direct comparison of all features is not made.

As noted above, the *Mining Act* registration system is one of *registration of title* as distinct from the Torrens system of *title by registration*.¹ Although this comment was made of the legislation before the 1996 / 2004 amendments, it is suggested that it still accurately describes the essence of the *Mining Act* registration system. Nevertheless, as we shall see, there are some aspects of the *Mining Act* registration system that give a form of deferred indefeasibility to those who deal with a registered tenement holder.

2.1. Statement of positive effect of registration

The *Mining Act* does not contain a statement, such as is found in the Torrens legislation, of the paramount or indefeasible title of persons who hold registered estates or interests.² For example, the *Transfer of Land Act 1893 (WA)* provides in s.68 that

... the proprietor of land or of any estate or interest in land under the operation of this Act shall except in case of fraud hold the same subject to such encumbrances as may be notified on the registered certificate of title for the land; but absolutely free from all other encumbrances ...³

In the absence of a statement of indefeasible title, it follows that registration as the holder of a mining tenement does not mean that the title is indefeasible in the Torrens sense. A person dealing with the registered title holder cannot rely on their own registration as title holder to perfect the transaction by which they took their interest. Although the *Mining Act* contains no paramountcy provision, it does contain other statements bearing on the effect of registration of title and dealings.

2.2. No impeachment of grant or renewal for irregularity in process

One challenge that may be made to a registered title holder is to question the root of title, namely grant or renewal of grant, for some irregularity of process. Under the Torrens system, the *Transfer of Land Act* provides in s.63 that

No certificate of title ... shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate ...

The first part of s.116(2) of the *Mining Act* purports to protect the grant of title in similar terms:

... a mining tenement granted or renewed under this Act shall not be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the grant or renewal ...

¹ See Part 1, section 4.6; *Finesky Holdings Pty Ltd v Minister for Transport (WA)* (2002) 26 WAR 368, per Steytler J at 378.

² *Hunter Resources Ltd v. Melville* (1988) 164 CLR 234, 259.

³ “Proprietor” is defined as the owner of the interest “whose name appears or is entered as the proprietor thereof in the register book”: *Transfer of Land Act (WA)* s.4(1).

This provision purports to protect only grant or renewal, not registration or the instrument of the title. Whilst the provision could protect a grantee from “informalities or irregularities”, it would not protect a title granted without jurisdiction; that is, granted without authority or without following procedures essential to the warden or minister exercising the power to grant a tenement.⁴ It must be said, therefore, that the root of title could be challenged for a jurisdictional failure in the process of grant or renewal.⁵

2.3. Evidentiary effect of instrument of licence or lease

Section 63 *Transfer of Land Act* goes on to provide:

... every certificate of title created and registered under any of the provisions herein contained shall be received in all courts of law as evidence of the particulars therein set forth or incorporated and of the entry thereof in the Register, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in ... the land therein described is seised or possessed of such estate or interest

By contrast, the *Mining Act* simply provides that “a document purporting to be a mining tenement shall be accepted as such in the absence of evidence to the contrary”.⁶ Clearly the evidence of the register and certificates of title may be impeached.⁷ Under the *Mining Act*, the most direct consequence of registration as title holder is that the rights and obligations under the tenement become vested in the holder.

2.4. Priority Provisions

The legislative reforms to the *Mining Act* have seen the introduction of priority provisions which somewhat resemble the priority provision found in Torrens legislation. *Transfer of Land Act* (WA) s.53(2) provides that

Instruments purporting to affect the same estate or interest have priority as between themselves according to the time of registration and not according to the date of the instrument, notwithstanding any actual or constructive notice.

Similarly s.103E of the *Mining Act*, inserted by section 103 of the 2004 Amendment Act, provides that

Dealings affecting the same mining tenement take priority according to the date and time of registration.

Given the new statutory definition of “dealings”, this provision simply replaces former regulations 75(f) & 77(b) of the *Mining Regulations*, which have been repealed.

⁴ *Crocker Consolidated Pty Ltd v. Wille* [1988] WAR 187, 191, per Burt CJ; *Hunter Resources Ltd v. Melville* (1988) 164 CLR 234, 259, per Toohey J; and *Watson v. National Companies and Securities Commission* [1988] WAR 332.

⁵ *Atkins v Minister for Mines* (1996) 15 WAR 226, 234-239.

⁶ *Mining Act* 1978 (WA) s.161(2); and s.161(3) regarding a certified copy of an extract from the register.

⁷ Cf. *Mining Act* 1978 (WA) s.116(2) discussed in section 2.8 below.

Prior to the amendments, regulation 103 gave priority to interests claimed under registered instruments over those claimed under unregistered instruments. The regulation operated on the broader definition of dealings (including equitable interests), and its operation is discussed elsewhere.⁸ As the amendments mean that equitable interests can no longer be registered, the provision has been repealed from the Regulations and did not need to be re-enacted in the statute.⁹ However, as will be seen, even the new priority provision operates subject to the registered instruments otherwise being legally enforceable. Priorities between unregistered equitable interests will be determined according to general principles of law discussed below.

2.5. Declarations of no concern with legal effect

With the exception of the priority provision just mentioned, the aim of the *Mining Act* is generally to deny any additional effect to a transfer or dealing from approval or registration. The *Mining Act*, both before and after the amendments, contains a clear statement denying any validating effect for the actions of approval or registration, or both.¹⁰ Post-amendments, this statement is contained in s.103C(7), which provides that:

[t]he acceptance of an instrument for registration does not give it any *priority* (other than in so far as registration may be taken to be constructive notice), force, effect or validity that it would have had if this section had not been enacted. (emphasis added)

This provision will have to be read subject to s.103E discussed above. Further, s.103C(6) provides that:

[n]either the Minister nor the authorised officer is concerned with the effect any instrument lodged [for registration] may have at law other than for the purposes of the *Mining Act*.

These provisions make it clear that the registration of a transfer or mortgage under the *Mining Act* does not have the “curing” effect of registration under the Torrens system.

2.6. Title Determined by General Principles of Law

The result of these provisions denying any validating effect to approval and/or registration of dealings is that the system is one of registration of title, rather than title by registration. This means that the person taking under the registered transfer or mortgage must, if challenged, show that the transfer or mortgage was itself legally enforceable according to the general principles of law. Further, a person claiming an equitable interest from a registered tenement holder must, if challenged, be able to show that their equitable interest is legally enforceable according to the general principles of law. Subject to the effect of the *Mining Act* s.103E priority provision discussed above and the notice provisions discussed below,

- (1) a person taking under a transfer or mortgage of the legal interest must be able to trace good title back to the root of title, usually grant, and

⁸ A Gardner, “Security of Title”, [1990] AMPLA Yearbook 284, 303.

⁹ The initial s.103E inserted by s.15 *Mining Amendment Act* 1996 did actually purport to re-enact the former regulation 103 in the statute. Upon the recommendation of AMPLA (WA), the initial version of s.103E was deleted and the current version enacted by s.103 *Mining Amendment Act* 2004.

¹⁰ The pre-amendment provision was *Mining Act* 1978 (WA) s.103A(4).

- (2) a person taking an equitable interest under another dealing must be able to trace the interest back to the root of title and show priority of right according to the general principles of law.

The general principles of law relating to priority provide, basically, that:¹¹

- where there are two competing equitable interests, the first in time prevails unless the conduct of the person claiming the first equity is such as to forfeit that priority;
- where there is a prior legal interest competing with a later equitable or a later legal interest, the interest created earlier in time will prevail except for a number of exceptions involving culpable action by the holder of the prior legal interest, such as where the prior legal interest holder creates the subsequent equitable or legal interest or acts fraudulently;¹² and
- where there is an equitable interest competing with a later legal interest, the equitable interest will prevail unless the holder of the legal interest is a bona fide purchaser of the legal estate for value without notice of the prior equity.

In applying these principles to the competing interests, one must remember at least two effects of the registration systems discussed above:

- (1) dealings, as defined by s.8 of the *Mining Act*, will only convey a legal interest upon approval and/or registration and this may affect the determination of priorities; and
- (2) registration may well provide notice of a prior legal interest, and lodgement of a caveat could provide notice of a competing equitable interest, so the provisions for public access to the register will be important.

2.7. Public access to register as notice of interests

The title or interest which a person takes under a transfer, mortgage or other dealing creating an equitable interest will be subject to prior interests of which s/he had notice. Equity says that notice may be actual, imputed (through an agent) or constructive. Of these, the most pertinent to the registration systems is constructive notice; which is deemed to arise in respect of matters about which a person would have received notice if s/he had made the usual investigations or had investigated a relevant fact which s/he did know.¹³ The effect of constructive notice from registration of a legal interest is expressly saved by s.103C(7). A caveat also gives constructive notice of an equitable interest, as will be discussed below.

Certainly a person negotiating a transfer, mortgage or other dealing should conduct a search of the register. But what will that show? Under the *Mining Act*, any person may obtain a copy of an entry in the register relating to any mining tenement or application for a mining tenement.¹⁴ The Act also provides that a person may obtain a copy of a dealing (as defined in s.8) or other instrument recorded in the register.¹⁵ This is subject to the requirements of regulation 84D(2), which provides that a copy of a dealing can only be obtained with the consent of the registered holder or the

¹¹ This brief summary is taken from R. Meagher, J Heydon & M Leeming, *Equity: Doctrines and Remedies* (4th edn 2002), ch.8, pp.309-349.

¹² A Bradbrook, S MacCullum, A Moore, *Australian Real Property Law*, (3rd edn 2002) LawBook Co, p.71.

¹³ Meagher, Heydon & Leeming, op. cit. n.11, 342 et seq.

¹⁴ *Mining Act*, s.103F(4)(a).

¹⁵ *Mining Act*, s.103F(4)(b).

Minister. With respect, it seems to us that there is no need to require consent of the registered holder or Minister to obtain a copy of an instrument of transfer or mortgage that has been registered.

2.8. Reliance on the register: The notice provision

Besides giving notice of competing interests, the register may also relieve persons consulting it from notice of competing interests that are not registered; in other words, persons dealing with a registered tenement holder may rely upon the register. The Torrens legislation protects a person dealing with the registered title holder by enabling that person to rely on the register.¹⁶ The so-called “notice” provision does two things:

- (i) it relieves a person dealing with the registered proprietor from checking the chain of title to see that title was acquired through legally effective transactions; and
- (ii) it permits a person dealing with the registered proprietor to take free of interests that are unregistered.

The *Mining Act* provides for a similar effect by incorporating in s.116(2)¹⁷ a provision similar to the Torrens notice provision: namely,

Except in the case of fraud, ... no person dealing with a registered holder of a mining tenement shall be required or in any way concerned to inquire into or ascertain the circumstances under which the registered holder or any previous holder was registered, or to see to the application of any purchase or consideration money, or be affected by notice, actual or constructive, of any unregistered trust or interest any rule of law or equity to the contrary notwithstanding, and the knowledge that any such unregistered trust or interest is in existence shall not of itself be imputed as fraud.

By this provision, the *Mining Act* provides a limited indefeasibility of title, in the sense that a person dealing with the registered title holder can rely on the register to take a good title free of any interests that are not registered. This protection for registration of a transfer or mortgage of the legal interest is subject to two qualifications:

- (1) registration will not of itself validate the transaction by which that person took from the registered title holder; that transaction could still be shown as invalid and, presumably, the register rectified; and
- (2) registration may be prevented by a caveat.

2.9. Caveats

Under the Torrens legislation, a caveat is a means of protecting an interest in the land claimed under an unregistered instrument or an equitable charge. There are different forms of caveats but, generally, caveats operate as statutory injunctions which freeze the register and preserve the status quo.¹⁸ A caveat does not substantiate an estate or interest claimed in the caveat but merely prevents the registration from destroying the estate or interest claimed, if substantiated.¹⁹ The validity of the

¹⁶ The general terms of the notice provision are set out in E Sykes, S Walker, *The Law of Securities* (5th edn 1993) Law Book Company; p.446–447; see eg. s.134 *Transfer of Land Act* 1893 (WA).

¹⁷ s.116(2) was amended by s.16 *Mining Amendment Act* 1996.

¹⁸ P Butt, *Land Law*, 4th edition, Lawbook Co, 2001, 640.

¹⁹ *Leros Pty Ltd v Terrara Pty Ltd* (1991) 174 CLR 407, per Mason CJ, Dawson and McHugh JJ, 420.

estate or interest protected by the caveat must still be determined according to the general principles of law.²⁰ Under the Torrens system, one generally needs to be able to show a legal or equitable interest in the title to be able to support a caveat; a purely personal right would not suffice.²¹

The *Mining Act* provides for a system of caveats, which has been much strengthened by the 1996 / 2004 amendments.²² This is consistent with the purport of the Act to prevent registration of equitable interests in mining tenements. Section 122A of the *Mining Act* provides that any person “claiming any interest in a mining tenement” may lodge either one of the three different forms of caveats: an absolute caveat, a subject to claim caveat, or a consent caveat.

An “absolute caveat” is the most powerful as it forbids the registration of a dealing (as defined in s.8) or surrender affecting the mining tenement or interest. A “subject to claim caveat” allows registration of a dealing to proceed on condition that the dealing be expressed to be subject to the claim of the caveator.

A “consent caveat” is as powerful as an “absolute caveat” as it prohibits the registration of a dealing or surrender affecting the mining tenement. However, a consent caveat can only be lodged if the holder of the mining tenement has entered into an agreement with another person and the agreement permits such a caveat to be lodged. The parties to the agreement will only be able to lodge a consent caveat if the agreement relates to

- the sale of the holder’s interest in the tenement; or
- any other matter connected with the holder’s interest in the tenement.

Although the second category appears very broad, it is limited by the requirement of “connection” with the tenement holder’s interest. It is submitted that this limitation purports to exclude the operation of consent caveats in relation to agreements which give rise to purely personal rights unconnected with the proprietary interest of the tenement holder. It has been held in the past that only a person with a proprietary interest in a mining tenement may lodge a caveat under the *Mining Act* and that contractual interests alone could not support a caveat.²³

An absolute or subject to claim caveat remains in force until the expiration of 14 days after notice that an application has been made to register a transfer or other instrument affecting the subject matter of the caveat, or until it is withdrawn by the caveator or upon the order of the warden.²⁴ A consent caveat ceases to have effect upon the order of the warden, withdrawal of the caveat by consent of the parties or expiry of the specified time.

A dealing (as defined in the Act) or a surrender affecting the subject matter of a caveat shall not be registered under s.103C of the Act while the caveat remains in force, except with the consent of a

²⁰ *Leros Pty Ltd v Terrara Pty Ltd* (1991) 174 CLR 407, per Mason CJ, Dawson and McHugh JJ, 420.

²¹ D. Whalan, *The Torrens System in Australia*, Law Book Co. 1982, 227-228; and see *Transfer of Land Act* 1893 (WA) s.137.

²² *Mining Act* 1978 (WA) ss.121–122E, and reg.76.

²³ *Rural & Industries Bank of WA v. Hamilton* Leonora Warden's Court, WA, delivered 19 Dec 1989, and noted in (1990) 9(2) AMPLA Bull 61, where it was held that a 5% net profit royalty was only a contractual interest which could not be protected by a caveat. *Grimes Holdings Pty Ltd v Sceghi*, Supreme Court of WA, unreported judgment of White J, delivered 20 August 1993.

²⁴ *Mining Act* 1978 s.122E.

warden.²⁵ Accordingly, the effect of the caveat system is to provide the only means for protecting unregistrable interests in a tenement. It is said that the caveat system under the *Mining Act* acknowledges that there may be created unregistered equitable interests in a tenement (ie. proprietary interests).²⁶ Although this is inconsistent with the reasoning of Supreme Court in *Finesky*, this view must be correct in the light of the 1996/2004 amendments to the Act (such as the s.8 definition of “dealings”, the s.103C provisions for the registration of only legal interests in tenements).

2.10. Rectification of Register

Under the Torrens legislation, the Registrar has powers of rectification of the register and instruments issued as part of the registration system. In general, these powers are discretionary²⁷ but are given a narrow construction to preserve the basic principle of indefeasibility of title.²⁸ The courts insist that these powers should only be used in cases where no difficult issues of law or fact are involved.²⁹

Following the 1996 / 2004 amendments, the powers of the Registrar to rectify mistakes in the *Mining Act* registration system are akin to those in the Torrens System.³⁰ The power is directed primarily at correcting the register so as to make the register “an accurate record of the particulars it contains” and would not extend to authorizing the cancellation or correction of an instrument where fraud was involved.³¹

2.11. Indemnity (Guarantee Assurance Fund)

The Torrens system legislation provides for compensation by the State to any person claiming under a registered instrument who has been deprived of land or of any estate or interest by reason of, among other things, fraud, the registration of another person as the proprietor of the estate or interest, or any error or misdescription in any certificate of title or entry in the register.³²

The *Mining Act*, on the other hand, does not provide for any indemnity for loss that may be suffered by reason of the functioning of the registration system. This seems consistent with the fact that the *Mining Act*, for the most part, does not give an indefeasible title but puts the competing parties to the proof of the better claim. Parties who are defeated by another establishing a better claim to an interest in a tenement may still have a remedy in contract against the party from whom they sought their interest.

²⁵ *Mining Act* 1978 s.122D.

²⁶ See Part 1, section 4.6 of this article.

²⁷ In Western Australia, the Registrar “shall” correct errors in the register upon the direction of the Commissioner: s.188(ii) *Transfer of Land Act* 1893 (WA).

²⁸ D. Whalan, op. cit. n.21, ch.25.

²⁹ *State Bank of New South Wales v Berowra Water Holdings Pty Ltd* (1986) 4 NSWLR 398.

³⁰ *Mining Amendment Act* 1996 s.15 inserting s.103G, and Mining Regulation 84E to be inserted by Mining Amendment Regulation (No 2) 2005 to replace the former Mining Regulation 107, which provided only for the form of an application to amend the register. Curiously, the *Mining Act* provisions do not refer to correcting an instrument of title.

³¹ *Mining Act* s.103G(3).

³² s.201 *Transfer of Land Act* 1893 (WA)

3. SUMMARY OF PRINCIPAL PROPOSITIONS AND REFORMS

Our aim here is to assess the significance of the legislative amendments to the *Mining Act* by summarising the effect of the amended Act's provisions on the issues identified in section 3 of Part I that are relevant to this Part; namely, the effect of obtaining registration and the resolution of competing interest in tenements.

3.1. Effect of registration of legal transfers and mortgages

The registration system under the *Mining Act* does not provide for the Torrens degree of indefeasibility upon registration of a title. Although there have been calls for the resources registration systems to provide the Torrens degree of indefeasibility,³³ it must be kept in mind that one of the major reasons for creating indefeasible registered title is to avoid the cost of searching for good root of title. The period of search for root of title for resources tenements is, because of the limited statutory term of resources tenements, generally much more limited than for general land tenure registered under the Torrens system. In any case, the *Mining Act* notice provision largely relieves persons dealing with the registered legal title holder from the need to do that.

The *Mining Act* does not validate a transaction by which a person becomes registered; that validity must still be determined according to the general law. However, it does permit a person dealing with the registered title holder to rely on the register to take a good title from the registered title holder subject only to other registered interests if that transaction is otherwise valid at general law.

The ability to register the transaction may be prevented by a caveat. The reforms have made the caveat system more flexible with the introduction of subject to claim and consent caveats. The caveat system is now the only way to protect equitable interests in a tenement.

Under the *Mining Act*, the ultimate security of title will depend on the operation of general principles of law to determine priorities, subject to registered dealings (as defined) taking effect according to their time of registration.

3.2. Resolving competing interests in tenements

The *Mining Act* gives priority to transfers and mortgages of the legal interest in a tenement which are first registered.

As the statutory priority provision operates only with respect to registered interests, priority disputes involving unregistered interests will be determined in accordance with the general principles of law.

4. CONCLUSION

From this article's review of the amended dealings provisions of the *Mining Act*, it is apparent that the legislative scheme for dealing with mining titles has become more like the Torrens system. Only legal interests can be recorded on the register; equitable interests may only be protected by

³³ For example, *Report of the Inquiry into Aspects of the Mining Act (1983)* Western Australia (Hunt Enquiry) 38–39.

caveats. The approval requirements have similarly been simplified to focus, mostly, on transactions concerning legal interests in mining tenements. There may be greater recourse now to the legal learning on the Torrens system to inform the interpretation of the *Mining Act* registration system. And, just as that system has continued to evolve gradually, we expect that, in due course, there will be pressure for further amendments to the *Mining Act* registration system. For example, there may be pressure to re-introduce the registration of certain types of interests such as proprietary royalties and sub-leases. Whilst the reformed caveat system will provide means to protect these sorts of interests, will it be adequate for some of these more substantial interests that are not merely transitory?