AMPLA SUBMISSION

INDUSTRIES ASSISTANCE COMMISSION INQUIRY INTO MINING AND MINERALS PROCESSING IN AUSTRALIA

AMPLA has made a detailed submission to the Inquiry into Mining and Mineral Processing in Australia which is being conducted by the Industries Assistance Commission. The submission addresses some of the legal issues associated with mining titles and their administration and taxation, both of which were identified, in the Commission's background paper, as among the matters central to the Inquiry. The following is an edited version of the Association's submission on these issues.

REGISTRATION AND INDEFEASIBILITY OF TITLE

Security of Title is a significant issue to the mining industry. Any uncertainty as to title is certain to be a major factor in discouraging the exploration for and development of mineral resources. The Association submits that there should be a system of registration for all exploration and mining tenements and that such a system should be properly and precisely maintained.

However, the fundamental issue to be decided is whether the system of registration should guarantee the title of the registered proprietor of an interest in a tenement in the same manner as the Torrens system in respect of freehold land.

The Torrens system has the following central features:

- It is a system of registration of land and land title rather than a system of registration of instruments;
- Registration is, apart from fraud and other limited exceptions expressed in the real property legislation and even fewer other exceptions evolved by the Courts, conclusive of legal title. The underlying principle is that the register is everything and all that a party dealing with registered land need do is search it to satisfy himself as to the ownership of the land and the rights and burdens attaching to the land;
- It is a system of legal title by registration. Equitable title or interests cannot be registered as such. In general, equitable claims are kept off the register and later purchasers of the legal title who become registered as proprietors cannot be affected by prior equities. However, provision is made for the interim protection of equitable interests through the caveat system;
- By means of assurance provisions, the system provides a government guaranteed fund to compensate owners who, by operation of the registration system, lose their title through misfortune such as error in the Titles Office or through fraud or forgery.

There is obvious advantage to the mining industry to have a system of registration of mining tenements with features equivalent to the Torrens system. There are however substantial impediments to the establishment of such a system. First, the existing records of the respective Mines Departments are probably inadequate for the purpose of

implementing a Torrens system of registration in respect of currently existing tenements. Secondly, and more importantly, it is unlikely that governments will be willing to provide the indemnity which is required to compensate owners who have been unfairly deprived of their title through operation of the registration system. The challenge then is to devise a system of registration which makes the register substantially conclusive but without complete indefeasibility.

The Mining Act 1978 of Western Australia and the Regulations under that Act have gone some way towards establishing a degree of indefeasibility of title for mining tenements in that State. (See s. 116(2) and regs 103 and 110(4).) Notwithstanding these provisions however the Mining Act 1978 does not give complete indefeasibility of title. There is no provision to the effect that the title of the registered holder of the mining lease is paramount. Accordingly, it is still necessary for a party who is concerned to establish the title to a particular mining tenement to trace all prior dealings back to the root title.

CONTROL OVER DEALINGS IN TITLES

A common feature of the legislative regime in respect of exploration and mining titles in Australia has been governmental control over dealings in titles. Broadly speaking, Ministerial approval is required for all dealings in the major exploration and mining titles. The extent and methods of control and registration do however vary from jurisdiction to jurisdiction so that there is no clear and uniform position in respect of the extent of governmental control over dealings, the requirements for registration of instruments and the consequences of failure to obtain governmental approval or registration of an instrument.

There are various levels of control which might be exercised by a government over dealings in exploration or mining titles:

- No control;
- Control over the transfer of the title or of a legal interest in the title;
- Control over the creation and transfer of equitable interests in the title such as farm-ins, joint ventures, options and scale agreements.

It is not the intention of the Association to comment as to the degree of control which should be exercised by a government in dealings in exploration or mining titles. The Association would however make the following observations:

- the greater the degree of control by government, then the greater the cost to the mining industry and government. There is added administrative costs in processing the relevant documentation. There is also a cost incurred by the delay in the implementation of the proposal provided for in the relevant documentation until such time as the relevant approvals have been obtained;
- The documents creating or dealing with interests in mining tenements are often complex and complicated legal documents. Departmental officers are usually not trained to interpret such documents and there is every likelihood of delay and error occurring where such documents require approval.

RIGHT TO PRODUCTION TITLE

The transition from an exploration licence or some form of retention title to an actual mining lease raises the difficult issue as to whether government should have the right to refuse the grant of a mining lease to the holder of an exploration licence who has been successful in exploration or to the holder of a retention title.

Generally speaking, the current mining legislation in Australia reserves to the relevant Minister a discretion to grant or refuse a mining lease. It is not the intention of the Association to comment in relation to that question of policy as to whether or not government should or should not surrender its existing discretions in relation to the grant of mining leases.

If, however, the view is taken that Ministerial discretion to refuse a mining lease must be retained, then the Association would submit that:

- the relevant mining legislation should prescribe the grounds upon which the Minister might refuse the grant of a mining lease to the holder of an exploration licence or a retention lease;
- the Minister should be required to give written reasons for his refusal to grant a mining lease; and
- the Minister's decision to refuse the grant of a mining lease should be capable of being reviewed by a court or other appropriate tribunal.

STRICT COMPLIANCE OR SUBSTANTIAL COMPLIANCE

Generally speaking, mining legislation requires certain things to be done in a prescribed manner for example, marking out of land to be applied for under an exploration licence or mining lease. Failure strictly to comply with such requirements may result in the miner's application being rejected or otherwise subjected to legal challenge.

One example of such a challenge is to be found in decision of the High Court in 1988 in the case *Hunter Resource Ltd v. Melville* (1988) 164 CLR 234. This case revolved around s. 105(1) of the Mining Act 1978 (WA) which provides that before applying for a mining tenement, other than an exploration licence, the applicant 'shall mark out in the prescribed manner and in the prescribed shape the land affected. Regulation 59 under the Mining Regulations 1981 sets forth the prescribed requirements underlying the need to mark boundary lines by pegs or cairns 'in the ground at interval not exceeding 300 metres'.

The Mining Warden dismissed an application for mining tenement because there had been non-compliance with the Regulations in that the boundary markers had been set at intervals exceeding the prescribed maximum. There were three intervals which exceeded the prescribed 300 metres. One was on the northern boundary, being 302 metres; others were on the southern boundary, being 301 metres and 303 metres. In all other respects, there was compliance with the marking out requirements, so that non-compliance was minor and could not have mislead anyone inspecting the land with a view to identifying the area of land claimed.

In a majority decision, the High Court upheld the decision of the Mining Warden to dismiss the application. The High Court was of the view that the legislation required strict compliance.

The Association submits that the principle of substantial compliance should be adopted in the relevant mining legislation so as to avoid delay, unnecessary expense and potential injustice to a party who has otherwise substantially complied with the requirements of the legislation. An example of a substantial compliance provision is presently contained in s. 11.6 of the Mineral Resources Act 1989 (Qld).

UNIFORMITY IN MINING LEGISLATION

The mining legislation current in each of the States and Territories is far from uniform. The difference in legislation in each of the States and Territories does nothing to assist the efficiency with which exploration and mining is carried out on a national basis.

The Association recognises that there may be different situations to be dealt with in each of the States and Territories which necessitate a different legislative response. However the Association considers that a substantial degree of consistency can and should be achieved. In particular, there is scope for consistency in mining legislation in relation to matters such as application for and granting of mining titles, registration of title and dealings with mining titles.

TAXATION ISSUES

When the exemption for income derived from gold mining operations ceases on 1 January 1991, the trading stock provisions of the Income Tax Assessment Act 1936 as amended ('Act') will become relevant. However, Division 16H of the Act does not deal with the issue of how stocks of gold existing as at 1 January 1991 are to be brought to account. Should such stocks be valued at their cost, their market selling value or their replacement price?

An associated issue is the extent to which stocks of gold constitute 'trading stock' for the purposes of the trading stock provisions of the Act. This is particularly relevant to the treatment of tailings dumps. (See the old English case of *Golden Horse Shoe (New) Ltd v. Thurgood* (1934) 18 TC 280.)

Both the above issues ought to be clarified in the Act.