23 October 2020

The Hon Matthias Corman
Minister for Finance
LAA Review Project Team
Property and Construction Division
Department of Finance
One Canberra Avenue
FORREST ACT 2603

Attention: LAA Review Project Team

Dear Sirs,

Re: Submission in relation to *Lands Acquisition Act 1989* Review Discussion Paper 2020: addressing Q10 "Are the current arrangements for mining on Commonwealth land sufficient and appropriate?"

Thank you for the opportunity to provide a submission on the above, and for the extension of time for same.

This submission is made from the frame of reference of extensive experience in the management of application for and grant of mining tenements (principally exploration tenements) affecting Commonwealth land, and the attendant requirements for accessing Commonwealth land for the purposes of exploration and mining.

It is therefore restricted to comment on Question 10 in the Discussion Paper.

The Discussion Paper states at Page 12:

> *"Mining*
>
> *7. The legal framework for mining on Commonwealth-owned land has resulted in complex administrative arrangements for access to explore or mine for minerals. The LAA provides14 that where no mining regulations have been made, section 51 and subsections 53(2) and (2A) of the previous Act, the Lands Acquisition Act 1955 apply. As no mining regulations exist, the Minister has the power to grant access for exploration. This power has not been delegated to Commonwealth officials.*

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8. The Governor-General can grant mining interests on Commonwealth land, apply state law to such interests and arrange for regulatory functions to be carried out by state officers. The 1955 Act empowers the Governor-General to authorise a mining lease over Commonwealth-owned land and that state mining laws will operate, so far as applicable, to that lease or licence

9. Organisations seeking to undertake exploration, mining and related activities on Commonwealth land apply to Finance, and a 'deed of access' may be negotiated before the proposal is presented to the Governor-General for approval.

10. The interaction with some state laws can add to the complexity of arrangements for access and exploration on Commonwealth land. For example, before issuing a mining tenement over Commonwealth-owned land, the relevant Western Australian Minister must seek the concurrence of the Commonwealth Finance Minister to the issue of that mining tenement. In addition, access arrangements for entry onto Commonwealth land are managed and administered by acquiring authorities and treated as a disposal of an interest in land."

1. Address to each of the relevant Discussion Paper points

The extract summarises, but regrettably, diminishes the current difficulties, as follows:

a. Access

7. The legal framework for mining on Commonwealth-owned land has resulted in complex administrative arrangements for access to explore or mine for minerals. The LAA provides14 that where no mining regulations have been made, section 51 and subsections 53(2) and (2A) of the previous Act, the Lands Acquisition Act 1955 apply. As no mining regulations exist, the Minister has the power to grant <u>access</u> for exploration. This power has not been delegated to Commonwealth officials. [our emphasis]

In this section of the review, difficulties with the administration of the current regime centre on the word "access".

In Western Australia "access" is currently interpreted to mean physical access to the area of an exploration or mining tenement (granted to the explorer by the State) by contractual agreement with the Commonwealth to its land in its right as a (real property) land holder, following the completion of statutory processes in relation to grant of mining tenements by the State of WA.

Queensland, South Australia and New South Wales also follow this model.

The Northern Territory follows this model where they deem the land is <u>leased</u> by the Commonwealth, but not where the land is held in the right of the Crown. The NT believes that

the Commonwealth real property does not form part of the Northern Territory and is not subject to NT mineral title jurisdiction.

In Victoria, "access" it is taken to mean conditions imposed by the Commonwealth pursuant to the Commonwealth mining tenement grant mechanism (see discussion of "Grant and Regulatory function" below), which is outside Victoria's jurisdiction.

Tasmania believes that it does not currently have any Commonwealth land within its State borders, and as such does not have a view on the matter. [1]

b. Grant and Regulatory Function

> *8. The Governor-General can grant mining interests on Commonwealth land, apply state law to such interests and arrange for regulatory functions to be carried out by state officers. The 1955 Act empowers the Governor-General to authorise a mining lease over Commonwealth-owned land and that state mining laws will operate, so far as applicable, to that lease or licence*

Again, there is considerable divergence of opinion across State boundaries as to the meaning of the word "grant" and "regulatory function".

In WA and South Australia this is taken to mean that the state processes for application and grant of a mining tenement are undertaken with the State in control of the regulatory function, and that State and Federal Ministers agree on the final terms of the grant of the tenement (see further discussion below at **Practical examples of current regimes**).

This is mirrored in Queensland and New South Wales, excepting that consultation is rarely undertaken with the Federal Minister prior to grant.[2][3]

In the NT, Commonwealth land is exempt from NT statutory mining tenement processes on the grounds that s.5 of the *Mineral Titles Act 2010* (NT) ("the Act") stipulates that the "Act applies to all the land of the Territory". This does not (in NT Mines opinion) include Commonwealth land, which they believe does not form part of the NT. If, however, the land is leased by the Commonwealth, the usual NT regulatory processes apply, and the NT will grant a tenement without consultation with the Federal Minister.

In Victoria, the current policy is that Commonwealth land is exempt from Victorian regulatory processes, whether leased or otherwise, and that Commonwealth can and should grant mining tenements of its own authority, notwithstanding there is currently no enabling legislation.[4]

Tasmania advise that they believe they have no Commonwealth land, and as such have not formulated a policy. [5]

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[1] Robert Willis, Mining Registrar, pers. comm., verbal, 18 October 2020
[2] Georgie Lucas, Mining Registrar, DNRME, Qld, pers. comm. verbal, 20 October 2020
[3] Melissa Grainger, NSW DRG, pers. comm. verbal, 20 October 2020
[4] Christy Thiagarajah, DJPR, pers. comm. emails, September/October 2020

c. Deed of Access

> *9. Organisations seeking to undertake exploration, mining and related activities on Commonwealth land apply to Finance, and a 'deed of access' may be negotiated before the proposal is presented to the Governor-General for approval.* [our emphasis]

As noted above in relation to access, in WA a "deed of access" is interpreted to mean that contractual agreement for physical land access must be made between the explorer and the Commonwealth to its land in its right as a quasi real property land holder, subsequent to completion of the State processes.

Again, this is mirrored in both Queensland and South Australia, but where a compensation agreement for access is only required where the Commonwealth land is restricted (for example operational defence land at Woomera) or for non-low impact activities, such as drilling. [6] [7][8]

In Victoria, negotiations for "deeds of access" in the same manner as for WA above can commence, following the Commonwealth grant of mining tenements on its own authority.[9]

As noted above, the NT believes it has no jurisdiction as Commonwealth land does not form part of the NT, and Tasmania believes it has no Commonwealth land.

d. Interaction of State Laws

> *10. The interaction with some state laws can add to the complexity of arrangements for access and exploration on Commonwealth land. For example, before issuing a mining tenement over Commonwealth-owned land, the relevant Western Australian Minister must seek the concurrence of the Commonwealth Finance Minister to the issue of that mining tenement. In addition, access arrangements for entry onto Commonwealth land are managed and administered by acquiring authorities and treated as a disposal of an interest in land*."

We believe that this statement is amply borne out by the examples given above, but also attach for the Minister's consideration a learned paper : "*The Application Of State Mining And Petroleum Legislation To Commonwealth Places Within The Boundaries Of A State"* By Philip

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[5] Ibid 1
[6] Ibid 2
[7] For example, the formalised access form for Woomera published by the (Cth) Department of Defence which explicitly states that an applicant for access must be the holder of a resource tenement, licence or lease granted by the South Australian Government. See Footnote 8
[8] Department of Defence *Application For A Resource Exploration Access Permit* (2020) https://www1.defence.gov.au/sites/default/files/2020-09/w001_-_application_for_resource_exploration_access_permit_correct_version.docx
[9] Ibid 4.

McNamara, 1983[10] which succinctly summarises the legal issues which continue to plague the administration of mining tenements over Commonwealth lands onshore .

2. Practical examples of current regimes

Practically speaking, and in short:

a. Western Australia

A mining company wishing to explore for minerals over Commonwealth land situated in **Western Australia**, lodges an application in the usual manner, native title processes are followed in the usual way, and the WA Minister confers with the Federal Finance Minister in relation to the imposition of conditions for the granting of that tenement. The company then treats with the Commonwealth for a private land access/compensation agreement for actual land access and constraints as necessary. Please note that for prospecting licences or mining leases, where physical marking out is required, State Ministerial consent must be sought prior to said marking out. This applies to "bothland in respect of which the Commonwealth has a freehold or leasehold interest, or land that is otherwise vested in or held by an officer or person on behalf of the Commonwealth.[11]

In addition, WA has (for example) executed an MOU with the Commonwealth in relation specifically to exploration in the north-west Yampi Sound (Defence) Training Area.[12]

b. South Australia

In **South Australia,** *"...an application for an Exploration Licence can be lodged at any time over any area of the state which is not in a Competitive Tender Region ...*[13]*,* mirroring Queensland.

Please note the extensive guidelines for miners and explorers interested in exploring Woomera published on the SA Mines website, which sets out comprehensively the regime employed for multiple land use. [14]

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[10] Phillip McNamara, *The Application Of State Mining And Petroleum Legislation To Commonwealth Places Within The Boundaries Of A State*, 1983 AMPLA Yearbook (1983) http://Www.Austlii.Edu.Au/Au/Journals/Aumplawaybk/1983/4.Pdf

[11] Department of Mines, Industry Regulation and Safety (WA), *Mining Act Guidelines – Basic Provisions* (01 November 2018) http://www.dmp.wa.gov.au/Documents/Minerals/Mining_Notices_Basic_Provisions.pdf

[12] The Hon Gary Gray AO MP Special Minister Of State, *Media Release* (February 24, 2012) https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1453721%22;src1=sm1]

[13] Department for Energy and Mining (SA), *Applications* (2020) https://www.energymining.sa.gov.au/petroleum/licensing_and_land_access/applications)

[14] Department for Energy and Mining (SA), *Woomera Prohibited Area* (2020) https://www.energymining.sa.gov.au/petroleum/licensing_and_land_access/woomera_prohibited_area_wpa

c. Queensland

In **Queensland**, the process is as described above, excepting that there is little or no consultation with the Federal Finance Minister for granting of a tenement affecting unrestricted land. For restricted land, or for destructive ("higher impact") activities such as drilling, consent and a private access agreement is required as described for Western Australia:

> *"Generally, all land except the following can be subject to a resource authority:...[except] Commonwealth land where an Act excludes mining.*[15]

d. New South Wales

The procedures in **New South Wales** mirror Queensland, but are not published[16]

e. Northern Territory

In the **Northern Territory**, an application over Commonwealth land (provided it is not land leased by the Commonwealth[17]) is either rejected outright, or if the land area is small, it is excised from the application, on the grounds that s.5 of the *Mineral Titles Act 2010* (NT) ("the Act") stipulates that the "Act applies to all the land of the Territory", which does not (in NT Mines opinion) include Commonwealth land which does not form part of the NT.

f. Victoria

In **Victoria**, the State refuses to accept any application for a mining tenement affecting Commonwealth land, as the State believes that the land is subject to Commonwealth rather than State jurisdiction. The Commonwealth maintains that Victorian State processes must be followed (as is its current policy in the other States) before it can agree to the grant of any tenements, and to any land access agreements over the affected land. The Victorian policy is therefore at odds with all the other States, particularly those with more experience. (Please note there is no Commonwealth Act preventing mining at Puckapunyal).

g. Tasmania

Tasmania advise that they believe they have no Commonwealth land, and as such have not formulated any policy (*Mining Registrar, pers. comm.*).

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[15] Queensland Government, Business Queensland, Land Constraints (1995-2020) https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/authorities-permits/applying/land-constraints

[16] Ibid 3

[17] Except where land is leased by the Commonwealth. See Discussion of Regulatory Function, 1.b., above

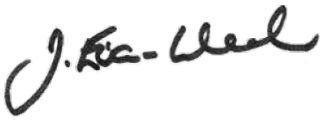
3. Conclusion

As demonstrated above, the current regime does not work consistently across the States and (whilst being fit for purpose), is neither currently equitable or transparent amongst explorers across different States and Territories, nor represents value for the large amount of monies which can often be expended attempting to clarify the current situation in any particular jurisdiction.

The adoption, at least in the short term, of either the current Queensland or South Australian models for granting of mining tenements affecting Commonwealth land in all States (promulgated by regulation under the LAA) would at least see progress during the current and long overdue resuscitation of the lucrative Australian mining industry, pending resolution and clarification of the current inconsistencies.

Should there be any further information or assistance that we can provide, we request that you contact the undersigned.

Yours faithfully
TAS Legal Pty Ltd
Tenement Administration Services Pty Ltd



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Principal

THE APPLICATION OF STATE MINING AND PETROLEUM LEGISLATION TO COMMONWEALTH PLACES WITHIN THE BOUNDARIES OF A STATE

By Philip McNamara*

The Commonwealth of Australia either owns or occupies numerous parcels of land, large and small, in all States of Australia. Most of these areas are geographically insignificant. Numerically, the overwhelming majority of areas owned or occupied by the Commonwealth within the States are small parcels or strata of land used as post offices, public service offices, telecommunications facilities, and airports. To the extent that these parcels lie within urban areas, they are of no interest to the mining industry. However, in addition to its miscellaneous urban holdings, the Commonwealth owns or occupies quite substantial tracts in all States, generally for defence purposes. Some of these larger areas (of which the best known examples are the Canungra base in Queensland, the Port Wakefield, Woomera and El Alamein areas in South Australia, and the Singleton Camp in New South Wales) are suspected to contain mineral bearing ores. In relation to these areas, two important questions arise: first, by whom are minerals in these places owned; and secondly, by the laws of which Parliament — Federal or State — can exploration for and exploitation of minerals in those places be regulated? The purpose of this article is to show that no universal answer can be made to either of these questions and that, in relation to each parcel of land, certain factual inquiries must be made before the related questions of law can be answered.

1. INTRODUCTION

At the outset, a distinction must be drawn between places owned by the Commonwealth and places merely occupied by the Commonwealth. As will be seen, when the Commonwealth acquires ownership of a place within the boundaries of a State, that place in turn acquires a special constitutional status. In relation to that place, the question which Parliament has authority over minerals *in situ* becomes a question of constitutional law. Where, on the other hand, the Commonwealth merely occupies a place — either as lessee or licensee or pursuant to a statutory power — the Commonwealth's rights and powers over minerals in that place depend primarily on the terms of the agreement or statute under which the Commonwealth's occupation is authorized. In this latter case, the questions which arise are principally questions of interpretation. This article is chiefly concerned with places owned by the Commonwealth and with the constitutional law questions which are generated by Commonwealth ownership of places within State boundaries in which recoverable minerals are situated.

There are at least five means by which the Commonwealth may acquire land which remains, for general purposes, part of the State in which the land lies. The first of these is now defunct: by virtue of the interaction of sections 69 and 85 of the

*LL.B. (Hons.) (ANU): MCL (McGill); Lecturer in Law, Univ. of Adelaide.

Constitution[1], certain lands occupied immediately prior to federation by some State departments were transferred into the ownership of the Commonwealth, on or soon after federation.

The second means is by far the most significant. The Constitution[2] authorizes the Commonwealth Parliament to make laws with respect to the acquisition of property from any person on just terms for any purpose for which the Parliament has power to make laws. Pursuant to this power, the Commonwealth Parliament has enacted legislation authorizing the Executive to acquire land within the boundaries of the States, both by way of compulsory acquisition and by voluntary purchase.

Thirdly, the Commonwealth may enter into a voluntary agreement for the purchase of land from a person. Subject to the purchase price being duly appropriated by the Parliament, the purchase would no doubt be effective if for an authorized purpose.[3] Next, land may be donated to the Commonwealth by a subject; on compliance with the State's laws regulating the disposition and assurance of freehold, a fee simple could by this means be vested in the Commonwealth. Finally, the Commonwealth might acquire an estate in land by prescription.

The Parliaments of all the States have enacted mining and petroleum legislation which is, in general, applicable to all lands and all minerals within the State concerned. None of these laws expressly exempts Commonwealth places or Commonwealth minerals from its sweep. If the Commonwealth and its assets were subject to State laws then, in general, Commonwealth places and minerals in them would in turn be subject to control by the States, subject only to countervailing federal legislation. Thus arises the question of constitutional law: can the States competently control Commonwealth property and the uses to which Commonwealth places are put? The High Court presided over by Sir Owen Dixon would have made an unreservedly negative answer to this question.[4] However, the matter has become somewhat more complex in recent years. The particular question whether State mining legislation binds Commonwealth land has arisen in only one

1 S.69 provides:

> On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:
>
> Posts, telegraphs, and telephones:
>
> Naval and military defence:
>
> Lighthouses, lightships, beacons, and buoys:
>
> Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

S.85 provides, so far as is relevant:

> When any department of the public service of a State is transferred to the Commonwealth —
>
> (i) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; . . .:
>
> (ii) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; . . .:

As to the properties transferred by this means, see the Financial Agreement, cl.13 and the Financial Agreement Act 1944 (Cth.).

2 S.51 (xxxi).

3 The Constitution, ss.61 and 81. Lane P.H. 'The Law in Commonwealth Places' (1970) 44 *Australian Law Journal* 403, 407.

4 *Commonwealth v. Bogle* (1953) 89 C.L.R. 229, 259.

reported case where the facts were of a very special nature[5] and, for all practical purposes, the general questions addressed in this article are outstanding.

As has been stated, this article is confined in scope to the questions of ownership of and legislative power over minerals in Commonwealth places within the boundaries of a State. The ownership and exploitation of minerals in the territories of the Commonwealth is a purely federal matter and is controlled by laws ultimately authorized by section 122 of the Constitution[6]. Nor is there any treatment of the question of ownership of and legislative power over minerals in the seabed under Australia's territorial sea, which is regulated by legislation emanating from the 1979 Offshore Constitutional Settlement[7].

2. OWNERSHIP OF MINERALS

At common law, the owner of the estate in fee simple of land was, as a matter of fact, presumptively the owner not only of the surface of the land but also of a diminishing cone of earth whose base was the surface of the earth and whose apex was the very centre of the earth. The common law is accepted as being expressed in the fanciful maxim, *cujus est solum, eius est usque ad coelum et usque ad inferos.*[8] It was a corollary of this that, presumptively, the landowner was entitled to such minerals as were found in the land, the minerals being regarded as part of the realty.[9] The single common law exception to this position obtained in the case of the royal metals, that is, gold and silver: it was accepted that at common law, in the absence of express words in a grant, the Crown was entitled to all gold and silver in gold and silver mines.[10] Thus, in the absence of a contrary intention, it was presumed at common law that a Crown grant carried title to the non-royal minerals but not to gold and silver. Equally, in a private assurance, it was presumed that the grant conveyed such minerals as were in the seller's seisin. Of course, the non-royal

5 In *South Australian Railways Commissioner v. Australian Anglo American Ventures Ltd.* [1976] Reports of Principal Judgments, Warden's Court, S.A., 12/76, it was held that the provisions of the Mining Act, 1971 (S.A.) did not apply to land acquired by the Commonwealth pursuant to the Railways Agreement (South Australia) Act 1975 (Cth.). That Act, like the Railways (Tasmania) Act 1975 (Cth.) and the agreements which they approved, contained special provisions as to the operation of state legislation on the places so acquired, provisions which qualified the operation of the Commonwealth Places (Application of Laws) Act 1970 (Cth.): see s.9 of the former Act and cls. 2(b), 2(c) and 11 of the South Australian agreement and s.8 of the latter Act and cls. 2(b), 2(c), and 10 of the Tasmanian agreement. The land within the scope of those agreements is not intended to be covered by the general propositions and conclusions which follow.

6 See in particular the Mining Act 1980 (N.T.) and Mining Ordinance 1939 (A.C.T.).

7 See in particular, the Constitutional Powers (Coastal Waters) Acts of each State (enacted in 1979 and 1980); the Coastal Waters (State Powers) Act 1980 (Cth.); the Coastal Waters (State Title) Act 1980 (Cth.); Seas and Submerged Lands Amendment Act 1980 (Cth.); the Petroleum (Submerged Lands) Amendment Act 1980 (Cth.); and the Petroleum (Submerged Lands) Acts 1982 of each State.

8 Megarry R. & Wade H.W.R., *The Law of Real Property* (4th ed. 1975) 68.

9 Megarry & Wade, *op. cit.* 69, 71; *Wilkinson v. Proud* (1843) 11 M & W 33, 152 E.R. 704; *Mitchell v. Mosley* [1914] 1 Ch. 438, 450; *Littlehampton Brick Co. Ltd. v. Churchett* (1971) L.S.J.S. 1252.

10 *The Case of Mines* (1567) 1 Plowd. 310, 337; 75 E.R. 472, 512. The ambit of this decision was restricted by the Royal Mines Acts 1688 and 1693 (Eng.), in relation to mines other than gold mines: *Attorney-General v. Morgan* [1891] 1 Ch. 432. See generally, O'Hare C.W., 'A History of Mining Law in Australia' (1971) 45 *Australian Law Journal* 281, 282.

minerals being part of the fee simple, the landowner's rights in them could be assigned or alienated in any way permitted by the common law rules of alienation of real estate; for example, an estate in fee simple in land might be conveyed by X to Y and his heirs reserving unto X and his heirs all X's right, title and interest in coal in the subject land. Such an assurance would have the effect of fragmenting the land so that Y, the fee simple owner of the land, had no estate or interest in the reserved coal.[11]

These common law principles, including the exception in favour of the Crown in the case of gold and silver in place, have been held to be part of the common law in so far as it was received in Australia in 1788.[12] Between the inception of the colony of New South Wales and the enactment of Crown lands (or 'waste lands') legislation, the power to alienate Crown land was vested in the Governors by their Commissions and Instructions and Letters Patent.[13] Throughout this period, grants of land were generally made without reservation of minerals in favour of the Crown, so that, in New South Wales, Victoria, Queensland and South Australia at least, substantial areas of land were alienated in circumstances such that the non-royal minerals were assigned to the grantee.[14]

During the nineteenth century, the Imperial Parliament committed the management of waste lands in Australia to the colonial legislatures.[15] Subsequently, the colonial legislatures enacted Crown lands legislation to regulate the disposition of unalienated real estate thereby displacing any relevant prerogative.[16] Pursuant to this legislation, the colonial minister for lands was invested with authority to alienate Crown land on such terms and conditions as he should see fit; in some colonies, grants of land were made subject to a reservation of all minerals;[17]

11 *Cox v. Glue* (1848) 5 C.B. 533; 136 E.R. 987.

12 For N.S.W., see the Australian Courts Act 1828 (Imp.), s.24; and *Cooper v. Stuart* (1889) 14 App. Cas. 286; *Attorney-General (N.S.W.) v. Brown* (1847) I Legge 312; 2 S.C.R. (N.S.W.) (App.) 30. For South Australia, see *White v. McLean* (1890) 24 S.A.L.R. 97. See generally *Williams v. Attorney-General (N.S.W.)* (1913) 16 C.L.R. 404, 439; *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141, 242–252; *Council of the Municipality of Randwick v. Rutledge* (1959) 102 C.L.R. 54,71, 80; *Wacando v. Commonwealth* (1982) 56 A.L.J.R. 16,18. The special common law position as to gold and silver mines was held to be part of the common law as received in Australia in *Woolley v. Attorney-General (Vic.)* (1877) 2 App. Cas. 163.

13 The power to control, manage and alienate waste lands in Australia was reserved to the Imperial Crown until 1855: see 5 and 6 Vict. c.36 (1842), amended by 9 and 10 Vict. c.104 (1846).

14 See Veatch A.C., 'Mining laws of Australia and New Zealand' (1912) 505 *United States Geological Survey Bulletin*, 37–172.

15 See the Australian Waste Lands Act 1855 (Imp.), amended by Statute Law Revision Act 1892 (Imp.); Western Australia Constitution Act 1890 (Imp.); Constitution Act 1867 (Qld.), s.30; Constitution Act 18 & 19 Vict. c. 54 (N.S.W.), s.2; Constitution Act 1855 (Vic.). As to South Australia, see Australian Constitutions Act 1850 (Imp.), s.7 and Constitution Act 1934 (S.A.), s.5; and as to Tasmania, see Australian Constitutions Act 1850 (Imp.), Act in Council (18 Vict. No.17) passed in 1859 and Constitution Act 1934 (Tas.).

16 See S.A: Waste Lands Act, 1858; N.S.W: Crown Lands Alienation Act 1861; Crown Lands Occupation Act 1861; Vic: Land Act 1869; Tas: Waste Lands Act 1858; Qld: Land Act 1897; W.A: Land Act 1898. See also the Crown Lands Alienation Acts 1860 and 1868 (Qld.) and the Alienation and Management of Minerals Lands Act 1872 (Qld.) under which freehold mineral concessions were granted.

17 Veatch, *op. cit.* 37–172.

at the other extreme, in South Australia, even the royal metals were alienated.[18] By the advent of the twentieth century, however, it had become standard if not mandatory practice for Crown grants to reserve all minerals to the Crown.[19] Nevertheless, vast tracts of land had been disposed of by the Crown in a manner such that private persons held the fee simple estate in the non-royal minerals and, in the case of South Australia, even in the royal minerals.

Apart from the operation of sections 69 and 85 of the Constitution, which are dealt with below, federation itself had no impact on the ownership of minerals in place whether those minerals were privately owned, reserved to the Crown or situate on Crown land. However, after federation, two significant developments took place. First, the States began to resume by legislation the ownership of minerals which had previously been granted away. For example, in Victoria,[20] Queensland,[21] South Australia[22] and Tasmania,[23] all uranium and thorium in place are vested in the Crown, whether or not the original Crown grant alienated, or contained a reservation of, those minerals. Furthermore, in Victoria,[24] the Crown has the power, by means of a published declaration, compulsorily to acquire minerals (in private land) previously alienated by the Crown. In South Australia, property in all previously alienated minerals *in situ* was, in 1971, vested in the Crown.[25] In 1981, all private coal in New South Wales was resumed.[26] Petroleum in place in land whenever first alienated is presumptively the property of the Crown in right of the State in which the petroleum is found.[27]

The second post-federation development was that the Commonwealth began to acquire freehold title to land within the borders of the States, that is, title to areas of land which, in constitutional terminology, are known as 'Commonwealth places' and which, by virtue of section 52(i) of the Constitution, are subject exclusively to Commonwealth legislative power. Commonwealth land acquisition legislation, based on section 51(xxxi) of the Constitution, has been in force since 1901. Since that date, the Commonwealth has acquired substantial parcels of land, both from private owners and from the Crown in right of the States, thus giving rise to the issue of which Parliament has legislative authority over minerals in those parcels of land.

18 40 & 41 Vict. No. 88. (1877), s.1.

19 O'Hare, *supra*, n.10, 284–286; Lang A.G. & Crommelin M., *Australian Mining and Petroleum Laws* (1979) 14–17; Crown Lands Act, 1888 (S.A.), s.9, (which did not reserve extractive minerals); Crown Lands Act 1903 (Tas.), s.106; Crown Lands Act Amendment Act 1905 (Tas.), s.27; Crown Lands Act, 1884 (N.S.W.), s.7; Land Act 1891 (Vic.), s.12; Land Act 1898 (W.A.), s.15; Mining on Private Land Act 1909 (Qld.), s.6.

20 Mines (Uranium & Thorium) Act 1955 (Vic.); Mines Act 1958 (Vic.), s.508(1).

21 Mining on Private Land Act 1909 (Qld.), s.6; Mining Act Amendment Act 1971 (Qld.), s.28 (which applies to all minerals).

22 Mining Act Amendment Act, 1945 (S.A.), s.4; Uranium Mining Act, 1945–1954 (S.A.).

23 Mining Act 1929 (Tas.), s.2B.

24 Mines Act 1958 (Vic.), ss. 292–298, replaced by Mines (Amendment) Act 1983 (Vic.) No. 9936, s.45(3).

25 Mining Act, 1971 (S.A.), s.16. Minerals in 'private mines' created pursuant to s.19(1) can, however, be mined without statutory authority.

26 Coal Acquisition Act 1981 (N.S.W.).

27 Petroleum Act 1915 (Qld.), ss. 5 and 6; Petroleum Act 1940 (S.A.), s.4; Mining Act 1929 (Tas.), s.2B; Petroleum Act 1955 (N.S.W.), s.6; Petroleum Act 1958 (Vic.), s.5; Petroleum Act, 1967 (W.A.), s.9.

In relation to each parcel of land, the first question to arise is, in whom is property in the minerals vested? In theory, there are three possibilities

(a) the minerals may be vested in the Commonwealth. This result would obtain if, for example, the Commonwealth acquired previously unalienated land from the Crown in right of the State (either by agreement or by force of section 85 of the Constitution[28] or pursuant to legislation authorized by section 51(xxxi) of the Constitution) or if the Commonwealth acquired from a private landowner (by compulsory acquisition or by voluntary purchase) land first alienated in fee by the Crown in a manner such that minerals (royal or otherwise) were not reserved to the Crown. As will be seen, this is the usual outcome of Commonwealth compulsory land acquisitions.

(b) the minerals may be vested in a private person. This result could obtain only if an unlikely combination of circumstances took place. For example, the land in question may first have been alienated by the Crown in circumstances such that at least some minerals were carried with the title; subsequently, the minerals (or some of them) may have been severed from the fee simple by conveyance or reservation; and finally, the Commonwealth may have acquired only the title of the owner of the general fee simple in the land, leaving the fee simple estate in the minerals outstanding in a private person. As will be shown, this would happen only in the unlikely event that the Commonwealth published a notice of partial acquisition, or where land was acquired by gift, voluntary purchase or adverse possession.

(c) the minerals may be vested in the Crown in right of the State. This result may be reached where, for example, the land was first alienated by the Crown subject to a reservation of all minerals and, subsequently, the Commonwealth acquired, by way of a notice of partial acquisition, the right, title and interest of the private landowner alone leaving the State Crown's ownership of minerals unaffected. Alternatively, if the land were first alienated in such a way that the grant carried minerals from the Crown, it may be that the State has, while the land was in private ownership, resumed some or all of the minerals in the land.[29] This result, too, could be reached where the Commonwealth acquired the land by gift, voluntary purchase or adverse possession.

This broad analysis shows that there can be no simple answer to the question, who owns minerals in Commonwealth places? A different answer may be necessary in relation to each parcel of Commonwealth land. The inquiry would be

28 In *Commonwealth v. New South Wales* (1923) 33 C.L.R. 1, 19, the High Court held that where the Commonwealth acquires land by virtue of s.85, then the entire right, title and interest in the land, along with all minerals (including the royal minerals) therein vests in the Crown in right of the Commonwealth. (Higgins J. dissented as to the royal minerals: see at 71). This decision may not apply where, at the moment when s.85 became operative, the strata in which minerals were found had, as a matter of law or fact, been segregated from the rest of the land so that the strata were not 'used [by the public service of a State] exclusively in connexion with the Department' within the meaning of s.85(1) of the Constitution: see at 30 compare the judgment of Isaacs J. at 37 *per* Knox C.J. and Starke J. 66–67 *per* Higgins J.

29 For example, in Tasmania and Victoria, uranium and thorium may have been resumed by the Crown; in South Australia, all previously alienated minerals in the land (except uranium, which reverted in 1945) revested in the Crown in right of the State in June 1972; in all jurisdictions, ownership of petroleum may have reverted to the Crown in right of the State: see the text accompanying nn.20–27.

as much factual as legal. The starting point in all cases where land has been acquired by the Commonwealth pursuant to its land acquisition legislation (which is discussed in the next section of this article) must be the notice of acquisition by the Commonwealth. If that notice entailed, as is usual, a total acquisition, (that is, an acquisition of all rights and estates in the land) then the Commonwealth owns the minerals. If the notice purported to vest less than an absolute interest in the Commonwealth, three other inquiries would need to be made: (a) a search of the title register in respect of the land would have to be conducted, to ascertain when the land was first alienated by the Crown and whether the Crown grant purported, as a matter of construction, to convey all or any minerals from the Crown or, on the other hand, reserved minerals to the Crown; (b) the mining and Crown lands legislation operative at the date of the Crown grant would need to be perused in order to ascertain whether a Crown grant of land silent as to minerals was capable, as a matter of law, of conveying some or all minerals to the grantee and whether the common law presumptions as to minerals had been displaced; (c) all mining and petroleum legislation enacted before acquisition of the parcel by the Commonwealth would need to be examined in order to ascertain whether minerals once granted away by the Crown had effectively been revested in the Crown in right of the State. Of paramount importance, however, is the terms of the instrument by the force of which the Commonwealth acquired the land: this must be perused in order to determine the estate which the Commonwealth was purporting to acquire.

Where, on the other hand, the acquisition took place by virtue of sections 69 and 85 of the Constitution, somewhat different factual enquiries, referred to below, would need to be made.

3. ACQUISITION OF PLACES BY THE COMMONWEALTH

By virtue of the operation of sections 69 and 85 of the Constitution, the Commonwealth acquired many parcels of land within State boundaries on or soon after federation. However, most land compulsorily acquired by the Commonwealth since federation has been vested in the Commonwealth by force of legislation enacted under section 51(xxxi) of the Constitution, and it may be convenient at this point to deal with the provisions of the Commonwealth's land acquisition legislation.

The first Commonwealth land acquisition statute was the Property for Public Purposes Acquisition Act 1901. The Act authorized the Governor-General to enter agreements with landowners, including the States, for the 'absolute purchase' of land by the Commonwealth[30] or for the grant of land[31] by the State to the Crown in right of the Commonwealth[32]. Compulsory acquisition of land (by published notice) from the States and from private persons was authorized by

30 S.3.

31 Land is defined by Acts Interpretation Act 1901 (Cth.), s.22 (c) to include 'messuages tenements and hereditaments, corporeal and incorporeal, of any tenure or description and whatever may be the estate or interest therein'. The Commonwealth land acquisition legislation was reported on by the Australian Law Reform Commission in 1980: Australian Law Reform Commission Report *Lands Acquisition and Compensation*, No. 14 (1980). See also Australian Law Reform Commission Working Paper No. 8 (1977) and Australian Law Reform Commission Discussion Paper No. 5 (1978).

32 S.5.

section 6, and its effect was described by section 7:

> Upon the publication of such notification in the Gazette, the land described in such notification shall by force of this Act be vested in the Commonwealth, freed and discharged from all trusts, obligations, estates, interests, contracts, charges, rates, rights-of-way or other easements whatsoever, and to the intent that the legal estate therein, *together with all powers incident thereto*[33] ... shall be vested in the Commonwealth. (emphasis added).

The estates of all persons interested in the land compulsorily acquired were converted to claims for compensation[34]. The remainder of the Act made provision for compensation[35], for the acquisition of underground land[36] and miscellaneous matters[37].

This Act was repealed by the Lands Acquisition Act 1906 which followed the same general scheme as its predecessor, which, in turn, had been modelled on the Land Clauses Consolidation Act 1845 (Imp.). Section 16 of the 1906 Act substantially re-enacted section 7 of the 1901 Act, and section 17 re-enacted the substance of section 11 of the 1901 Act. The 1906 Act contained, however, a number of significant departures from the 1901 Act. First, the Commonwealth was authorized to acquire leasehold estates, and it was declared that Crown grants or Crown leases to the Commonwealth would, by force of the Act and notwithstanding anything in the law of the State, 'be valid and effectual to vest the land in the Commonwealth according to the tenor thereof'[38]. This phraseology was probably intended to overcome two kinds of provisions in State laws: first, those prohibiting the alienation of Crown land except under State statute[39] and secondly, those qualifying the right of the Crown to grant land without reservations of minerals. Probably section 6 of the 1906 Act did not exceed the Commonwealth's powers.[40]

Secondly, the 1906 Act contained the following provision:

> 62. (1) The Governor-General may authorize the grant of a lease or licence to any person to mine for any metals or minerals[41] on any land[42] the property of the Commonwealth.
>
> (2) Subject to the regulations, the laws of the State in which the land is situate relating to mining shall, so far as applicable, apply to leases and licences under this section and to mining carried on by virtue thereof.
>
> (3) The Governor-General may enter into any arrangement with the Governor in Council of any State for carrying this section into effect by State officers.

33 This would catch rights to mine: *Rowbotham v. Wilson* (1860) 8 H.L.C. 348, 360; 11 E.R 463, 468; *Commonwealth v. New South Wales* (1923) 33 C.L.R.1, 40.

34 S.11.

35 S.8, 9 and 11, Parts III and IV.

36 S.10.

37 Part VI.

38 S.6.

39 *E.g.* Crown Lands Consolidation Act 1913, (N.S.W.), s.6; Crown Lands Act 1903 (Tas.), s.16(1).

40 See *Commonwealth v. New South Wales* (1923) 33 C.L.R.1, 27.

41 This was held to include the royal metals by Isaacs J. in *Commonwealth v. New South Wales ibid.* 43.

42 'Land' was defined in s.5 to include 'powers' over land, which would include rights to mine. See the authorities cited in n.33 and, in relation specifically to the 1955 Act, *Maddalozzo v. Commonwealth* (1978) 22 A.L.R. 561, 565 (S.C. (N.T.)); (1979) 25 A.L.R. 437, 440 (F.C.A.); (1980) 29 ALR 161, 166, 170, 173. (H.C.A.).

The interpretation and effect of this provision and of its successors will be considered later.[43]

As in the case of the 1901 Act, commercial mining on acquired land on the part of the Commonwealth was prohibited by the Act of 1906.[44]

Both the 1901 and the 1906 Acts made it quite clear that compensation was payable to all persons holding estates or interests in the acquired land, including interests in or powers over minerals in place, so that any notice of acquisition could, according to its tenor, be effective to cause minerals (including minerals reserved to the Crown) to accrue to the Commonwealth.[45] The fact that an owner of an estate or interest in the land might omit or neglect to pursue a claim for compensation under the Act did not affect either the validity of the Act or the efficacy of a particular acquisition. In other words, the acquisition was valid even if some or all landowners were not in fact compensated. It sufficed, to make the Act valid, that the Act offered just terms to those who chose to pursue their claims to compensation; and a notice of acquisition sufficiently complying with the Act would be equally valid.[46]

The effect of section 16 of the 1906 Act (which corresponds to section 7 of the 1901 Act) was the subject of the decision in *Commonwealth* v. *New South Wales*.[47] There, the High Court came to the three general conclusions in relation to the operation of the legislation which remain applicable today: first, the Court held that section 51(xxxi) of the Constitution authorizes laws for the acquisition of minerals, along with all other species of property, and laws for the compulsory acquisition of property in the ownership of the Crown in right of the States, including both the base minerals and the royal metals.[48] That is, the Court held the 'unanimous opinion that, in properly framed Commonwealth legislation under section 51(xxxi), the prerogative rights in respect of the royal metals possessed by the States may lawfully be terminated by the legislation of the Commonwealth . . .'.[49]

Secondly, the Court held that, by publication of a single notice describing its surface position and dimensions, the Commonwealth might (and indeed presumptively does) acquire land from the surface to the centre of the earth. A notice of acquisition can have this operation even where part of the land is owned by a subject and another part (for example reserved minerals) is owned by the Crown in right of the State.[50] *A fortiori*, by a single published notice, the Commonwealth might acquire, for example, the interest of one private person in minerals in place, the residual fee simple of the general landowner and the radical title held by the Crown in right of the State. It is important to note, however, that this conclusion

43 *Infra* 24.

44 S.23.

45 See s.11 of the 1901 Act and ss.26 and 27 of the 1906 Act (which are confined to compulsory acquisitions). For a general review of the legislation, see Brown D., *Land Acquisition*, (1972).

46 The 1906 Act was held to be valid in *Grace Bros Pty. Ltd. v. Commonwealth* (1946) 72 C.L.R. 269. The validity of the 1955 Act was assumed in *Jones v. Commonwealth* [No. 2] (1965) 112 C.L.R. 206.

47 (1923) 33 C.L.R.1.

48 *Ibid.* 22, 31, 37–38.

49 *Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Limited* (in Liq.) (1940) 63 C.L.R. 278, 322–323 *per* Evatt J.

50 (1923) 33 C.L.R.1, 23 *per* Knox C.J. and Starke J.

applies only to land compulsorily acquired by notice. Where land is acquired by the Commonwealth by voluntary sale, the Commonwealth could, on general principles, acquire only the estate which the seller could and did in fact assure to the Commonwealth.[51]

Finally, the Court concluded that the Commonwealth Parliament might authorize the Crown to acquire land divided vertically or horizontally, for example, a seam of minerals.[52] The quantum of land compulsorily acquired depends on the terms or tenor of the published notice of acquisition, not on the estate held by the surface owner. Presumptively, it was held, a notice of acquisition of 'land' operates to acquire all interests in the land not already held by the Commonwealth.[53]

The present Act, the Lands Acquisition Act 1955 is in substantially the same terms as the Act of 1906, which it repealed. Section 8 re-enacts section 6 of the 1901 Act which has been noted above. Section 10(4) substantially reproduces section 7 of the 1901 Act which, it has also been noted above, operates to free compulsorily acquired land both from the kinds of rights referred to in section 7 of the earlier Act and also from 'reservations'.[54] Again, though, this 'discharging' provision does not apply to land acquired by agreement, with consequences to be alluded to below. To the extent that property acquired under the Act contains minerals reserved to the State Crown then, whether or not the State Crown's claim for compensation is ever pursued, the State Crown's interest is converted to a claim for compensation against the Commonwealth.[55] Equally, a right to mine enjoyed by a private person over acquired land is converted to claim of a similar kind.[56]

The definition of land in the present Act[57] is not explicit as was the definition in the Act of 1906, but it is probably no less wide.[58] Acquisition continues to be

51 See s.3 of the 1901 Act, s.14 of the 1906 Act and s.7 of the 1955 Act. It is partly for this reason that the compulsory acquisition process is used to acquire land even where the owner 'consents' to the transfer of ownership.

52 This would be of significance if, for example, the Commonwealth wished to acquire a seam of minerals or an ore-body without acquiring the surrounding soil, the superincumbent overburden or the subjacent earth, as it may wish to do in the case of an ore-body of uranium or of a strategic metal.

53 In this respect, the decision in *Commonwealth v. New South Wales*, (1923) 33 C.L.R.1 was affirmed by the Court in *Maddalozzo v. Commonwealth* (1980) 54 A.L.J.R. 289.

54 Previously 'reservations' had been dealt with by s.8 of the 1901 Act and by s.16 (2) of the 1906 Act in a context which implied that the word meant 'reserved for a specific *use*', (as in the context of Crown lands legislation: see, by way of example s.6 of the Crown Lands Consolidation Act, 1913 (N.S.W.)) rather than a 'reservation to the Crown of part of a particular parcel', or a reservation of minerals. However, in *Commonwealth v. New South Wales*, (1923) 33 C.L.R.1, 53 *per* Isaacs J. implied that 'reservations' in the 1906 Act would apply to a reservation of minerals. *Cf.* the judgment of Higgins J. at 60–61; *Attorney-General v. Brown* (1847) 1 Legge 312; and the judgment of Windeyer J in *Randwick Corporation v. Rutledge* (1959) 102 C.L.R. 54, 70, 74, 77–78. It is in the former sense only that 'reserved' is used in ss.6 (2) and 8 (2) of the 1955 Act: see *Jones v. Commonwealth* [No 2] (1965) 112 C.L.R. 206, 218, 220–221, 224, 235–236.

55 S.11(1). Compensation payable to the Crown is fixed by s.22.

56 S.11(2) and see also *Maddalozzo v. Commonwealth* (1980) 54 A.L.J.R. 289.

57 S.5(1).

58 In *Unimin Pty. Ltd. v. Commonwealth* [1974] 2 A.C.T.R. 71, 78; (1974) 22 F.L.R. 299 it was held that a non-exclusive *profit à prendre* enabling the grantee to remove sand, determinable either on one month's notice by the grantee or at will by the grantor, was an interest in land within the meaning of s.11 of the Lands Acquisition Act, as expanded by s.5.

effective 'upon publication of a notice of acquisition'.[59] Section 51 of the 1955 Act substantially re-enacts section 62(1) and (2) of the 1906 Act, set out above.[60] Section 53(1) and (2) authorize the Minister to grant leases and licences of and rights, powers and privileges over land not immediately required for Commonwealth purposes.

Other Commonwealth Acquisition Legislation

Sundry other legislation authorizes the compulsory acquisition of land by the Commonwealth or its agencies for public purposes and it, too, being based, in its operation within the States, on section 51(xxxi) of the Constitution[61] would by parity of reasoning authorize the acquisition of interests in minerals held by the State Crown or by a private person.[62]

Commonwealth Use of Land in Private Ownership

In addition to acquiring land, the Commonwealth Parliament has an undoubted power to enact statutes authorizing the entry onto and the use, occupation and exclusive possession of land by its agents and instrumentalities for all purposes for which it may make laws.[63] Where such laws deprive the owner of a substantial degree of the beneficial interest in the land, they may amount to laws

59 S.8.

60 S.51 provides

> (1) The Governor-General may authorize the grant of a lease or licence to a person to mine for metals or minerals on land, situate in a State, which is vested in the Commonwealth.
>
> (2) Subject to such exemptions and modifications as are prescribed, the laws of the State in which the land is situate relating to mining shall, so far as applicable, apply to a lease or licence under this section and to mining carried on under the lease or licence.

By virtue of s.3 (2) of the 1955 Act, this provision applies to land acquired under the two earlier acquisition Acts.

61 *Bank of New South Wales v. Commonwealth* (1948) 76 C.L.R. 1, 345–350; *W.H. Blakeley & Co. Pty. Ltd. v. Commonwealth* (1953) 87 C.L.R. 501, 521; *Attorney-General (Cth.) v. Schmidt* (1961) 105 C.L.R. 361, 371–372. It is likely that s.51(31) has precluded any prerogative which the Crown in right of the Commonwealth may otherwise have enjoyed for the purposes of compulsory acquisition of property. It is equally likely that the incidental power implicit in every other express power conferred by s.51 does not extend so as to authorize the compulsory acquisition of property, although these questions have not been finally resolved: see Fricke G.L., *Compulsory Acquisition of Land in Australia* (2nd ed., 1982) 6. In a sense, s.51(31) is itself merely an incidental power, for its exercise depends on the availability of a purpose arising from a law authorized by another power within s.51. Thus, the obligation to pay just terms attaches to compulsory acquisitions flowing from all laws authorized by s.51.

62 See *e.g.* the Commonwealth Railways Act 1917 (Cth.), s.63; Lighthouses Act 1911 (Cth.), ss.5,6A; Snowy Mountains Hydro-electric Power Act 1949 (Cth.), s.18; War Service Homes Act 1918–1949 (Cth.), s.16; Defence Act 1903 (Cth.), s.63(e); Naval Defence Act 1910 (Cth.), s.41; Lands Acquisition (Defence) Act 1968 (Cth.). Laws for the acquisition of land in the territories are authorized by s.122 of the Constitution, quite apart from s.51(31): *Teori Tau v. Commonwealth* (1969) 119 C.L.R. 564, 570. *Cf. Kean v. Commonwealth* (1963) 5 F.L.R. 432. However, the Commonwealth has made its general land acquisition legislation operative in the A.C.T., Jervis Bay and the external territories: see Australian Capital Territory and Jervis Bay (Lands Acquisition) Act 1955 (Cth.). The Northern Territory legislature enacted a Land Acquisition Act in 1978.

63 See, for example, Defence Act 1903 (Cth.), s.69.

'with respect to the acquisition of property'[64] so as to be required to offer just terms to the owner. That is, they may involve the 'acquisition of property' for the purposes of section 51(xxxi) of the Constitution but not the acquisition of a place for the purposes of section 52(i) of the Constitution.[65] Paradoxically, these laws would not affect ownership of minerals, although they may frustrate an exercise of a power or right to get at minerals enjoyable at common law or pursuant to State statute.

Further, under the Defence Act 1903 (Cth.), the Governor-General is authorized to make regulations prescribing the declaration 'as a prohibited area of a place (including a place owned by, or held in right of . . . a State) used or intended to be used for a purpose of defence, the prohibition of a person entering, being in or remaining in the prohibited area without permission and the removal of any such person from the area'.[66] This power is clearly one which the Commonwealth Parliament can confer on the Governor-General; any valid exercise of it, while not affecting ownership of minerals would, by virtue of section 109 of the Constitution, prevent the exercise of a right to mine in a 'prohibited place'[67] conferred either by the common law or by the law of a State. Such prohibited places are not, of course, 'Commonwealth places' for the purpose of section 52(i) of the Constitution.

To summarize: land within the boundaries of a State which is occupied by the Commonwealth may be divided into two categories. On the one hand, there is land *acquired* voluntarily or compulsorily by the Commonwealth pursuant to section 51(31) of the Constitution, voluntarily under section 61, and automatically by virtue of the combined operation of sections 69 and 85(1).[68] This land remains part of the territory of the State; it is, however, in constitutional vernacular, a Commonwealth place, within section 52(i). Generally when land is acquired by the Commonwealth by the first and third means, the Crown in right of the Commonwealth obtains the entire right, title and interest in the subject land. This proposition does not hold true where (a) the mode of acquisition being section 85, a seam of minerals had been separated from the 'property of the State . . . used exclusively in connexion with the department' of the State, in which event ownership of the separated minerals would remain unaffected; or (b) on the proper interpretation of the statutory notice of compulsory acquisition or of the deed of conveyance or memorandum of transfer (in the case of a voluntary transfer), the Commonwealth did not attempt to acquire all or some of the minerals in the land. Save where either of these two exceptions applies, it is impossible as a matter of law for a Commonwealth place within the boundaries of a State to contain minerals owned either by the Crown in right of the State or by a private citizen.

64 *Minister for the Army v. Dalziel* (1944) 68 C.L.R. 261; Baker R.W., 'The Compulsory Acquisition Powers of the Commonwealth' in *Essays on the Australian Constitution* (2nd ed. 1961) 193, 194–200.

65 *Bevelon Investments Pty. Ltd. v. City of Melbourne* (1976) 135 C.L.R. 530, 541.

66 Defence Act 1903, s.124 (1) (nb); Control of Defence Areas Regulations S.R. 1927, No. 109.

67 The area surrounding Woomera in South Australia was a prohibited area by virtue of proclamations pursuant to the Defence (Special Undertakings) Act 1952 (Cth.), the Supply and Development Regulations, the National Security (Munitions) Regulations and the Defence Force Regulations. The size of the prohibited area has been progressively diminished since 1953.

68 Land surrendered to the Commonwealth under s.111 of the Constitution ceases to be part of the State and becomes a territory, governed by s.122.

On the other hand, there are many parcels of land *occupied and used* by the Commonwealth for its authorized purposes (particularly defence) either by agreement with the landowner or pursuant to Commonwealth legislation. These parcels have not been 'acquired' in any manner which would cause the Commonwealth to obtain ownership of minerals. State mining legislation would, depending on its terms, continue to operate on these places, not being excluded by section 52(i) of the Constitution. However, rights granted under that legislation may not, depending on the proper interpretation of the Commonwealth laws regulating the area, be exercisable without the consent of the person charged by Commonwealth law with the administration of the place. This would be a consequence of the operation of section 109 of the Constitution.

4. LEGISLATIVE POWER OVER MINERALS IN COMMONWEALTH PLACES

As has been seen, when the Commonwealth compulsorily acquires a place within the boundaries of a State, then subject to a contrary intention in the published notice of acquisition it acquires in fact not only the surface but also all the land beneath the surface, to the centre of the earth, along with all minerals in place in the land. This proposition would generally be true also of places acquired by the Commonwealth by virtue of section 85 of the Constitution. Where, however, land is acquired by the Commonwealth by voluntary transfer (either from the Crown in right of the State or from a private landowner), the extent of the Commonwealth's ownership depends on the quantum of the estate conveyed by the transfer and it may be that, in such a case, the Commonwealth does not obtain title to all (or any) minerals in the place. Nevertheless, parcels in all three such categories of land are still undoubtedly 'places acquired' by the Commonwealth within the meaning of section 52(i).

That being the case, the power of the Commonwealth Parliament over the place, including minerals in the place, is, by virtue of section 52(i),[69] exclusive. The power becomes exclusive at the moment of acquisition by the Commonwealth, that is, upon the publication of the notice of acquisition[70] in the case of compulsory acquisitions and, in the case of voluntary acquisitions, on delivery of the conveyance or on registration of the memorandum of transfer. In other words, on the Commonwealth acquiring the place, post-federation State mining and petroleum legislation previously applying to the place becomes inoperative, and post-federation State legislation enacted after acquisition and during ownership of the place by the Commonwealth does not become applicable to the place.[71]

On the Commonwealth ceasing to own a place (or part of it) within the boundaries of a State — for example, if the Commonwealth conveyed away its interest in the place or in minerals in the place — State statutes will and subordinate legislation and administrative orders may (according to their tenor) become

69 S.52 of the Constitution provides

> The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to —
>
> (i) . . . all places acquired by the Commonwealth for public purposes:

70 Lands Acquisition Act 1955 (Cth.), s.10 (4).

71 *Worthing v. Rowell and Muston Pty. Ltd.* (1970) 123 C.L.R. 89; *R. v. Phillips* (1970) 125 C.L.R. 93. The operation of pre-federation colonial mining statutes (which have in any event been repealed) is considered below.

applicable to the place or to that part of it disposed of by the Commonwealth.[72]

To illustrate these propositions: if the Commonwealth had acquired an interest in minerals in place in South Australia before July 1972 or in coal in place in New South Wales before 1981 or in uranium in place in Victoria before 1955, mining for those minerals could not validly have been either authorized or prohibited by State law; further, the revesting provisions applicable to privately owned minerals enacted in those jurisdictions in those years would not operate on Commonwealth owned minerals in those States; however, on the Commonwealth disposing of the place or of the relevant minerals in it, the State's vesting and regulatory legislation would operate according to its tenor.

The proposition that minerals in places owned by the Commonwealth are not subject to State mining and petroleum legislation[73] is not affected by the Commonwealth Places (Application of Laws) Act 1970 (Cth.). This Act, which was complemented by State legislation intituled the Commonwealth Places (Administration of Laws) Acts 1970, was intended to attract general state laws to Commonwealth places in order to fill the legal vacuum exposed by the High Court in *Worthing's* case.[74] Its principal provision is section 4, which is in the following terms in so far as relevant to the present paper:

> 4. (1) The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time and in relation to each place in that State that is or was a Commonwealth place at that time.
> (2) This section does not —
> (a) extend to the provisions of a law of a State to the extent that, if that law applied, or had applied, in or in relation to a Commonwealth place, it would be, or have been, invalid or inoperative in its application in or in relation to that Commonwealth place otherwise than by reason of the operation of section 52 of the Constitution in relation to Commonwealth places; or
> (b) operate so as to make applicable the provisions of a law of a State in or in relation to a Commonwealth place if that law would not apply, or would not have applied, in or in relation to that place if it were not, or had not been, a Commonwealth place. . . .
> (5) Sub-section (1) of this section does not — . . .
> (c) extend to the provisions of any law of a State in so far as it is not within the authority of the Parliament to make those provisions applicable in or in relation to a Commonwealth place.

'Commonwealth place' is defined by section 3 to mean 'a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth'.

There are two reasons for concluding that section 4 of the Act does not attract State mining or petroleum legislation to Commonwealth places containing minerals owned by the Crown in right of the Commonwealth. First, section 4

72 *Attorney-General (N.S.W.) v. Stocks and Holdings (Constructors) Pty. Ltd.* (1970) 124 C.L.R. 262. See the critique of this decision and of those in n.71 in Howard C. *Australian Federal Constitutional Law* (3rd ed. 1972) 496–505.

73 It may be convenient for the reader to refer at this stage to the Excursus *infra*, 32, where a general summary of the mining and petroleum legislation is found. The purpose of the Excursus is merely to illustrate the types of laws generally contained within State mining and petroleum statutes.

74 (1970) 123 C.L.R. 89. The legislation is analyzed in Rose D.J., 'The Commonwealth Places (Application of Laws) Act 1970' (1971) 4 *Federal Law Review* 263.

attracts State laws to Commonwealth places so as to make them operative on persons and property other than the Commonwealth and Commonwealth property in those places. Secondly, by virtue of section 4(2)(a), where a State law which might become applicable in a Commonwealth place in virtue of section 4(1) is inconsistent with a Commonwealth law operative in that place — such as sections 51 and 53 of the Lands Acquisition Act 1955[75] — then, by virtue not of section 52(i) of the Constitution but rather by virtue of section 109 of the Constitution, that State law does not apply in that place. Each of these two propositions warrants elaboration.

Commonwealth Immunity from State Legislation

In the present state of the authorities, it must be accepted that the Commonwealth enjoys an immunity from State legislation even if the State legislation intends to bind the Crown.[76] That is, a State Parliament can neither prohibit, restrict or regulate conduct by the instrumentalities of the Commonwealth nor interfere with the exercise by Commonwealth agents of their statutory powers. The Commonwealth may choose to be bound by State laws and it may, on voluntarily entering into a transaction within the boundaries of a State, be bound by or 'affected by' formal or procedural or facultative laws of the State.[77]

This immunity, known as the Commonwealth's 'implied immunity', is quite distinct from the express mutual immunity from cross-taxation created by section 114 of the Constitution. The accepted articulation of the implied immunity was developed by Sir Owen Dixon, in a series of judgments beginning with *West* v. *Commissioner of Taxation* (N.S.W.)[78] and culminating with *Commonwealth* v. *Cigamatic Pty. Ltd.* (In Liquidation).[79] In the latter case, His Honour's view (which in previous cases had been a minority view) on the power of the State legislatures to bind the Crown in right of the Commonwealth won acceptance by a majority of the

75 See n.60, *supra* and text subsequent thereto.

76 What is meant when it is said that an Act 'binds the Crown'? First, the Act may impose obligations on and restrict the freedom of action of the agents and instrumentalities of the Crown. Secondly, it may subject Crown property — such as Crown lands — to the operation of the law and consequently to use and enjoyment on the part of subjects. Thirdly, the Act may create rights which the Crown cannot ignore or override. And, finally, the Act may extinguish a related Crown prerogative. None of the State mining and petroleum statutes presently in force in Australia is expressed to bind the Crown, but all the statutes apply to Crown land and, given their generally exhaustive nature, it can be taken that, except to the extent that the prerogative is expressly preserved by the statutes, the prerogative power to grant mining tenements over Crown land has been merged in the statute. Thus, in at least two respects, the legislation 'binds' the Crown in the right of the State. As to the implied abrogation of the prerogative by the mining legislation, there are innumerable authorities of which the earliest is *Attorney-General v. Great Cobar Copper Mining Co.* (1900) 21 L.R. (N.S.W.) 351 and the most recent is *Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk* [1975] A.C. 521. The prerogative is partially preserved by Mining Act 1973 (N.S.W.), s.4 and Mining Act 1968 (Qld.), s.6. Several of the most recent High Court authorities on the operation of statutes on Crown actions and Crown property are reviewed in an acerbic comment by Churches S.C. in (1980) 7 *Adelaide Law Review* 389. To these authorities should be added *Townsville Hospitals Board v. Townsville City Council* (1982) 56 A.L.J.R. 789.

77 The 'affected by' doctrine is artificial and of uncertain scope: for a criticism of it, see Zines L., *The High Court and the Constitution* (1981) 272.

78 (1937) 56 C.L.R. 657, 681–682. See also *Federal Commissioner of Taxation v. The Official Liquidator of E.O. Farley Ltd.* (1940) 63 C.L.R. 278, 304–305, 308, 312.

79 (1962) 108 C.L.R. 372.

High Court.[80] The decision of the Court in *Cigamatic* was that the State Parliament lacked power to control the Commonwealth's prerogatives[81] and power to affect either the rights (and particularly the fiscal rights) which the Commonwealth may have as against its own subjects or the obligations which the Commonwealth may owe to its subjects.[82] Logically, however, the decision implied that no State law can adversely affect the Commonwealth.[83]

The decision in *Cigamatic* rests on very meagre foundations. It is inconsistent with the reasoning underlying the *Engineers'* case.[84] It renders redundant the express immunity in section 114 of the Constitution in so far as that benefits the Commonwealth, and the exclusive powers conferred by section 52(ii) of the Constitution. Furthermore, it erodes the scope of operation of section 109. Sir Owen Dixon's theory of implied immunity on the part of the Commonwealth has met with sustained academic criticism.[85] Nevertheless, neither the decision in

80 A second basis on which Commonwealth immunity from State legislation has been rested, professedly without resort to implications from the text of the Constitution, is the view expressed by Sir Garfield Barwick in *Victoria v. Commonwealth* (1971) 122 C.L.R. 353, 373 where his Honour said

> The reason for the inability of a State to make a law binding on the Commonwealth ... derives from the fact that the Crown has not by the Constitution submitted itself to the legislatures of the States.

81 Interests in royal metals vested in the Crown in right of the Commonwealth may be regarded as within the reach of the prerogative: *Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd.* (1940) 63 C.L.R. 278, 308–309 *per* Dixon J. and 320–323 *per* Evatt J.

82 The Court overruled its own earlier decision in *Uther v. Federal Commissioner of Taxation* (1947) 74 C.L.R. 508 where it was held (Dixon J. as he then was, dissenting) that the New South Wales Parliament was entitled to regulate the priority in which debts, including debts due to the Commonwealth, should be paid by the liquidator of an insolvent company. The reasoning in *Cigamatic* is inconsistent with the reasoning but not with the decision of the Court in *Pirrie v. McFarlane* (1925) 36 C.L.R. 170 where it was held (Isaacs and Rich JJ. dissenting) that the States could include Commonwealth agencies and personnel within the sweep of their general regulatory laws. In that case, Isaacs J. held (at 199) that the States had no power to enact laws binding the Crown in right of the Commonwealth in respect of '"primary and inalienable functions of the constitutional government" of the Commonwealth' — whatever that might mean. His Honour's reasoning was the first judicial expression of a doctrine of Commonwealth immunity from State law.

83 This much was decided earlier in *Commonwealth v. Bogle* (1953) 89 C.L.R. 229, 259, where Fullager J. (in whose reasons Dixon CJ., Webb, Kitto and Taylor JJ. concurred) held that 'the State Parliament has no power over the Commonwealth. The Commonwealth ... is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament'.

84 *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129, 155, where the majority held that the doctrine of implied prohibition 'finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning. The principle we apply to the Commonwealth we apply to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters, but, in case of conflict, giving to valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of sec.109'.

85 See, for example, Zines L., 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221; Evans G., 'Rethinking Commonwealth Immunity' (1972) 8 *Melbourne University Law Review* 521; Meagher R.P. and Gummow, W.M.C. 'Sir Owen Dixon's Heresy' (1980) 54 *Australian Law Journal* 25; Zines L., *The High Court and the Constitution* (1981), 275–277. The theory is defended by Byers M.H. in a commentary in Evans G. and Crommelin M. (eds), *Labor and the Constitution* (1977) 67–68.

Cigamatic nor the parallel decision in *Bogle's* case[86] has been overruled. Those cases imply that, *quite independently of section 52(i)*, a State Parliament cannot regulate or control the use to which the Commonwealth may put its property and that a State cannot confer rights over Commonwealth property on subjects of the Commonwealth, or, indeed, on anyone else.[87] Thus, the State Parliaments cannot enact legislation affecting any interest which the Commonwealth may have in minerals in place. And because it is this implied immunity, and not section 52(i), which results in the fact that Commonwealth minerals in place are beyond the reach of State laws, then, by virtue of section 4(2) of the Application of Laws Act, State laws are not made applicable to those minerals by section 4(1) of the Application of Laws Act.

The Effect of the Judiciary Act

Before parting with the operation of State laws on the Commonwealth and on property owned by the Commonwealth and before dealing with section 109 of the Constitution, it is necessary to mention certain provisions of the Judiciary Act 1903 (Cth.). The most important provision of the Judiciary Act for present purposes is section 64, which has been in the following terms since 1903:

> 64. In any suit to which the Commonwealth . . . is a party, the rights of parties shall as nearly as possible be the same . . . as in a suit between subject and subject.

Section 79 of the Act provides that the laws of procedure and evidence in force in a State shall, subject to the Constitution and to applicable Commonwealth laws, be applied by Courts exercising federal jurisdiction; and courts exercise federal jurisdiction whenever the Commonwealth is a party to a suit.[88] Section 80 of the Act attracts the common law and State statute law to suits in Courts exercising federal jurisdiction where necessary to complement federal law in the interests of the final determination of a suit. Section 56 makes the Commonwealth amenable to suit in contract and tort in designated courts, that is it provides a *right of access* to courts where a breach of contractual or delictual obligation is alleged against the Commonwealth. Can any of these provisions apply so as to subject Commonwealth property to state control, pursuant to general mining laws, in the absence of countervailing Commonwealth legislation?

It now seems clear that section 64 of the Judiciary Act is not limited to procedural matters and that it may indeed substantively alter the rights of the Commonwealth *once engaged in litigation.*[89] This creates 'the odd result that a

86 (1953) 89 C.L.R. 229.

87 See *Bogle's* case, (1953) 89 C.L.R. 229, 260. In *Victoria v. Commonwealth* (1971) 122 C.L.R. 353, 410 (the *Payroll Tax* case) Walsh J. referred in passing to 'the inability of a State to make laws binding upon the Commonwealth'. The reasoning in *Bogle's* case is also supported by the judgment of Menzies J. in the *Stocks & Holdings* case (1970) 124 C.L.R. 262, 271, where his Honour implied that the immunity acknowledged in *Bogle* was complementary to the operation of s.52 of the Constitution. Contrast the judgments of Barwick CJ. at 266 and of Walsh J. at 286–289.

88 Zines, *op.cit.* 272. S.64 applies only to civil actions: Judiciary Act 1903, s.2.

89 *Asiatic Steam Navigation Co. Ltd. v. Commonwealth* (1956) 96 C.L.R. 397, 427–428; *Maguire v. Simpson* (1977) 139 C.L.R. 362. In this latter case, there are indications that 'the *Cigamatic* doctrine' may have evolved *per incuriam* of s.64: see at 402 *per* Mason J., 403–404 *per* Jacobs J. Contrast, however, their Honours' remarks in *Bradken Consolidated Ltd v. Broken Hill Proprietary Co. Ltd.* (1979) 145 C.L.R. 107, 135–136 where no disapproval of *Cigamatic* was expressed. In *Maguire v. Simpson* at 390, Gibbs J. (as he then was) left open the question whether *Cigamatic* was rightly decided.

State Act that does not bind the State (because not intended to bind the Crown in right of the State) will be made "applicable" in any suit by or against the Commonwealth.'[90] Equally oddly it may be the case that a State Act which, by virtue of section 52(i) or an implied immunity cannot, in a non-litigious context, adversely affect Commonwealth property, becomes 'applicable' to the Commonwealth when litigation against the Commonwealth under or involving the State Act has commenced.[91] This latter result seems too absurd to contemplate but may be dictated by the cryptic words of section 64 of the Judiciary Act. Does that provision apply only to State legislation directly affecting litigation and choses in action maintainable by or against the Commonwealth (such as the Limitation Act at the centre of proceedings in *Maguire* v. *Simpson*[92]) or does it have a broader operation?

Section 64 of the Judiciary Act is contained in Part IX, intituled 'Suits by and Against the Commonwealth and the States'. This title may be taken into account in the interpretation of the legislation.[93] Further, in interpreting section 64, attention must be paid to the terms of its constitutional source. The constitutional foundation of section 64 is far from clear at present. That provision operates in three distinct contexts: in suits by the Commonwealth, in suits against the Commonwealth and in suits in which the States are litigants. It may be that, in each of these three respects, the provision rests on a different head of Commonwealth legislative power. In so far as section 64 deals with proceedings against the Commonwealth — and that is its relevant operation for present purposes — it would appear to be authorized by section 78 of the Constitution[94] which provides:

> 78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

It cannot, in present state of the authorities, be taken for granted that section 64 is wholly valid. However, its validity in so far as it affects the rights and obligations of the Commonwealth in litigation does seem to have been put beyond question by the course of decisions culminating in *Maguire* v. *Simpson.*

Section 64 does not purport, as a matter of construction, directly to affect Commonwealth choses in possession, such as the Commonwealth's land holdings. Its direct operation (to the extent that it is relevant here) is on choses in action maintainable by or against the Commonwealth. Any other operation might not be supported by section 78 of the Constitution, which could not reasonably be interpreted as authorizing laws by which the Commonwealth purported to subject its non-litigious rights and its choses in possession to State laws. To the extent that section 64 affects those assets indirectly, it may be authorized by a combination of

90 Zines L., *The High Court and the Constitution* (1981) 281.

91 The reasoning of Fullager J. in *Asiatic Steam Navigation Co. Ltd. v. Commonwealth* (1956) 96 C.L.R. 397, 424, is contrary to the supposition in the text.

92 (1977) 139 C.L.R. 362.

93 Acts Interpretation Act 1901 (Cth.), s.13.

94 The proposition in the text is supported in part by the reasons of O'Connor J. in *Commonwealth v. Baume* (1905) 2 C.L.R. 405, 418 and by the reasons of Barwick CJ. and Jacobs J. in *Maguire v. Simpson* (1977) 139 C.L.R. 362, 371, 404–405. Contrast the comments of Gibbs J. at 388 and Mason J. at 401 in the latter case, and the joint judgment of Dixon C.J. and of McTiernan and Williams JJ. in the *Asiatic Steam Navigation* case, (1956) 96 C.L.R. 397, 419–420.

the relevant heads of legislative power conferred by section 51 of the Constitution and of the relevant paragraphs of section 52. Nevertheless, it remains true that section 64 is expressly confined in its relevant respect to the rights and obligations of the Commonwealth as a litigant. It does not purport to affect the landholdings of the Commonwealth except as litigant. Therefore, except to the extent that a real asset of the Commonwealth is the subject of properly initiated litigation, nothing in section 64 militates against the conclusion already expressed that the mining laws of the State do not apply to Commonwealth places within the boundaries of the State, despite the Application of Laws Act. Further, no other provisions of the Judiciary Act affect that conclusion.

Is the situation transformed once the Commonwealth is a party to competently initiated litigation? Could a suit be framed in which, for example, the result could be achieved that a State Mining Act might, by virtue of section 64, become 'applicable' to Commonwealth minerals in a Commonwealth place? It can be argued that section 64 — which operates in its relevant respect only after suit is commenced against the Commonwealth — creates to some extent an artificial *lex fori*, a set of laws which bind the Commonwealth only as a litigant; that is, that section 64 intends to make 'applicable' to the Commonwealth, as litigant, State laws which, apart from section 64, could not constitutionally bind the Commonwealth. On this view, laws attracted by section 64 'bind' the Commonwealth only within the four corners of the court room, by virtue of the fact that, for the purposes only of the resolution of litigation, section 64 reduces the Commonwealth to the status of an ordinary litigant who is subject to general State laws. For purposes other than the resolution of litigation, however, those same general State laws remain inoperative on Commonwealth possessions.

If the operation of section 64 is confined, in its relevant respect, to choses in action maintainable by or against the Commonwealth, it becomes possible to reconcile the decision in *Maguire* v. *Simpson* with the reasoning in *Cigamatic* and *Bogle* as to the Commonwealth's implied immunity (as creditor and property owner respectively) from the operation of State laws. Yet, even if section 64 were confined, in so far as it affects the rights and obligations of the Commonwealth, to choses in action maintainable by or against the Commonwealth, the decision in *Cigamatic* would appear to be wrong unless one puts a gloss on the result in that case. A court applying the reasoning in *Maguire* v. *Simpson* could refuse to overrule *Cigamatic* only if it decided that section 64 of the Judiciary Act did not apply to the rights which the Commonwealth was asserting in those proceedings. The debts claimed by the Commonwealth in *Cigamatic* could be characterized as prerogative assets radically different in nature from the mere choses in action held by an ordinary creditor against a debtor. There is some foundation for this approach in the decided cases. The court would nevertheless have to go further and hold that, on its proper interpretation, section 64 does not apply to prerogative assets enjoyed by the Crown in right of the Commonwealth.

The difficulty with confining the presently relevant part of section 64 to choses in action maintainable by or against the Commonwealth in the way suggested above is that section 64 appears merely to affect *existing* rights of action. It does not expressly create rights of action maintainable against the Commonwealth. Litigation cannot be instituted against the Commonwealth — and section 64 cannot be attracted — unless, prior to the institution of the suit the proposed plaintiff has an antecedent right or cause of action against the Commonwealth. In

other words, the Commonwealth must have breached an obligation owed by it before suit is commenced and quite apart from section 64.[95] This antecedent obligation of the Commonwealth must arise ultimately from the Constitution itself or from a federal law. Section 56 of the Judiciary Act confers rights to proceed against the Commonwealth in respect of contractual and delictual obligations. Equally, other federal legislation may expressly or impliedly create rights of action against the Commonwealth. Outside the fields of contract and tort and apart from particular federal statutes, what is the basis of instituting actions against the Commonwealth so that section 64 is activated? Does the Judiciary Act predicate one result where an action against the Commonwealth involves a tort or a breach of contract by the Commonwealth and a contrary result in other contexts? In other words, may it be the case that State statutes dealing with matters of contract and tort can become 'applicable' to the Commonwealth as litigant (by virtue of the combined operation of sections 56 and 64 of the Judiciary Act) but that State statutes operating in other fields cannot, subject to particular federal laws, be made applicable to the Commonwealth by section 64?

Some of these difficulties and the proposed confined operation of section 64 can be illustrated as follows. Assume that there is a parcel of mineral-bearing lands in rural South Australia (Blackacre) owned by X on which Y (the holder of a miner's right) proposes to peg out a mineral claim. Further assume that adjacent to Blackacre is a parcel (Whiteacre) owned by the Commonwealth on which is erected a factory. Let it be further assumed that the area on Blackacre on which Y proposes to conduct mining operations is within one hundred and fifty metres of the factory on Whiteacre. By virtue of section 9(1)(d)(ii) of the Mining Act 1971 (S.A.) the part of Blackacre within a radius of one hundred and fifty metres of the factory is 'exempt land' and mining operations cannot lawfully be carried out on that part of Blackacre unless it ceases to be exempt in accordance with the Act. Section 9(3) of the Act creates two alternative mechanisms by which the exempt status of the affected area of Blackacre may be terminated: either Y and the Commonwealth may enter an agreement for the waiver of the exemption[96] or, on the other hand, the Land and Valuation Court may, on Y's application, determine compensation to be payable to the Commonwealth[97] and, as it were, give a substituted waiver on behalf of the Commonwealth.[98]

If Y and the Commonwealth were unable to agree to waive the exempt status of Blackacre in so far as it derives from the proximity of the factory on the Commonwealth place, can the Commonwealth be made a respondent to the necessary proceedings in the Land and Valuation Court? Section 56 of the Judiciary Act is not applicable. Section 64 of that Act does not attract the Mining Act to Whiteacre unless and until proceedings are competently initiated. And it has already been concluded that the Mining Act does not, despite the Application of Laws Act, operate on Whiteacre. The question then becomes, can proceedings be

95 This matter was alluded to by Menzies J. in *Downs v. Williams* (1971) 126 C.L.R. 61, 68, and in *Commonwealth v. Anderson* (1960) 105 C.L.R. 303, 316–318. Contrast the reasons of Gibbs J. in *Maguire v. Simpson* (1977) 139 C.L.R. 362, 385. At present, the authorities provide no clear resolution of the difficulty discussed in the text.

96 S.9(3)(a).

97 S.9(3)(b).

98 The operation and effect of s.9 are discussed in a note by McNamara P., 'Retrospective Amendment to Mining Act, 1971 (S.A.)' (1983) 2 *AMPLA Bulletin* 25. Consider, as an alternative to the scenario in the text, the fact situation in *Commonwealth v. Hazelldell Ltd.* [1921] A.C. 373.

competently instituted against the Commonwealth in the Land and Valuation Court? In other words, is there a right to proceed against the Commonwealth in the relevant respect? Section 39 of the Judiciary Act may conceivably confer jurisdiction on the Land and Valuation Court to entertain the action, but by virtue of what federal statute is Y entitled to make the Commonwealth a respondent? Once it is accepted that the Court has jurisdiction or that the action is properly initiated against the Commonwealth, then section 64 would operate to affect the rights of the Commonwealth as litigant (subject to an inconsistent and pre-eminent federal law) by virtue of the fact that the Mining Act is made 'applicable' to the Commonwealth for the purposes of the suit.

If the difficulties alluded to are overcome and if section 64 of the Judiciary Act is given the limited operation ascribed to it, then the result in *Cigamatic* can be reconciled with the reasoning in *Maguire* v. *Simpson*. The same cannot be said, however, of the sweeping *dicta* in *Bogle's* case. In part, those *dicta* are a restatement of section 52(i) of the Constitution. In part, they conflict with section 64 of the Judiciary Act for they take no account of the case where, as landowner, the Commonwealth sues a private tenant in a State court for rent or occupation fees.[99] It is difficult to assert how much of *Cigamatic* and *Bogle* will survive. Nevertheless, it can be concluded at the very least that general State laws remain inoperative on both Commonwealth choses in possession and on what might be termed 'prerogative assets' of the Commonwealth Crown. Despite section 64 the Commonwealth is not, as a landowner, bound by State mining statutes, although such statutes may become 'applicable' to it as a litigant. This is the result predicated by the *dicta* in *Bogle* and by the decision in *Cigamatic*, which has not been formally overruled. And this being so, the conclusion remains true that State Mining Acts fail to operate on Commonwealth property and on Commonwealth minerals by reason of matters extraneous to section 52(i) of the Constitution. From this it follows that section 4 of the Commonwealth Places (Application of Laws) Act does not attract State mining statutes to Commonwealth minerals in place.

If, however, section 4(2)(a) of the Application of Laws Act were interpreted otherwise or if the *Cigamatic* doctrine (along with *Bogle's* case) is rejected, then section 4(1) would clearly attract State mining controls to Commonwealth places and Commonwealth minerals, subject only to section 109 of the Constitution. This is because the effect of section 4(1) is to apply State laws pursuant to federal legislation: on these hypotheses, to the extent that the State Act binds the State Crown, it binds the Commonwealth, even in a non-litigious context, subject to section 109.

Secondly, if *Cigamatic* were rejected, the only provision in the Constitution (apart from section 109) which might invalidate the State law is section 52(i) and therefore section 4(1) could attract the State mining and petroleum legislation to Commonwealth minerals. However, as will be seen, section 109 probably does operate in this context to exclude the operation of State statutes relating to the exploitation of minerals and petroleum in place in Commonwealth places.

Inconsistency of Laws

A further and independent reason why, it is submitted, section 4(1) of the

99 *Cf. Commonwealth v. Anderson* (1960) 105 C.L.R. 303, 310–311, 313, 317, and the observations of Gibbs J. in *China Shipping Co. v. South Australia* (1979) 145 C.L.R. 172, 203–205.

Application of Laws Act does not attract State mining and petroleum legislation to Commonwealth places lies in a combination of section 4(2)(a) of the Application of Laws Act, section 109 of the Constitution and sections 51 and 53 of the Lands Acquisition Act 1955, set out above.[100] These last-mentioned provisions are, it is submitted, intended to be a complete statement by the Commonwealth Parliament of the law to be applied in the extraction of minerals from Commonwealth places.

While section 51(2) of the Lands Acquisition Act may appear at first sight to be, in some ways, a precursor of the Commonwealth Places (Application of Laws) Act, it is suggested that it is merely a direction to the Governor-General as to the classes, terms and conditions, incidents, duration, assignment and determination of tenements and the procedures on the grant thereof and is not intended even indirectly to subject Commonwealth places to State mining controls. Sections 51 and 53 of the Lands Acquisition Act contemplate a complete range of controls over and a complete scheme of regulation of mining on Commonwealth places and there would, therefore, be no room for the operation of State mining laws which might, but for section 109 of the Constitution and section 4(2)(a) of the Application of Laws Act, be attracted to those places by section 4(1) of that Act.[101]

These provisions in the Lands Acquisition Act give rise to a number of questions of interpretation which will be referred to below.

Anomalous Situations

The reasoning in the preceding sections of this article has been posited on the factual premise that, when the Crown in right of the Commonwealth acquires a place in a State, it acquires the entire interest in the land and everything in it along with the radical title previously enjoyed by the Crown in right of the State. This result follows, as has been seen, from the terms of sections 69 and 85 of the Constitution and from the terms of the Lands Acquisition Act (given the tenor of the standard notice of acquisition published pursuant to that Act). Thus, when the Commonwealth acquires a place in a State, it will, in the overwhelming majority of cases, also acquire title to minerals in place in the land, including the royal metals. Accordingly, in the overwhelming majority of cases, Commonwealth ownership of land and of minerals in place will not be divorced. However, there are at least three anomalous situations which may result in the Commonwealth acquiring land (yet not minerals in the land) and holding minerals in land (yet not the general title to the land). These situations are worth at least passing mention.

The first would arise where, on a transfer of State departmental property to the Commonwealth pursuant to section 85 of the Constitution, the Commonwealth took the general fee simple in land or perhaps only the surface stratum, leaving the ownership of minerals unaffected, due to the fact that the minerals or sub-surface strata were not 'exclusively used' by the State department, at the material time, having been legally or physically segregated from the surface, prior to the moment when section 85 operated.[102] In this event, State law would regulate the mining of the sub-surface strata; mining operations could not,

100 *Supra*, n.60.
101 *R. v. Loewenthal; ex parte Blacklock* (1974) 131 C.L.R. 338.
102 This possibility was countenanced by Knox CJ. and Starke J. in *Commonwealth v. New South Wales* (1923) 33 C.L.R. 1, 20.

however, be staged *from* the Commonwealth land merely by virtue of an authority granted under State law, for the reasons given in the preceding section.

The second anomalous situation would arise where, as a consequence of a voluntary assurance or on the proper interpretation of a notice of compulsory acquisition under federal legislation, the Commonwealth acquired only the general fee simple (excepting minerals) or a fee simple estate in a seam of minerals, apart from the general fee simple. In the former event, the result would be the same as on a partial transfer under section 85 — access to the non-Commonwealth minerals in the Commonwealth place could not be gained pursuant to a tenement or authority granted under State law alone. It appears that this very situation obtains in relation to the defence forces land on the Yampi Peninsula in Western Australia (where the statutory notice of acquisition expressly excludes 'mineral rights') and in relation to that part of the land contiguous to the Port Wakefield Proof Range in South Australia which was acquired by voluntary transfer. In the latter event, the seam of minerals would constitute a place acquired by the Commonwealth for public purposes within section 52(i) of the Constitution[103] and would thereby be beyond the reach of State mining legislation, notwithstanding the operation of section 4(1) of the Application of Laws Act, for the reasons given in the preceding section of this article.

The final anomalous situation would occur where, after having acquired the entire estate in a parcel of land (including the radical title of the Crown in right of the State and any interest which the State may hitherto have retained in minerals, the royal metals and petroleum), the Commonwealth disposed of the land in such a manner that ownership of the minerals was divorced from ownership of the land. Where, for example, the Commonwealth transferred the land either to a private citizen or to the State[104] by means of a deed of conveyance or memorandum of transfer which reserved minerals to the Commonwealth, the transferee would take the general fee simple stripped of reserved minerals. Equally, where the conveyance or transfer executed by the Commonwealth contained no reference to minerals, a private transferee would acquire the general fee simple together with the base minerals and (momentarily) petroleum, but not any royal metals in place.[105] In either case sections 51 and 53 of the Lands Acquisition Act would continue to govern exploitation of any minerals remaining in the ownership of the Commonwealth to the exclusion of State statutes.

103 As to Yampi, see *Commonwealth of Australia Gazette* S.241 (20 November 1978). In *Bevelon Investments Pty. Ltd. v. City of Melbourne* (1976) 135 C.L.R. 530 the High Court seemed to accept the proposition that if the Commonwealth held a sufficient proprietary interest in a stratum of a building, that stratum could constitute a 'place' for the purposes of s.52(i). From this it would follow that a stratum in soil could also be a 'place'. The Court held, though, that the taking of a leasehold interest in premises or land would not amount to the acquisition of a *place*, for the purposes of s.52(i), although it might constitute an acquisition of *property* for the purposes of s.51(xxxi). See, too, the earlier *dicta* of Windeyer J. in *Worthing's* case (1970) 123 C.L.R. 89, 124, approved by Gibbs J. in the *Bevelon Investments* case at 540 and the *dicta* of Barwick CJ. in *Worthing's* case at 96–97.

104 Note in this connection the qualified obligation imposed on the Commonwealth by s.53(3) of the Lands Acquisition Act to re-transfer land to a previous owner at a reasonable price if agreement can be reached.

105 *Halsbury's Laws of England* (4th ed.) v. 31, para. 199. Provisions such as Conveyancing Act 1919 (N.S.W.), s.47(2) would apply neither to an assurance by the Commonwealth nor to any royal metals to which it may be entitled as landowner.

5. THE INTERPRETATION OF SECTIONS 51 AND 53 OF THE LANDS ACQUISITION ACT

These provisions, it will be recalled,[106] authorize the federal Executive to create mining titles and other proprietary rights over land acquired by the Commonwealth, in substantial accordance with the relevant laws of the State. In this respect, they are clearly ambulatory in effect. The present provisions owe their origin to section 62 of the 1906 Act and apply to all land whenever acquired by the Commonwealth.[107] Section 51 presents some minor difficulties of interpretation. Before these difficulties are alluded to, mention should be made of three further matters.

One collateral effect of section 51 is to limit any prerogative power that the Crown in right of the Commonwealth may have had in relation to minerals on Commonwealth places.[108] Secondly, it should be noted that in the absence of section 51, where the Commonwealth, pursuant either to the prerogative or section 61 of the Constitution or as landowner, granted mining rights to a private person over minerals in a Commonwealth place, section 4(1) of the Application of Laws Act would, for reasons already given, operate so that some state controls *on private persons* engaging in mining operations could apply to the grantee.[109] Finally, reference should be made to section 108 of the Constitution, which provides:

> Every law in force in a Colony which has become or becomes a State, and relating to any *matter* within the powers of the Parliament of the Commonwealth, shall, *subject to this Constitution*, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State. (emphasis added)

This provision generates the question, might pre-federation Colonial mining laws[110] apply in Commonwealth places. Assuming that 'matter' in section 108 embraces the places referred to in section 52(i) of the Constitution, and that section 52 does not altogether exclude colonial laws from Commonwealth places, the possibility of an affirmative answer to that question cannot be ruled out. Whatever might be the solution to the general theoretical problems posed by section 108 in conjunction with section 52(i) and section 4 of the Application of Laws Act,[111] it is suggested that, by reason of the text of the federal lands acquisition legislation, pre-federation colonial mining laws will not have applied in any Commonwealth place acquired since 1906 and will not have applied after 1906 to any place acquired between 1901 and 1906.

Even if pre-federation colonial mining laws were continued in force in Commonwealth places after federation by section 108, it is apparent that sections 51 and 53 of the present Lands Acquisition Act (and section 62 of the 1906 Act,

106 For the text of ss.51 and 53, see n.60 and the subsequent text.

107 Lands Acquisition Act 1955, s.3(2).

108 The Parliament having legislated, the prerogative is *pro tanto* abrogated: *Attorney-General v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508; *Johnson v. Kent* (1975) 132 C.L.R. 164, 169–170.

109 Contrast *R. v. Loewenthal; ex parte Blacklock* (1974) 131 C.L.R. 338, 346.

110 *E.g.* the Mining Act, 1893 (S.A.).

111 See Rose D.J., 'The Commonwealth Places (Application of Laws) Act 1970' (1971) 4 *Federal Law Review* 263, 269–270 and the Excursus; Quick J. and Garran R.R., *The Annotated Constitution of the Australian Commonwealth* (1901) 656–658, 938; Lane P.H., 'The Law in Commonwealth Places — A Sequel' (1971) 45 *Australian Law Journal* 138, 141–142.

which sections 51 and 53 superseded) are 'provisions made . . . relating to' mining on Commonwealth places (being a 'matter within the powers of the Parliament of the Commonwealth' within the meaning of section 108). This conclusion has two consequences. First, the State Parliaments have lost their power (otherwise arising under section 108) to amend and repeal any pre-federation mining laws operative in Commonwealth places. Secondly, on the enactment of section 62 in 1906, section 109 of the Constitution would have operated to exclude the State mining laws (both pre-federation and post-federation) from the Commonwealth places, even if section 52(i) of the Constitution did not. By section 64 of the 1906 Act, section 62 was made applicable to acquisitions since 1901, both under sections 85 of the Constitution and under the Property for Public Purposes Acquisition Act 1901. By section 3(2) of the present Act, sections 51 and 53 are made applicable to all Commonwealth places whenever and howsoever acquired.

Thus, even on the assumption that section 52(i) of the Constitution does not itself exclude pre-federation Colonial laws from Commonwealth places, and thus, as it were, 'override' section 108[112] it is submitted that pre-federation mining laws have not operated on Commonwealth places since at least 1906 and probably since 1901. All pre-federation Colonial mining laws have been repealed and, in virtue of the decisions in *Worthing's* case and in *R.* v. *Phillips*,[113] their post-federation replacements[114] could not operate on Commonwealth places.

Putting aside their constitutional implications, what powers do sections 51 and 53 of the present Act cast on the Governor-General? Section 51(1) confers a power to grant 'leases and licences' for the mining of 'metals and minerals'. In deciding whether a particular substance is a 'metal' or 'mineral', what tests are to be applied? Can (or must) the State's mining legislation be consulted to ascertain the meaning of these words? It is suggested that these words are to be interpreted by pursuing the same approach as is taken by the Courts in interpreting any other Federal Act, such as Division 10 of the Income Tax Assessment Act 1936 (which authorizes the deduction from assessable income of certain money expended 'on a mining property . . . for the extraction of minerals').[115] In interpreting this Division, the courts have with the aid of expert evidence as to informed vernacular usage applied common law principles in order to distinguish between minerals and ordinary earth on the one hand and minerals and other non-living resources (such as petroleum and natural gas) on the other.[116] The definition provisions of the Mining Act of the relevant State have been given little weight.[117] Irrespective of the

112 *Cf.* Howard, *op.cit.* 495–496, 498–499. Section 108 was inconclusively considered by the High Court in *Phillips* case (1970) 125 C.L.R. 93, 99, 102–103, 105, 108–109, 117–119, 123–127, 134. See also *R. v. Bamford* (1901) 1 S.R. (N.S.W.) 337; *McKelvey v. Meagher* (1906) 4 C.L.R. 265; *McArthur v. Williams* (1936) 55 C.L.R. 324, 360–361; *Worthing's* case (1970) 123 C.L.R. 89, 109, 120, 128–130.

113 (1970) 125 C.L.R. 93.

114 *E.g.* the Mining Act 1893 (S.A.) was repealed by the Mining Act 1931; the Mineral Lands Act 1892 (W.A.) was repealed by the Mining Act 1904; the Mining Act 1874 (N.S.W.) was repealed by the Mining Act 1906.

115 Income Tax Assessment Act 1936 (Cth.), s.122. In addition, s.23C of the Act exempts from taxation income derived by a company from the sale of gold produced in Australia and s.23(o) contains a more general exemption in relation to gold mining properties.

116 See, *e.g.*, *N.S.W. Associated Blue Metal Quarries Ltd. v. Federal Commissioner of Taxation* (1956) 94 C.L.R. 509; *Waratah Gypsum Pty. Ltd. v. Federal Commissioner of Taxation* (1965) 112 C.L.R. 152; *Earl of Lonsdale v. Attorney-General* [1982] 3 All E.R. 579.

117 *I.C.I. Australia Ltd. v. Federal Commissioner of Taxation* (1971) 46 A.L.J.R. 35; 679 (FC).

definition provisions of the law of the State concerned, it is a distinct possibility that section 51 of the Lands Acquisition Act does not authorize tenements in relation to petroleum, natural gas and oil shale, because to describe those substances as 'minerals' would not be a natural use of language.

A second issue arising is, what kinds of tenements does section 51 authorize? The section refers to 'leases' and 'licences'. 'Licences' might include not only the exploration licence authorized by all State mining legislation, but also common law licences, both those revocable at will and those in the nature of an interest in land, such as a *profit à prendre*.[118]

'Leases' presents more difficulty. At common law, a lease connotes a grant of a right of exclusive possession of land for a term;[119] no doubt, it is in this sense that the word is used in section 53 of the Act. However, a mining lease is not necessarily a lease of land. It may be so where the owner of the minerals is the owner of the general fee and grants sufficient possession to the lessee, or where the owner of the minerals is the Crown granting sufficient possession to the lessee over minerals in unalienated Crown land.[120] Where, however, the mining lessor is the Crown acting pursuant to statute and the 'lease' operates over Crown minerals situate in lands owned in fee by the lessee or by a second subject, the 'mining lease' cannot necessarily be regarded as a 'lease' of land for common law purposes. The tenor of the legislation authorizing the ' mining lease' is of paramount importance. It is possible that, on the interpretation of the legislation, the statutory 'mining lease' will not satisfy the common law tests for the creation of a leasehold estate but will, rather, confer three important powers on the grantee: a power to occupy land for mining purposes; a power to get at minerals (or a defined seam or class of minerals); and a power to convert minerals to the use of the grantee, either with or without payment of a royalty.[121] The Courts would, however, no doubt treat a mining lease, *i.e.* its constituent powers, as a 'lease' (and therefore authorized by section 51), in the normal situation where the Commonwealth, as owner of both land and minerals in a Commonwealth place, granted what purported to be a mining lease to a subject. The consequence of this is that the Governor-General is entitled by section 51 to grant a mining lease conformable to State law even if that law contemplates a 'mining lease' which is not a 'lease' at common law.

Again, it may be asked whether the power in section 51 'to grant a lease . . . to mine' will support a miscellaneous purposes licence or works licence for say residential or treatment purposes, or a water licence? At first sight, the power appears to be too narrow to support the creation of rights incidental to mining

118 See *Unimin Pty. Ltd. v. Commonwealth* (1974) 22 F.L.R. 299 and *Ex parte Henry; Re Commissioner of Stamp Duties* (1963) 63 S.R. (N.S.W.) 298; (1964) 114 C.L.R. 322.

119 *Radaich v. Smith* (1959) 101 C.L.R. 209.

120 *Goldsworthy Mining Ltd. v. Commissioner of Taxation* (1973) 128 C.L.R. 199; *ICI Alkali (Aust) Pty. Ltd. (in vol. liq.) v. Federal Commissioner of Taxation* [1977] V.R. 393; (1976) 11 A.L.R. 324; (1978) 78 A.T.C. 4728. This would, in any event, be the case where the Commonwealth granted exclusive rights over Commonwealth owned minerals situate in Commonwealth owned land.

121 See *Wade v. NSW Rutile Mining Co. Pty. Ltd.* (1969) 121 C.L.R. 171, 192–193 *per* Windeyer J. and *Milirrpum v. Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141, 290–292. The proposition in the text is supportable most clearly in the case of 'leases' authorized by Part V of the Mining Act 1971–1981 (S.A.). Contrast the Mining Act 1929 (Tas.), s.31(1)(g). See also Campell-Johnston T., 'Problems in the Creation, Transfer and Registration of Legal and Equitable Interests in Mining and Petroleum Concessions in Victoria' (1982) 4 *AMPLJ* 495, 502–506 and the authorities there cited.

tenements. Section 53 might empower the Governor-General to authorize the use of Commonwealth land for purposes ancillary to mining. However, the Commonwealth licence could not authorize the mining operator to use natural resources, such as water and standing timber, which were subject to State or private control.

Putting aside these difficulties of interpretation, it appears that the intention of section 51 of the Lands Acquisition Act is both to confer powers and to impose restrictions on the federal Executive and to require the Governor-General to follow the same procedures and formalities as are required of the State Minister. Thus, public notice provisions and the like may be attracted. Equally, conditions imposed by state law on applicants for tenements might be imposed by the Governor-General: thus, the Governor-General could, on the strength of section 51(2) and despite the absence from section 51(1) of 'mineral claim', require the applicant for a mining lease to have pegged out such a claim, at least where the claim is, by State law, a legal condition precedent to the grant of a mining lease.[122] By the same token, where State law authorized it, the Governor-General might require the mining operator to furnish security before commencing operations.

However, State mining and petroleum legislation could not by virtue of section 51 of the Act apply *en bloc* on Commonwealth places. For example, restrictions in State mining legislation (such as provisions declaring land to be exempt from mining)[123] would not necessarily apply to mining operations on Commonwealth places. Provisions in State Mining laws prohibiting illegal mining[124] might apply to Commonwealth places[125] although quite likely they would be displaced by a combination of section 109 of the Constitution and the Crimes Act 1914 (Cth.).[126] State Mining Assistance legislation would no doubt fall within the phrase 'laws relating to mining' in section 51; the federal Executive could not, however, pay money to a mining operator except under the authority of a Commonwealth appropriation Act.

Necessarily, tenements created by the Commonwealth over minerals in Commonwealth places could not be forfeited or cancelled by the Crown in right of the State. Nor could a Mining Warden appointed under State legislation to entertain suits concerning tenements exercise powers in relation to tenements created by the Commonwealth because the jurisdiction of the Mining Wardens is limited to tenements arising directly from the Mining Act of the State.[127] The contrary conclusion would immediately present difficulties as to whether section 51 was intended to invest Wardens' Courts with the judicial power of the Commonwealth and whether the Wardens' Courts were 'courts' for the purposes of section 77(3) of the Constitution. Given that, in most jurisdictions where the office has survived, Wardens exercise both judicial and administrative functions,[128] the state Wardens could not validly be invested with part of the judicial power of the

122 *E.g.* Mining Act (S.A.), s.22 and s.34(1).
123 *E.g.* Mining Act (S.A.), s.9.
124 *E.g.* Mining Act (S.A.), s.74.
125 Pursuant to s.4(1) of the Commonwealth Places (Application of Laws) Act 1971; see *R. v. Willoughby* [1975] W.A.R. 19.
126 See, in particular, ss.29, 30 and 89 and see *R. v. Loewenthal, supra* n.109.
127 *E.g.* Mining Act (S.A.), s.67; Mining Act 1968 (Qld.), s.80; Mining Act, 1973. (N.S.W.), s.133.
128 Lang and Crommelin, *op. cit.* 186–208.

Commonwealth, for as long as the *Boilermakers' Case*[129] remains authoritative.

As far as revenue matters are concerned, minerals recovered from Commonwealth places would subject the miner to an obligation to pay a royalty not to the State, but to the Commonwealth to the extent that the law of the relevant State imposed a royalty on extraction of minerals. Does this involve that section 51 is a 'law imposing taxation' for the purposes of sections 53 and 55 of the Constitution? It is submitted that it does not, because royalties are not taxes.[130]

Next arises questions as to the width of the phrase 'laws relating to mining' in section 51(2). Is this wide enough to require the Governor-General to impose, so far as possible, planning and environmental restrictions which would apply by law if the mine were being developed pursuant to State legislation? In South Australia and New South Wales, where planning and environmental restrictions are specifically addressed to mining operations,[131] the answer would appear to be in the affirmative unless, by virtue of section 109 of the Constitution, the State laws were taken to be rendered inapplicable by the Environment Protection (Impact of Proposals) Act 1974 (Cth.).[132] Elsewhere, where at most general environmental protection legislation applies to mining operations, the phrase 'laws relating to mining' would probably be held not to embrace laws dealing with planning and environmental matters. The same reasoning would apply to industrial safety legislation addressed specifically to mining[133] which might not be displaced by inconsistent Commonwealth laws.

A special case would arise where the Commonwealth conducted or authorized operations for the recovery of uranium from a Commonwealth place within the boundaries of a State, pursuant to section 41 of the Atomic Energy Act 1953 (Cth.), as it did in the Northern Territory at Rum Jungle and Ranger. In such a case, provisions of State laws 'relating to (uranium) mining', such as the Radiation Protection and Control Act 1982 (S.A.) and the Nuclear Regulation Act 1977 (W.A.) could probably not be applied by the Governor-General despite section 51 of the Lands Acquisition Act, for the more specific Commonwealth Act[134] would exclude entirely the power conferred by the more general Lands Acquisition Act. *A fortiori*, State environmental protection, planning and industrial safety legislation would also probably be inapplicable from such a uranium mine project.

The Lands Acquisition Act by section 68 confers an express regulation-making power on the Minister. In addition, to some extent, section 51 of the Act impliedly authorizes the Governor-General to 'make laws' in relation to mining on Commonwealth places: the Governor-General after all appears expressly to be

129 *R. v. Kirby, Ex parte Boilermakers' Society of Australia* (1955–1956) 94 C.L.R. 254, (1956–1957) 95 C.L.R. 529. But see the comments of Barwick CJ. and Mason J. in *R. v. Joske, Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 C.L.R. 87.

130 In this context, a royalty is the sale price of minerals sold by the 'lessor' to the 'lessee': see, *e.g. Pacific Coal Co. Pty. Ltd. v. Perpetual Trustee Co. Ltd.* (1954) 91 C.L.R. 486; [1956] A.C. 165.

131 Planning Act, 1982 (S.A.), ss.59, 60; Mining Act 1973 (N.S.W.), Parts VI and VII.

132 The procedures authorized by this Act may be applied to 'significant' proposals involving public works on Commonwealth places: see s.5(1).

133 *E.g.* Mine and Works Inspection Act, 1920 (S.A.); and the Mines Regulations Acts in force in most other States.

134 In this case, the Atomic Energy Act 1953 (Cth.). See also Environment Protection (Nuclear Codes) Act 1977 (Cth.) s.11.

given some latitude in deciding which State laws will and which will not apply to leases and licences granted under section 51. Moreover, where State mining legislation confers a discretion on the State minister as to the quantum of royalties,[135] the Governor-General must select a rate of royalty within the parameters fixed by State law. In a loose sense, this is law-making. Section 52(i) of the Constitution does not, however, prevent the Parliament from delegating to the Executive its 'exclusive' power to make laws with respect to Commonwealth places.[136] Thus, if section 51 of the Act does confer a law-making power, it would be authorized by section 52(i) of the Constitution.

Section 51 seems to be both a delegation of power to the Governor-General and a source of power in the Governor-General to delegate the lease and licence granting power to others. In practice, leases and licences over Commonwealth land are granted by the Commonwealth Crown Solicitor, on behalf of the Commonwealth. And there would appear to be no objection to the delegation of this power by the Governor-General, either in specific cases or generally, to State Ministers.[137]

It appears that neither section 51 nor section 53 of the Act has been subject to a reported decision and, for this reason, some of the questions posed above cannot be answered with complete confidence. These questions of interpretation could, it is thought, arise only in two contexts. First, they might arise in the context of a dispute between an applicant for a tenement and the Commonwealth over the terms and conditions of a proposed tenement over Commonwealth land. Because the Governor-General has a discretion whether or not to grant a tenement, such a dispute would not be justiciable on its merits. Secondly, it may happen that the Commonwealth creates a mining lease over land of which it subsequently disposes during the term of the lease. The transferee from the Commonwealth would take title subject to the lease. The transferee, seeking to rid the land of the lease, may impugn its validity on the ground that its provisions did not conform 'so far as applicable' to the provisions of the relevant State Act. In proceedings for a declaration of the invalidity of the lease, the questions posed above may assume some importance.

6. CONCLUSION

One of the purposes of this article has been to seek to demonstrate that no answers can be given in the abstract to the related questions which Crown — State or Commonwealth — owns minerals and petroleum *in situ* in a Commonwealth place and which Parliament — State or Federal — has legislative power over minerals and petroleum *in situ* in a Commonwealth place. In the great majority of cases, when the Commonwealth acquires land within a State, it acquires (as a matter of fact) the entire estate and interest in that land and thereby gains not only the ownership of all minerals and petroleum in the land but also (as a matter of constitutional law) exclusive legislative power over those resources. However, a

135 *E.g.* Mining Act (S.A.), s.17.

136 *Golden-Brown v. Hunt* (1972) 19 F.L.R. 438, 444; *Rees v. McCay* (1975) 7 A.C.T.R. 4, 9.

137 This was the assumption underpinning the drafting and administration of the Petroleum (Submerged Lands) Act 1967 (Cth.), under which the 'Designated Authority' was the State Minister.

number of anomalous situations have been described — not all of them unlikely to arise — where the Commonwealth may not as a matter of fact acquire ownership of minerals and petroleum *in situ* or may not gain legislative power over those minerals; in these anomalous situations, certain factual enquiries must be made before an answer can be made to the questions of ownership and regulatory power. In these anomalous situations, very difficult questions of law and fact would arise and it is suggested that the Lands Acquisition Act be amended to deal with them.

The difficulties alluded to could be obviated for the most part if the Commonwealth were unable to own (except in a transitional phase) part only of the entire interest in a particular parcel of land. For example, the Lands Acquisition Act could be amended to require the Commonwealth to acquire the radical interest of the Crown in right of the State wherever the Commonwealth acquires the fee simple estate in the land. Secondly, the provisions of the Act dealing with the disposal of land by the Commonwealth might be amended to deem the Commonwealth, whenever it disposes, in favour of a subject, of a fee simple estate in land previously acquired (in its entirety), to have transferred to the State Crown the radical title previously held by the State Crown along with title to any royal metals in the land. Finally, the Act should be amended to require the Commonwealth to acquire land exclusively by published notice under section 10 (rather than by transfer) so that the entire estate in the land is acquired by the Commonwealth free of reservations, even where both the State Crown and any private landowner consent to the acquisition.

The objective of these proposed amendments is to prevent a division of ownership of land as between the State and Commonwealth Crowns, with consequent confusion over ownership of and regulatory power in respect of minerals and petroleum in place. Where the Commonwealth owns the entire estate in land, the central questions raised in this article admit of a reasonably clear and convenient answer, along each of two paths: the Commonwealth owns all minerals and petroleum in place in the land and has exclusive legislative power over the place and everything in it for the duration of its ownership. And, notwithstanding the Commonwealth Places (Application of Laws) Act, exploration for and exploitation of natural resources on and in such land can be authorized only under the Lands Acquisition Act, and not under State law.

State mining and petroleum legislation may be 'applied', though, to exploration and recovery operations on Commonwealth places circuitously, that is, through section 51 of the Lands Acquisition Act. It has been shown that this provision contains a number of latent ambiguities. It should be either amended or — and this is the course preferred by the writer — replaced by a thorough web of regulations under section 68 of the Act. There are a number of reasons why the latter course is preferred.

First, if the 'mining laws' applied in all Commonwealth places throughout Australia were uniform, administration of the tenements would be simpler and it could be centralized. Secondly, the present section 51 is ambulatory; State mining and petroleum legislation is notorious for the frequency and extent of its amendment. Under the present provision, Commonwealth officers must amend their practices, procedures and documents each time the law of the relevant State is changed. And it may happen, during the subsistence of a Commonwealth created tenement, that a substantive state law provision is amended: in that event, is the

Commonwealth bound or entitled to invoke the amendment to its tenement? Would any transitional provisions in the State amending Act have to be applied to the Commonwealth-created tenement?

Finally, it is suggested that there is an incurable ambiguity in section 51: it refers to State 'laws relating to mining'. All the State Parliaments have enacted myriad laws regulating peripheral aspects of mining: industrial safety laws, environmental protection and planning laws, and water regulation laws. It is completely open to speculation whether these laws (some of which may 'operate on' mining without 'relating to' it) fall within the description 'laws relating to mining'; equally, it is open to speculation whether section 51, in referring to 'minerals' embraces petroleum and substances like oil shale.

These problems could largely be resolved if, by regulation, the Commonwealth prescribed a code of laws modelled, say, on the Minerals (Submerged Lands) Act 1981 (Cth.). That Act, with some adaptations (provision would have to be made exempting residential areas and national parks from its scope and to include petroleum within its sweep) is a workable model for onshore mining legislation. The regulations would have to contain provisions dovetailing with other federal laws which can operate on or otherwise affect mining ventures: for example, the Environment Protection (Impact of Proposals) Act, the Australian Heritage Commission Act and the Atomic Energy Act.

The present provisions of the Lands Acquisition Act relating to mining escaped adverse comment by the Australian Law Reform Commission in its Report on the Act. However, the Commission recommended the amendment of section 51 to remove all reference to 'state laws relating to mining' and to vest in the Governor-General an unfettered discretion as to the terms, conditions and restrictions of the mining tenement over Commonwealth land.[138] Section 51 has been put to use (for example, in relation to extractive minerals at Canungra and to authorize exploration over the El Alamein area) and it appears to have generated no practical problems or, at least, no problems so pressing that they have resulted in litigation. Reform, therefore, is not urgent. Perhaps another reason why there has been so little mining activity on Commonwealth places in rural areas (where minerals are amenable to exploitation) is that these places are occupied in the main by the defence forces for purposes incompatible with mining activities other than preliminary exploration work. That being the case, the Commonwealth could not covenant with a mining lessee for the quiet and uninterrupted use and occupation by the lessee of the demised land. This pattern of Commonwealth landholding, where the only parcels of Commonwealth land attractive to the mineral industry are held by the defence forces, is unlikely to change in the near future and, for this further reason, reform of the present provisions of the Act cannot be said to be urgently required. Immediate attention along the lines suggested earlier is required, though, to the acquisition and disposition provisions of the Act to prevent division of ownership and control between State and Commonwealth and consequent lengthy and costly disputes over mineral-rich areas like the Singleton Army Camp which are destined to return to State or private control.

138 *Report, supra*, n.31, 224 and the Draft Act, cl.94. There appears to be a drafting or typing error in sub-cl. 94(2), which has resulted in the omission of 'lease or' twice before 'licence'.

EXCURSUS

Summary of Standard Features of State Mining and Petroleum Legislation

1. All petroleum and natural gas and most minerals *in situ* are vested in the Crown in right of the State.
2. Exploration for and recovery of Crown minerals and of petroleum is prohibited except on the part of the holder of the appropriate statutory permit, which may be granted by the Minister or his delegate.
3. In some jurisdictions, owners of private minerals may mine or authorize mining of those minerals without the authority of the Crown; in other jurisdictions, the permission of the Crown is required before even privately owned minerals can be extracted.
4. Entry onto land for mining purposes on the part of the holder of a statutory tenement is lawful, in some jurisdictions, even without the consent of the landowner; in other jurisdictions, the consent of the landowner is required before a statutory tenement holder can lawfully enter land for mining purposes.
5. The holder of a statutory tenement is required (i) to pay compensation to affected landowners and/or to lodge a security bond before commencing operations; (ii) to report discoveries, operations and expenditure to the Minister; (iii) to pay royalties and rent at the prescribed rates.
6. Dealings in statutory tenements are prohibited except with the consent of the Minister.
7. Statutory tenements may be cancelled for breach by the Crown or by State tribunals.
8. The Minister is authorized to assist and subsidize mining operations.
9. Certain mining tenements carry (i) rights to use water passing through the land; (ii) rights to use the subject land for purposes of residence, storage and treatment; (iii) rights to use standing timber on the subject land or on nearby Crown land for purposes connected with mining.
10. In the case of hydrocarbons, the Crown is authorized to grant pipeline licences for the construction of pipelines over private and public lands.