

THE LAW SURROUNDING “MINER’S RIGHT”

Origin of the Mining Law of Queensland

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The mining law of Queensland is contained in many and varied forms. It is found in Statutes, Authority and precedent. However, the mining law for the purposes of this discussion is the body of mining law contained within the Statute of this State called the Mining Act 1968-1973.

This Act of Parliament reflects the manner in which mining is encouraged and regulated in Queensland. It prescribes the requirements and conditions precedent to the obtaining of a title to mine land in Queensland, as well as establishing the rights of a miner.

Before going to the origin of the mining law, perhaps it is of importance to summarize the provisions of the Mining Act, so that it is understood what the rights of a miner are in the law.

When one looks at the Mining Act prevailing in this State a pattern is seen to emerge. The Crown claims right and ownership in all mineral in Queensland subject to certain exceptions, but it is prepared to appropriate its rights in that mineral to a miner, subject to conditions. Some of the conditions to be observed by the miner are the taking of possession of the land in question, the payment of royalty to the Crown on the mineral won, together with fees for use of the land.

The stage is set by the obtaining of a document which is capable of creating legal relationships between the holder and the Crown. This document is known as a miner’s right. It is issued by an officer of the Crown called the Warden for a term of years, upon the payment of certain fees. It gives the holder rights and entitlements which are exercisable by the holder subject to the provisions of the Act.

These rights and entitlements authorize the taking up and occupying of land for the purpose of winning mineral, the right of way across land to the place occupied for mining purposes, the erection of structures upon the land so occupied, the use of timber and stone from Crown land, the construction of dams and water races, and the occupation of Crown land for residence purposes.

The occupation of land by a holder of a miner's right is accomplished by means of marking the land at each corner by posts or stones of certain dimensions for identification purposes. Upon marking the land, if possession is desired, registration of that fact must be obtained by application to the Warden who shall issue a title to the applicant. The land occupied becomes known as a claim and a mining tenement.

The application is to be considered by the Warden, if any person objects to the occupation of the land, in a court presided over by the Warden, called a Warden's Court. If the objection is not of substance or if there is no objection, the applicant for registration is to be put into possession of the land and permitted to mine it.

LAND MUST BE WORKED

Once registration is effected the holder of the claim must work the land or seek exemption from labour conditions. If it remains unworked, the Crown may resume its rights. Another person who is the holder of a miner's right may enter the land upon giving notice of his intentions to the Warden and to the holder for the purpose of working the land.

Registration establishes further rights upon the holder of the claim such as the right of sale of the land, the right of disposition of the land to an heir and successor, and the right to sub-let the land to another. It is, in other words, a title which is very similar to fee-simple title, carrying with it the rights and benefits associated with fee-simple title.

The holder of the claim is required to maintain his boundary markings, thus ensuring that every person may know where the claim is in fact located.

The holder of the claim, unlike most persons in the community, has a right of redress or benefit in actions brought against him or instituted by him in his own court — the Warden's Court — in which he may sue or be sued in relation to any matter arising in relation to mining or controversies that occur affecting property rights.

Some of such matters within the jurisdiction of the Warden's Court are the right to possession of the claim, the area of the claim, demands for debts or damages by or against miners relating to the claim, or the making of agreements relating to the working of the claim.

There are several Warden's Courts established in Queensland, each located within its own Mining District, but each is capable of exercising jurisdiction throughout Queensland in matters brought before it.

The Warden's Court is a Court which is clothed with ordinary and special powers.

Some of the special powers are power to order the deposit of mineral which is the subject of action brought in the Warden's Court in the person claiming ownership of the mineral, power to order a survey of a disputed area, power to order delivery of mineral into the hands of the Court until ownership of that mineral is decided, power to inspect mining tenements.

The other form of title issued by the Crown for the mining of mineral is called a mining lease, but the provisions applicable to this title are of similar effect to those previously mentioned in relation to a claim. The only significant difference is the fact that a miner's right is not required to be held by an applicant for, or the holder of, a mining lease as a condition precedent to his obtaining this form of title.

MINING LAW UNIQUE

It will be noted that the mining law is thus unique particularly in relation to the rights of a miner and the jurisdiction of the Warden's Court for protection of those rights. These two features alone, no doubt, are the most intriguing aspects of mining law. Their origins are somewhat equally intriguing. Perhaps what makes for the intrigue is the fact that the rights bestowed upon a miner are of the nature of exclusive rights, not in common with the rights bestowed by any other statute upon any group of persons in the community. This is true also in relation to the operations of the Warden's Court, which is a Court equal in jurisdiction in its own sphere to the highest Courts in Australia.

To turn now to the origin of these rights contained in the mining law applicable in Queensland, one must retreat into history and time itself through many countries, their legal systems and customs.

Mining of metal has been one of mankind's oldest endeavours, and it is recorded that the Phoenician civilisation

prided themselves in their travels in the then known world in a quest for mineral, particularly the mining of tin in England.

However, much of the history associated with mining has been lost until the times of the Romans. The Romans had a great legal system, and much of our present day law, including mining law, had its origins in Roman law.

Roman law recognised the domain of the State and the ownership of mineral in the soil by the State. Upon the Roman conquest of Britain, Roman law was introduced into Britain and the British legal system commenced to flourish. With the passing of time and later invasions by other European peoples such as the Angles, Saxons, Danes and Normans, the British legal system was fused with the ideas of the legal systems of these peoples. This system established probably that great body of law called English law, both written and unwritten, including the common law of England and the Statute law of England.

It is both traditional and proper when speaking of law generally in any English-speaking country in the world today to refer to the English law. Australian law, Queensland law, and in particular the mining law of Queensland, is no exception to this rule.

The English law which, as we have seen, is steeped in history and tradition, has found its way into every place colonised by Britain. Upon the arrival of the first settlers in Australia in 1788, the English law arrived with them. Indeed, the mining law of England also became applicable in the new colony because it is said that the English law is the birthright of every British subject.

PRINCIPLES OF ENGLISH LAW

Because of this application of English law, one must look to the English law itself in order to determine the genesis of the mining law of this State. Within this body of law there are many principles, both written and unwritten, which regulate the customs and habits of citizens. The miner is treated no differently in this respect. Accordingly there are, in fact, many rules of law which have from a time unknown in history been present in English law relating to the rights of a miner in the mining of mineral in various parts of England.

These principles arose from the very customs of the miners themselves in the particular districts, and are peculiar to each district in question. Much of these principles have

in later years been enacted in statute form for the benefit of record. Such is the case in relation to the mining of lead in Derbyshire, tin in Cornwall and Devonshire, coal and iron in the Forest of Dean.

The miners themselves were responsible for introducing the customs which, in turn, became the rule of law applicable in the districts in which the mining took place.

The English law, like the Roman law, recognises the principle of Royal mines, which are mines of gold and silver. Ownership of these mines and metals has always been claimed by the Crown through its Royal Prerogative. Apart from this concept, all other mineral belonged to the owner of the soil whether that owner be king or freeman. This, of course, formed part of the feudal system of land tenure known as the manorial system.

In land other than manor land which we might consider today to be the equivalent of freehold land, the minerals were the property of the Crown, but perhaps as a result of Roman influences, the English law recognised that the interests of a miner were opposed to the interests of the owner of the land. Since this was the practice and custom in the particular mining districts, it was conceded that the miners had obtained some concession by prescription and custom from the Crown. In fact some of these customs were recognised by Parliament and enacted in statute form in the nineteenth century to form part of the statute law of England.

CUSTOMS IN DEVONSHIRE AND CORNWALL

In Devonshire and Cornwall it was the practice that free tanners, as they were called, could work land belonging to the lord of the manor or the Crown, subject to the giving of a one-fifteenth part of the tin won to the owner of the soil. This gift was known as "toll" or "dish" tin. Upon making over the gift the free tinner established his right to mine.

It was required that the land be marked off at each corner by turfs or stones. The piece of land could be waste land or inclosed land which was formerly waste land. The tinner was required to produce before the next Stannary Court his application for possession of the land known as a bound. If no opposition was made, he was to be put into possession of the bound and allowed to mine.

Yearly renewal of the markings were required to be effected by the tinner by means of cutting a piece of turf from each corner on specified Saints' days of the year. Failure to do so could render the bounds forfeited to another,

but if the tinner did renew his markings after the time expired but before forfeiture, his lot was restored.

Bounds could be sold or demised or farmed out. Leaving bounds unworked could cause another to enter and work the land after the new tanners gave two months' prior notice of entry to the bounds.

The owner of the soil could resume his rights if no work was being performed on the bounds. The tinner, however, was allowed a reasonable time to carry out his mining operation. This time included the necessary time allowed for consideration of the mining methods to be used and time for preparation of the mining operation.

Stannary Courts presided over by a Lord, Warden or vice-Warden, who were officers of the Duchy of King John, were local tribunals existing from time immemorial for the benefit of miners. They were recognised by Royal Charters. These Courts were convened on a regular basis. They exercised both common law and equity jurisdictions within which controversies affecting mining and property rights could be adjusted.

The bounds in Devonshire were recognised as estates in fee-simple capable of devolution at law to heirs and successors.

CUSTOMS IN DERBYSHIRE

In Derbyshire, a discoverer of lead was entitled to have two meers of ground (about 27 to 32 yards along the vein) assigned to him with sufficient surface area to work the land in the opinion of the barmaster and two of the grand jury. Freeing the ground was achieved by delivering the first dish of ore to the owner of the soil. A "dish" was a dish capable of holding fifteen pints of water.

The barmaster was a person formerly appointed by the miners and merchants, but in later times by the lords, to carry out certain duties such as marking the meers, visiting the meers, discovering causes of forfeiture, giving miners the right to use water, securing duties payable, entering the mines, holding courts and generally enforcing the customs of the manor.

The courts were called Barmote Courts in which actions relating to title, trespass or debts could be brought. Interests were transferred by entry in the barmaster book, wherein priority of title by time of entry prevailed. Consolidation of titles was permitted with the consent of the barmaster. There were great and small Barmote Courts, the great ones meeting twice a year, the small ones as the occasion required.

CUSTOMS IN FOREST OF DEAN

In the Forest of Dean the mine court determined the workings of land called "gales," which were capable of being worked for coal or iron, and leases of quarries of stone by freemen or persons of age twenty-one years who had worked in iron or coal mines for one year and one day; these persons were known as "free miners." Compensation was payable to the owner of the soil wherein the mine was located for injury to the surface of the land by mining.

The free miner was required to pay rent called "galeage" to an officer of the Crown called the gaveler, who measured the metes and bounds of the gale before entering the record of a grant of the gale in the register book. This grant was a grant in fee simple. It was capable of devolution to an heir at law, as well as assignment or disposition by will.

Non-payment of galeage or the failure to work the gale led to forfeiture of the gale.

These customs had existed in the Forest of Dean and in the hundred of St. Briavels from a time immemorial.

All of these customs were recognised by Acts of Parliament from the seventeenth century onwards, but these laws applied only within the districts in which the customs arose.

Consequently the English law recognised severance of title in soil where the surface might belong to one person and the mines to another. Different minerals in the mines could, in fact, belong to different proprietors.

Outside the districts the general law prevailed, but no specific general law existed in English law relating to mines and minerals other than the regalian right to mines such as the Crown's right to gold and silver, and the recognition of the common law principle that minerals other than gold and silver vested in the owner of the soil unless severance of title had occurred.

The principle of regalian right is found and recognised in most legal systems including the Roman, French, Spanish and Mexican legal systems.

THE AUSTRALIAN EXPERIENCE

It might be thought that by now the Mining Act of Queensland as outlined is a direct transposition of the English law because of the similarities of the rights of miners between the two, but it is not as simple as it would appear.

Even though the English law relating to mines and minerals was applicable to the Australian colony upon settlement in 1788, the English law so applicable was the com-

mon law principle of the vesting of minerals other than gold and silver in the owner of the soil. The law enacted by Statute in England was applicable only within the certain districts where mining was carried on in England.

Gold of course was the mineral or metal that determined the wealth of nations at that time. It was the most sought-after metal in the world, and in the infant colony this principle equally applied.

When gold was discovered in Australia in commercial quantities in 1851 there was practically no mining law applicable in Australia. For this reason the Government of the colony instituted a system of licensing miners and the era of the gold commissioners commenced. This practice was continued in Victoria, but owing to the fee for the licence — 30 shillings per month — and the manner in which it was collected, the miners revolted. This was the famous stand taken against the Government by the miners in defence of their rights and liberties at Eureka in Ballarat, Victoria, in December 1854.

In 1854 the Victorian Government instituted reform to the law as a result of the miners' grievances, and instituted the miner's right in Victoria. This action gave to Australia something which is not found elsewhere in the world, that is, a document called the miner's right which authorises the execution of certain rights, privileges and entitlements by the holder of that right in and upon land in which mineral is present.

However, the miner's right applied only to gold and only to waste land of the Crown, because in keeping with the general principle of English law, gold and silver were the only minerals of importance. In fact, the Australian system at that time followed the English law by the Crown's granting land in fee to a purchaser without reservation of any other minerals.

Of course, this practice was of little consequence because other than gold or silver, no other mineral was being searched for in the colonies.

New South Wales followed suit with a Goldfields Act of 1857, which incorporated the provisions relating to a miner's right. It is probably worthy of note to understand that at this time the gold rushes of California in America were in full operation. Californian law closely resembled the law of Spain and Mexico insofar as mining for mineral was concerned, as well as a mixture of the English law applicable to the districts of Cornwall and Devonshire and the Continental legal systems. However, Californian mining law

prescribed the posting of notice upon a tree, stake, or mound of rocks, identifying the occupier of the land. This was the first step in the inception of the miner's right.

The miner's right in California referred to the piece of land in question and the right to mine that land. It was not in the nature of a legal document.

Upon the discovery of gold at Gympie in 1867 the regulations made under the Goldfields Act of 1856 (the New South Wales Act) had application in Queensland, but because of the complexity of the mining operations, rules of the Local Mining Court were introduced under the New South Wales Act. These rules preserved the rights of the miner authorising him to mark and apply for claims, residence areas, machinery areas, by inserting posts, posting notices and seeking registration before the Court. The Court exercised jurisdiction in determining title to the land marked, the settling of disputes between the miners, and the registration of the miners' titles.

FIRST QUEENSLAND ACT

In 1874 the first Statute law of the State was introduced in the form of the Goldfields Act. The provisions of this Act substantially followed the Rules of the Local Mining Court of Gympie, but it introduced provisions guaranteeing the rights of miners which were exactly in line with those rights in the English law which applied in the districts of Cornwall, Devonshire, Derbyshire and the Forest of Dean, as well as retaining the principle of the miner's right. A form of gold mining lease title was also introduced.

By 1898, when another mining statute was introduced, gold had lost its importance. Other minerals were beginning to become just as important. Consequently the Mining Act of 1898, which followed the recommendations of a Royal Commission constituted by the Government to inquire into the goldfields of the State, incorporated all the provisions of the 1874 Act but placed other minerals on the same level as gold.

All the Statute law of this State up to the year 1910 applied only to the winning of gold and other minerals from Crown land. The principle of alienation of land in fee to purchasers without reservation of minerals other than gold and silver had been followed in Queensland. In fact, many mines were opened in private land not by title issued by the Crown but through private agreement with the owners of the land.

In 1910 the first statute authorising the issue of title by the Crown for the mining of mineral in private land in Queensland came into force. It also extended the rights of a miner to mine in private land. From that time on, all minerals have been reserved by law in all grants of land made by the Crown to purchasers.

This now brings us to the current Mining Act. It can be seen that the bulk of the provisions of the present mining law of Queensland relating to the rights of a miner originated with the miners themselves. Apart from the document called the miner's right, which is truly Australian by birth, the majority of the rights of a miner have their genesis in the English law applicable to the districts of Cornwall, Devonshire, Derbyshire and the Forest of Dean.

Thus the mining law of Queensland is intriguing when it is found that the law designed to regulate mining in this State has been practically developed by mining communities throughout the world over unknown periods of time. The miner to whom the law is applicable has by common ancestry in his occupation developed his rights in the law that applies to him and his work.

It can be said in finality that the miner is therefore in a different position to most others in our community. What other group of persons with common interests, occupational or otherwise, in our community, can claim by history and authority that the reasons for the application of their lawful rights occurred by their own actions or the actions of their ancestors by occupation, over vast periods of time and recorded history in many and different countries of the world?

Instead of the English law directly applying to the foundation of the mining law of this State, it has taken a deviated route through other forms of law before having a vast bearing and influence in our present-day mining law in protecting and preserving the rights of a miner.

LOCAL MINING COURTS

The paper on the State's mining laws was read on behalf of Mr. Ryan, who was on duty in the country, by Mr. Alan Queale, a Councillor of the Royal Historical Society of Queensland. Mr. Queale—himself notably well informed on the State's mining laws—had made recent researches at the Oxley Memorial Library and the State Archives on some of the points to which he knew Mr. Ryan's script referred.

In the discussion that followed the paper's delivery Mr. Queale made several interesting observations which deserve to be recorded in accompaniment to Mr. Ryan's survey.

Mr. Queale said:

"There is a lot of interesting material in New South Wales and Queensland Parliamentary papers on gold mining. I have glanced at it a few times, and it was there I saw mention of the Imperial Acts under which Governor Fitz Roy intended to prosecute intruders."

A Proclamation dated 22 May 1851, issued by Fitz Roy, regulated the mining for gold in New South Wales soon after its discovery on Summer Hill Creek and, at the same time, asserted Crown ownership to all gold in its natural state in the lands of the Colony. It declared also the Government's intention to prosecute, under the provisions of several Imperial Acts, all who mined for the precious metal without first obtaining a Gold Licence.

EARLY FIND ON DOWNS

Six months later Chris. Rolleston, Commissioner of Crown Lands for the Darling Downs, reported a gold strike at or near Lord John Swamp in the Warwick District. In the July previous to this discovery George Barney, Chief Commissioner of Crown Lands, had issued instructions to his Commissioners beyond the boundaries to protect Crown rights against encroachment, intrusion and trespass by gold-seekers.

Residents of Brisbane and Ipswich subscribed money for a reward for anyone discovering gold in the Moreton Bay or Darling Downs Districts.

At the request of the Warwick Bench of Magistrates, Governor Fitz Roy arranged for Edward Hammond Hargraves, credited with the Summer Hill Creek discovery near Bathurst, to examine and report. Hargraves writing from Kangaroo Point, Brisbane, in May 1852 declared that the Darling Downs cannot boast a goldfield, that a specimen allegedly found there was a bullet beaten into the shape of a nugget and covered with gold-leaf. The Downs was a gold-producing area a decade later. The same Hargraves also declared Western Australia to be non-auriferous!

It was not until December 1852 that an Act of Council (16 Vic. No. 43) was passed to regulate the management of goldfields in New South Wales. A temporary Act, it provided *inter alia*, that the Rules and Regulations made under Governor Fitz Roy's Proclamation were to have the

— To The Honorable The Minister for Lands —

¹⁸⁵³
The Humble Petition

of the undersigned Miners residing at
— Gympie Creek —

Respectfully Sheweth

That a large population is now settled in this district and that the discovery of numerous rich beds of gold in quartz is sufficient to ensure the permanent character of the digging.

That great inconvenience is felt from the want of a local mining court and that the Act provides for the constitution of such a court under certain conditions.

That your petitioners in compliance with these conditions hereby append the signature of one hundred miners who have held miners' rights in the Colony of Queensland for the year specified.

Your petitioners therefore humbly pray that you will cause such steps to be taken as will enable us as your petitioners the power to elect a mining court at Gympie Creek.

And your petitioners as in—

The original of this document—a petition by miners for a Local Mining Court at Gympie in the early gold-mining days—is in the State Archives, where it was photographed by Mr. Alan Queale.

force of law. The Act commenced on 1 February 1853 and was to have expired on 31 December 1854 but it was amended and extended, remaining in force until its repeal by the Goldfields Management Act of 1857 (20 Vic. No. 29).

It was under the 1857 Act that Queensland's first gold fields were proclaimed—Canooka and Calliope in pre-Separation days. The Act, inherited by Queensland after its erection into a Colony, applied to the small Darling Downs fields of Talgai, Canal Creek, Lucky Valley, etc., to Peak Downs, to Crocodile Creek, Morinish, Ridglands and other

THE COURT AT GYMPIE

Although attempts were made to establish such Courts on the Rockhampton and Cape River fields, the only one which operated in Queensland was that at Gympie where, on the petition of a hundred miners as required by the Act, the Governor-in-Council approved of the establishment of the Court and its Rules.

The Court, in spite of the democratic fashion in which its members were elected, was not the most efficient of tribunals. Working miners were not always able to interpret their own Rules and its Chairman, Gold Commissioner King, several times resorted, unsuccessfully, to obtain the Attorney-General's opinion. Sometimes, too, members did not attend the sittings or stand for election.

In 1872 an attempt was made to introduce new mining legislation but it failed to pass. It was not until 1874, when the Colony of Queensland passed its own Goldfields Act, that the Local Gympie Mining Court ceased to exist. Wardens replaced the Gold Commissioners, and Warden's Courts were established and uniform mining laws applied to the goldfields throughout the Colony.