

Cadia Holdings Pty Ltd v State of New South Wales

(2010) 269 ALR 204

*Publicly owned minerals: Let the truth be spoken**

1 Introduction

The decision of the High Court of Australia in *Cadia Holdings* dealt with the amount of royalties that was due to the Minister for Mineral Resources of New South Wales (“Minister”) by Cadia Holdings Pty Ltd (“Cadia”) in respect of copper mined from land in New South Wales (“NSW”) (*Cadia Holdings v State of New South Wales* par 1).

French CJ indicated in a separate judgement that the determination of the amount of royalties payable in NSW depends on events “which occurred more than three centuries ago” in Tudor England (par 1). The High Court had to embark on a route which started in 1568 when the English court in *Case of Mines (R v Earl of Northumberland)*(1567) 1 Plowden 310 recognised the royal prerogative to gold, silver and other metals, such as copper mixed with gold and silver (*Cadia Holdings* par 1). This was followed by an examination of the statutory modification of the prerogative in England in favour of owners of base-metal mines (see par 1). Thereafter, the court had to determine whether:

- (a) the modified prerogative was received as part of the common law of NSW;
- (b) upon federation in Australia such prerogative formed part of the executive powers of the Commonwealth (Federal government) or the State governments; and
- (c) NSW mining legislation affected the disposition of the minerals upon the grant of freehold (an estate) in land by the State.

This was followed by an examination of the applicable provisions of the Mining Act 1992 (NSW) (“Mining Act 1992”).

The Mining Act 1992 provides for the granting of prospecting or mining rights in respect of minerals. Any person may apply to the state for a mining lease (see s 51). Section 11(1) provides that upon lawful severance of minerals from the land such minerals become the property of the miner (par 78). In terms of the Mining Act royalties are payable by holders of mining leases upon recovery of “publicly owned minerals” (par 7). If the minerals are privately owned, the lessee remains liable to pay royalties as if they were publicly owned, but the Minister in turn has

* I wish to acknowledge the comments and suggestions of Samantha Hepburn, of Deakin University. I, however, remain responsible for the correctness of the end product. The law is stated as at 30 December 2011.

to repay seven-eighths of the royalties to the owner of the minerals (s 284; par 7, 64). In terms of the Mining Act 1992 the concept of a “mineral” includes copper and gold, whilst a “publicly owned mineral” is defined in section 4 as “a mineral owned by, or reserved to, the Crown” (par 7). A “privately owned mineral” is just the opposite of a publicly owned mineral (see s 4; par 61). The expression “the Crown” is a reference to “the Crown in the right of the State of New South Wales” (par 63, 48).

After my summary of the facts in *Cadia Holdings*, the historical route followed by the High Court, especially in the judgement of French CJ, will be discussed followed by the decision of the High Court. A joint judgement was delivered by Gummow, Hayne, Heydon and Crennan JJ. The decision illustrates how the pendulum has swung in Anglo-Australian law over a period of more than three centuries from privately owned minerals to publicly owned minerals. An attempt will be made to determine the parameters of the royal prerogative in modern day Australia. Due to the creation by section 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 of state custodianship over minerals in South Africa (see Badenhorst “Ownership of minerals *in situ* in South Africa: Australian darning to the rescue?” 2010 *SALJ* 646), the importance of the *Cadia Holdings* decision for South African mining law will also be shown. A conclusion will also be reached as to the importance of the *Cadia Holdings* decision.

2 Facts

Cadia and Newcrest Operations Ltd (“Newcrest”) were the owners of the freehold in the land near Orange. They held 10 certificates of title to different portions of the land (par 1, 6). The certificates of title were subject to “reservations and conditions in the Crown grant(s)”. The original nine Crown grants were made between 1852 and 1881 (par 6, 68). Only one of the Crown grants reserved “all gold and mines of gold” to the Crown (par 6, 69). The copper was not expressly reserved to (or conveyed by) the Crown during the original grants of freehold in land.

Cadia held four mining leases in terms of the Mining Act 1992 in respect of the land. By virtue of these leases it operated two mines from which it recovered ore in which gold and copper were so intermingled that they could not be mined separately (par 6). The weight of the extracted copper vastly exceeded the weight of the extracted gold. The value of the recovered gold, however, substantially exceeded the value of the recovered copper (par 6). Cadia paid royalties to the Minister for the period 1 July 1998 to 31 March 2008 (par 8).

To recap, Cadia and Newcrest held the freehold of the land subject to the mining leases of Cadia. As a lessee in terms of a mining lease, Cadia paid royalties to the state. If the copper mined qualified as “privately owned minerals”, the state had to repay seven-eighths of the royalties to Cadia and Newcrest. If the copper mined qualified as a “publicly owned mineral” the state would be entitled to all the royalties paid for copper mined on the land. Copper would qualify as a privately owned mineral if

it was not subject to the royal prerogative, or if conveyed to the grantee at the time of the original Crown grants of freehold. The crux of the matter was, therefore, the origin and meaning of the notion of “publicly owned minerals”.

Cadia and Newcrest successfully recovered the seven-eighths of royalties paid in the Supreme Court of NSW because, on the facts, it was decided that the copper was a “privately owned mineral” within the meaning of the Mining Act 1992 (*Cadia Holdings Pty Ltd v NSW* 2008 1 ALR 334 (NSW)). The State and Minister subsequently appealed successfully to the Court of Appeal of NSW (*NSW v Cadia Holdings Pty Ltd* (2009) 257 ALR 528). Briefly, the majority of the Court of Appeal held that:

- (a) the royal prerogative was not modified and still applied to an indivisible ore body (which included the copper) (per Basten JA par 120); or
- (b) the Royal Mines Act 1688 (UK) and Royal Mines Act 1693 (UK) withdrew copper mines from the prerogative although the ore contained appreciable quantities of gold and silver which were of commercial value, provided the mines could fairly be described as copper mines

(per Kay LJ par 144)(and not gold-copper mines, such as the Cadia mines)(par 154). As will be shown in 3 below, the 1688 statute excluded mines of copper from the royal prerogative. Consequently, it was held that the copper mined was “publicly owned minerals” and subject to payment of higher royalties. Cadia and Newcrest were ordered to repay the royalties together with interest to the Minister (par 125, 158).

3 Arguments

In a subsequent appeal to the High Court of Australia, Cadia and Newcrest claimed repayment of seven-eighths of the royalties alleging that the copper mined was “privately owned minerals” (par 9). It was argued that the copper had been granted away at the time of the original Crown grants of the land. In the alternative, it was argued that the Crown’s title to copper was abrogated by the Mining Act 1992 (par 12). As will be shown, the first argument was successful in the appeal to the High Court.

The State of NSW and the Minister resisted the claim on the basis that the copper was “vested in the Crown pursuant to its prerogative right to mines of gold and was therefore a publicly owned mineral” (par 8). Their contention depended on the proposition that the mines were properly characterised as mines of gold for purposes of the royal prerogative despite the fact that they contained copper (par 9). The Minister argued that he was entitled to retain the royalties payable in respect of copper on the basis that the quantity and value of the gold in the ore body meant that the mines could not be regarded as mines of copper protected by the Royal Mines Act 1688 (UK) (par 4). In their interpretation of the Royal Mines Act 1688 the Minister also relied on a rule of statutory construction that the prerogative is not displaced except by express words or necessary implication (par 94). In other words, the prerogative was not expressly or by necessary implication modified by the said statute.

4 Decision of the High Court

According to the court the right of the Minister to royalties depended “upon the interaction between the rules of law laid down in the 16th and 17th century and the Mining Act 1992” (par 2). The court held that the royal prerogative, as modified by the Royal Mines Act 1688, applied to NSW and had the “effect that the right to copper in the land at Orange was conveyed by the Crown grants of that land in the mid-19th century” (par 5). Such copper was, therefore, “privately owned minerals” (parr 59, 106). The decision of the court in respect of the following sub-headings will now be discussed in more detail:

4 1 Royal Prerogative

In the *Case of Mines (R v Earl of Northumberland)* miners found a mixture of gold and silver in copper that was mined from lands belonging to the 7th Earl of Northumberland. A suit was brought by Queen Elizabeth I claiming prerogative rights to the gold. Despite the absence of legislation or case law to that effect (*Q v Wilson* 1874 12 SC NSW 258 270) the existence of such prerogative to gold and silver was judicially recognised by all the justices of England and Barons of the Exchequer (par 13). The High Court dealt with the *Case of Mines* against the background of Australian case law (see pars 14-15, 80-82). It is submitted that the following rules can be deduced from the *Case of Mines*:

- (a) Mines of gold and silver belong to the Crown by prerogative (the *Case of Mines* 336).
- (b) By virtue of the prerogative the Crown is entitled to: (i) enter the land of a subject to dig and carry away the ore of gold and silver; and (ii) other incidents that are necessary for getting the ore (the *Case of Mines* 336; *New South Wales v Cadia Holdings Pty Ltd* (2009) 257 ALR 528 par 123).
- (c) The Crown’s prerogative did not extend to mines of copper, tin, lead or other base metals (*Cadia Holdings (Pty) Ltd v State of NSW* 7).
- (d) If gold and silver are found in mines of base metals, the base metals, gold and silver belong to the Crown by prerogative (This was decided by the majority of the court (*Case of Mines* 336). The three dissenting judges only recognised the royal prerogative to other base metals contained in gold and silver if the value of gold and silver exceeded the value of the other base metals (336). The position of the nine judges in respect of mixed ore was modified by an opinion obtained in 1640 from 15 leading Counsel that the Crown would only acquire the whole of the ore if the value of the royal metal exceeded the cost of separation (*New South Wales v Cadia Holdings Pty Ltd* (2009) 257 ALR 528 par 17, 76)).
- (e) By virtue of the prerogative the Crown is entitled to dig and carry away the mixed minerals, even if the gold or silver is less valuable than the base minerals (*Case of Mines* 337; *New South Wales v Cadia Holdings Pty Ltd* parr 16, 17, 101).
- (f) A grant of a freehold (an estate) in land, containing gold and silver, by the Crown will not convey the gold and silver to the grantee unless there is a specific grant or conveyance of the gold or silver (*Case of Mines*

337; *Q v Wilson* 1874 12 SC NSW 258 281; *Commonwealth of Australia v State of NSW* (1920) 33 CLR 1 11 20).

- (g) If a legislature wants to abrogate or qualify the prerogative in any way “patent precise words” (and possibly necessary implication) are formally required for such abrogation or qualification (*Cadia Holdings Pty Ltd v State of NSW* 24 37).

The royal prerogative thus “allocated to the Crown, without parliamentary sanction, the right to important natural resources including base-metal mines containing gold or silver” (*Cadia Holdings Pty Ltd v State of New South Wales* 24). The following justifications were advanced for the recognition of the royal prerogative: First because of the excellence of gold and silver contained in the soil, the common law has allocated them to the person that is most excellent, and that is the King (*Case of Mines* 315-316). Second because of the necessity of gold and silver, the King will be able to defend his subjects with an army against hostilities and with good laws (*Case of Mines* 316). Third because of the convenience of gold and silver for mutual commerce, trafficking, coinage and other like purposes (*Case of Mines* 316; Badenhorst 2010 *SALJ* 646 663). Further, the need to avoid undue concentration of financial power in the King’s subjects was perceived as an important justification (*Cadia Holdings Pty Ltd v State of New South Wales* 5). These policy reasons had an impact on the classification of the royal prerogative. For instance, French CJ perceived it as an aspect of the Crown’s fiscal prerogatives (par 3). Reference was also made to the classification of the prerogative as a proprietary right of the King (par 32). In the joint judgement the royal prerogative is described as “preferences, immunities and exceptions peculiar to executive government” (par 75) and “an exceptional right which partakes of the nature of property” (par 75).

4 2 Modification of the Prerogative

The Royal Mines Act 1688 (UK) and the Royal Mines Act 1693 (UK) modified the prerogative with respect to any mine of copper, tin, iron or lead. By section 3 of the 1688 Act, no mine of copper, tin, iron or lead would be taken to be a royal mine on the basis that gold or silver may be extracted from it (*Cadia Holdings Pty Ltd v State of New South Wales* 7-8, 27). French CJ explained that the 1688 Act protected private interest in copper mines which contained gold by allowing their owners to retain the copper (par 3). The 1688 Act did not affect the Crown’s prerogative to mines of gold and silver (par 19), but “altered, in favour of private interests, the balance of private and public rights in relation to base metals associated with gold and silver” (par 57). As such it was expressly directed to the scope of the prerogative right and constituted the “patent precise words” required by common law rule of interpretation for qualification of the prerogative stated in the *Case of Mines* (par 57). The 1693 Act attempted to avoid taxonomical difficulties by permitting the owner of a mine containing copper, tin, iron or lead to work the mine even though it might be claimed to be a royal mine (par 17).

In the joint judgement it was held that section 3 of the Royal Mines Act 1688 was a limitation of the prerogative (par 100) and removed the

specified minerals from the prerogative (par 102-113). A mine may be characterised as a “mine of copper” as well as a “mine of gold” for the operation of section 3 of the Royal Mines Act 1688 (par 103). It was held (par 105) that:

[b]y operation of section 3 of the Royal Mines Act, a mine of copper thereafter could not be classified as a ‘mine of gold’ within the scope of the prerogative given by the *Case of Mines* where copper was mingled with gold in the ore.

4 3 Reception of the Prerogative

The rule regarding the reception of English law by the colonies is stated as follows by French CJ (par 21):

It was a common law rule that the common law applied to a colony characterised as ‘settled’ to the extent applicable to the conditions of the colony and the terms of the charter or instrument providing for its government.

Imported English law included statute law and judge-made law (Butt *Land Law* (2010) 1). From the earliest time Australia was legally regarded as a colony that had been settled and not conquered (Butt *Land Law* 1; Gray, Edgeworth, Forster & Grattan *Property Law in New South Wales* (2007) 70). Despite vastly different conditions in England and Australia a vast amount of English law was received in Australia (see Gray *et al* 71). The royal prerogative was part of the common law (par 21) and its application in mines of gold and silver in the Australian colony was acknowledged in NSW (10; *Millar v Wildish* (1863) 2 W & W (E) 37 43; *R v Wilson* (1874) 12 SCR (L) NSW 258 269-271 280 281;). The cut-off date for the reception of English law into Australia was 1828 (Butt *Land Law* 2). In terms of the Australian Courts Act 1828 (Imp) all the laws and statutes in force in England on 25 July 1828 applied to the administration of justice in the courts of NSW and Van Diemen’s Land (Tasmania) (par 23). The practical problem of determining which pre-1828 law applied to the colony was resolved by the Imperial Acts Application Act 1969 (NSW) (See Butt 2-3; Gray *et al* 71-72).

The introduction of the rule of construction, which accepted in the *Case of Mines* that a specific grant of gold and silver is required before it passes under grant of land from the Crown (see 3 (f) above), into the colony of Victoria was confirmed by the Privy Council in *Woolley v Attorney-General of Victoria* ((1877) 2 App Cas 163 166)(10)). It was found in *Woolley* that the rule of construction had not been modified by the Waste Lands Act of 1842 (Imp)(167). In *Wade v New South Wales Rutile Mining Co Pty Ltd* ((1969) 121 CLR 177 186) the correctness of *Woolley* in establishing the royal prerogative and the rule of construction in the Australian colonies was accepted beyond doubt (par 26). It was held that the rule of construction, “required clear words or necessary implication before legislation or a grant thereunder could be taken as authorising a grant of land conveying with it rights to mines of gold and silver in the land” (par 29). The rule of construction was applicable to legislation and other executive grants to land (par 14). The result of the law of construction was that no express reservation of gold and silver was

necessary to preserve the Crown's rights (see par 70). Thus, gold or silver did not automatically pass by a Crown grant of freehold in land (par 70).

French CJ confirmed that the 1688 and 1693 Acts (despite their repeal in 1969 by the Imperial Acts Application Act 1969 (NSW)) were part of the law in force in NSW at the time when the grants of the land owned by Cadia and Newcrest were made by the Crown (par 27). The subsistence of the prerogative in the colony of NSW was also found to be in line with the characterisation of the Crown's rights in respect of the lands of the colony in *Mabo v Queensland (No 2)* ((1992)175 CLR 1) (par 28; see also par 51). In the *Mabo* decision a distinction was drawn between the Crown's title to a colony (*imperium*) and the Crown's ownership of land in the colony (*dominium*) (*Mabo* par 45). Upon acquisition of sovereignty to the territory the Crown acquired radical (ultimate) title to all the land in the territory (par 50), but it did not automatically acquire absolute sovereignty of title (Hepburn *Australian Property Law Cases, Materials and Analysis* (2012) 366). The notion of radical title enabled the Crown to become the absolute beneficial owner of unalienated land required for the Crown's purposes if the land was uninhabited (par 51). If the land was occupied by the indigenous inhabitants the radical title acquired with the acquisition of sovereignty was burdened by native title (par 69). Radical title was described as "a postulate of the doctrine of tenure and a concomitant of sovereignty" (par 50). The doctrine of tenure, which forms the foundation of Australian land law (*Attorney-General (NSW) v Brown* (1847) 2 Legge 312; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Mabo v Queensland (No 2)* par 47), entails that the Crown is the original owner of all land and no person holds a title in land except "of or from" the Crown (Price & Griggs *Property Law in Principle* (2008) 42).

In the joint judgement it was held that the common law prerogative as abridged by section 3 of the Royal Mines Act 1688 was received into NSW (41). As section 3 was in force in England on 25 July 1828 it was declared to have been in force in NSW on that day by the Imperial Acts Application Act 1969 (NSW) (par 104).

4 4 Effect of Federation Upon the Prerogative

By the Commonwealth of Australia Constitution Act 1900 (UK) the Australian federation was established on 1 January 1901. At the outset French CJ indicated that "distribution" of prerogative powers and rights between the Commonwealth and the States is not spelt out in the Commonwealth Constitution (par 30). French CJ showed that the different justifications for the existence of the royal prerogative (see 3 above) could mean that the prerogative could arguably be either an incident of Commonwealth executive power or State power (see par 33). French CJ seemed to have favoured the view and disposed of the appeal on the basis that the prerogative remained with the executive governments of the States after federation (par 33). It was deemed unnecessary by the other justices to consider this issue insofar as the litigation was conducted on the assumption that a prerogative of a

proprietary nature, which before the federation was exercisable by the executive government of the colonies, was exercisable by the executives of the various States (par 88).

4 5 Regulation of Mining in NSW

Legislative regulation of mining in NSW commenced after the discovery of gold in significant quantities in 1849 (par 35). The proclamation of Governor Fitzroy on 22 May 1851 asserted the right of the Crown to all gold in NSW and prohibited mining for gold in the colony without a licence (par 36). The assertion of the Crown's rights to gold was unnecessary in the light of the *Case of Mines* (par 36). By section 2 of the NSW Constitution Act 1855 (Imp) control over Crown land was vested in the colony. This control permitted the NSW Parliament to legislate for ownership of minerals to be retained by the Crown in future grants of freehold title (Hunt *Mining Law in Western Australia* (2009) 2). A policy decision was thus taken that the Crown should own all minerals (Hunt 1). It is submitted that the policy decision was probably influenced by the royal prerogative. A general policy in favour of mineral reservation in favour of the Crown was introduced by the Crown Lands Act 1884 (NSW), which states that all grants of land issued under the Act shall contain a reservation of all minerals (Bradbrook, MacCallum, Moore & Grattan *Australian Real Property Law* (2011) 796). Private ownership of minerals will only exist in NSW if the Crown grant was made prior to the Crown Lands Act 1884 and minerals were not exempted prior to that date. As will be shown, the Crown grants in *Cadia Holdings* provide an example of such private ownership of copper in NSW (Bradbrook *et al* 796). Due to such retention of minerals upon grant (alongside the royal prerogative) the situation has developed that the Crown in right of the State owns nearly all minerals in Australia (Hunt 2). In addition, statutes of other Australian States reserve ownership of other minerals in the Crown (in right of the State) (s 9(1)(b) Mineral Resources (Sustainable Development) Act 1990 (Vic); s 8(2), (3) Mineral Resources Act 1989 (Qld); s 16(1) Mining Act 1971 (SA); s 16(3) Crown Lands Act 1976 (Tas); s 6(2)-(5) Mineral Resources Development Act 1995 (Tas); s 9(1)(b) Mining Act 1978 (WA); s 16 Mining Act 1991 (SA)). In the Northern Territory reservation is in the Crown (in right of the Commonwealth) (s 3 Minerals (Acquisition) Act (NT)). If such statutes did lead to expropriation of "privately owned minerals" provision was made for compensation thereof (see the examples given in Badenhorst 2010 *SALJ* 646 666-667). Unlike those statutes, neither the Mining Act 1992 nor its predecessors asserted Crown ownership of other minerals and such ownership depends upon the terms of the Crown Grant (Crommelin "Native Title Claims and Mineral Ownership" Research paper, Mineral law 2011 Melbourne School of Law 19).

French CJ provided an overview of legislation which preserved the prerogative rights or common law rule of interpretation stated in the *Case of Mines* (par 36-42). French CJ held that the mining legislation in NSW did not affect the disposition of the minerals at Orange by the original Crown grants (par 42). That disposition in respect of copper and

gold in the land had to be determined by the scope of the royal prerogative (par 42). In other words, whether copper was privately owned depended on the scope of the prerogative at the time of grant of freehold of the land and the terms of the grant (see 4 7 below).

4 6 Effect of Mining Act 1992 on the Royal Prerogative

In examining the impact of the Mining Act 1992 it was mentioned that the royal prerogative was preserved by section 379 of the Mining Act 1992 (par 7, 48). Insofar as the Mining Act 1992 provided that it was binding on the Crown in right of the state (par 49) it had an impact on the prerogative. The Mining Act 1992 contains a broad prohibition against mining by any person without the relevant authority. In light thereof it was accepted by the State in *Cadia Holdings* that the Crown, therefore, no longer had the right to enter the land and mine for gold and silver (par 49). With reference to case law it appeared that:

- (a) There are no recorded instances where the Crown exercised its right of entry and mined for gold and silver (par 50).
- (b) The common law rights of a holder of an estate were not interfered with (see par 50).

French CJ, however, decided that the absence of such a right of entry did not result in the abolition of the royal prerogative as such (see par 50). He reasoned that “the right of entry, while a logical incident of the prerogative right, is not a necessary condition of its existence” (par 50). Viewed in the light of the concept of radical title as considered in *Mabo v Queensland (supra)*, it was held that the existence of the prerogative (whether as sovereign authority or beneficial ownership) is not affected by “the Crown’s inability to enter, without relevant authority, the land in which they are located” (par 51).

4 7 Application of the Modified Prerogative

The decision of the High Court illustrates that the prerogative as modified (by the 1688 and 1693 British Acts) determines the scope of the grant of an estate in land upon which copper and gold mining operations are conducted (see par 4).

At the outset French CJ held that the modified prerogative had the effect that the right to copper was conveyed by the Crown grants of the land in Orange between 1852 and 1881 (par 5). French CJ concluded that a mine containing a substantial amount of copper answers the statutory description of a mine of copper for purposes of the 1688 Act. That would be the case “even if the quantity of gold in the mine is such that it is capable of dual characterisation as a gold mine” (par 59). The effect of such conclusion is that (par 59; see also par 50):

[t]he original Crown Grants of the land on which the mines stand passed over the ownership of the copper such that the copper is properly characterised as a ‘privately owned mineral’ within the meaning of the Mining Act of 1992.

Copper is, accordingly, privately owned. French CJ decided that “the liability to pay royalties for the copper mined from the land is therefore

to be assessed on the basis that it was a ‘privately owned mineral’ within the meaning of the Mining Act 1992” (par 5). In the joint judgment it was also found that the Cadia mine should be classed as a “mine of copper” (par 103) and that the copper upon which the royalty was payable by Cadia to the Minister was a privately owned mineral for purposes of the Mining Act (par 107). The decision of the Supreme Court of NSW was found to be correct and it was decided that the appeal against the decision of the NSW Court of Appeal should succeed (par 67).

4 8 Modern Day Meaning of the Royal Prerogative

To recap, it was thus decided that, upon the grant of freehold in land by the Crown (in NSW prior to 1884), ownership of copper was also conveyed to the grantee of the freehold in land. Upon such conveyance the copper qualified as “privately owned minerals” in terms of the Mining Act 1992 and for a repayment to the owners of the minerals of seven-eighths of the royalties paid by the mineral lessee.

It is submitted that, as deduced from *Cadia Holdings*, the royal prerogative at present entails the following in Australia:

- (a) Mines of gold and silver belong to the Crown in right of the State by prerogative.
- (b) Such prerogative does not extend to mines containing a substantial amount of copper, tin, lead or other base metals even if gold or silver may also be extracted from them.
- (c) A grant of freehold in land, containing gold and silver, by the Crown will not convey the gold and silver to the grantee unless there is a specific grant or conveyance of the gold or silver.
- (d) A grant of an estate in land, containing copper, tin, lead or other base metals, by the Crown will convey to the grantee such base metals (unless ownership of such metals has prior to the grant been reserved to the State or Territory by legislation).
- (e) Abrogation or modification of the royal prerogative by the legislature has to take place expressly or by necessary implication.

As indicated in *Cadia Holdings* state legislation such as, for instance, the Mining Act 1992, has abrogated the rights or incidents of the Crown in right of the State to enter the land and mine for gold and silver. Despite such abrogation, the modified prerogative to gold and silver remains otherwise intact.

Since the days of the *Case of Mines* the metaphorical pendulum of mineral ownership has started to swing in England from common law private ownership of minerals to public ownership of gold and silver (and base minerals mixed with gold and silver). The pendulum moved slightly back during the modification of the prerogative by British legislation in the 17th century by excluding certain base minerals, even if gold and silver could also be extracted. Upon reception of English law in colonial Australia the pendulum and its position became part of Australian law. In addition to the royal prerogative, a policy of Crown ownership of minerals was adhered to by legislatures upon granting of freehold to

land. Because the right of entry and mining was not exercised by the Crown the pendulum swung a little backwards again resulting in the loss of the Crown's incidents of entry and mining. With the statutory reservation of ownership of other (or all) minerals in Australia the pendulum moved towards a state of almost complete publicly owned minerals.

In modern times the following policy reasons are advanced for the retention of ownership of minerals by the Crown. The first is the economic value of the minerals to the States and Territories. Secondly, the government has greater control over the development of mineral resources, which can be used to encourage development and to regulate and protect the environment, heritage sites and the interests of other members of society (Chambers *An Introduction to Property Law in Australia* (2008) 178; Badenhorst "The make-up of transitional rights to minerals: Something old, something new, something borrowed, something blue ...?" 2011 *SALJ* 763 666). Due to the strong economic focus of Australian mineral laws in general the environment is not always protected with too much rigour and there is a new concern about the protection for private land interests during the extraction process.

5 Importance to South African Law

South Africa was acquired by the British during the 19th century by conquest which meant that "the laws of a conquered country continue in force, until they are altered by the conqueror" (*Campbell v Hall* 1774 1 Cow 204 209). Therefore, the royal prerogative was not received as part of South African law. Sir John Cradock's Proclamation on Conversion of Loan Place to Quitrent Tenure, dated 6 August 1813 can, however, be explained as a statutory manifestation of the royal prerogative or an attempt by the legislature of the Cape colony to retain rights to minerals in future grants of ownership of land. Section 4 of the Proclamation reserved to the Crown rights "on mines of Precious Stones, Gold or Silver" (Dale *An Historical and Comparative Study of the Concept of Acquisition of Mineral Rights* LL.D. thesis Unisa (1979) 217; *Benade v Minister van Mineraal-en Energiesake* 2002 JDR 0769 (NC) 8). Despite the ambiguity of the wording, Sir John Cradock's Proclamation has been regarded as the statutory reservation of the rights to gold, silver and precious stones in favour of the state (Franklin & Kaplan *The Mining and Mineral Laws of South Africa* (1982) 36 n 33; Jones & Nel *Jones Conveyancing in South Africa* (1991) 4, 28, 403). Another South African example may be given. The Crown Lands Act 14 of 1878 (C), which provided for the sale of Crown land, also preserved a type of royal prerogative, and provided in section 10(e) that the rights of prospective purchasers would not extend to any deposits of gold, silver and precious stones (Dale 218). Sir John Cradock's Proclamation was repealed by Act 44 of 1968 (Badenhorst & Mostert *Mineral and Petroleum Law of South Africa* (2004) revision service 8 1-18). Unlike in Australia, a policy decision was not taken by legislatures of, for instance, the old *Zuid-Afrikaansche Republiek* or Orange Free State, that the State should own all minerals. On the other hand, in the colony of Natal the philosophy was

one of vesting in the State the right of mining and disposing of all minerals (Badenhorst & Mostert 1-20).

Land subject to statutory reservation of mineral rights in favour of the State became subject to the transitional measures of section 43 of the Minerals Act 50 of 1991 that were applicable to owners of “alienated State land” (Stevens “Mining Law and Mineral Rights” in *Practical Legal Training: Notarial Practice* Law Society of South Africa (2000) 106). In terms of the definition in section 1 of the (repealed) Mining Rights Act 20 of 1967, and section 1 of the (repealed) Precious Stones Act 73 of 1964, “alienated State land” was land not owned by the State, but subject to a reservation of mineral rights in favour of the State. Briefly, in terms of section 43 of the Minerals Act, owners of such land (or their nominees) could, during a transitional period, either acquire the State’s mineral rights or grant consent to a nominee to mine (Badenhorst & Mostert 12-5). Such an owner of “alienated State land” could, in turn, have qualified as a holder of an “old order right” for purposes of the transitional arrangements contained in the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”) (see further Badenhorst & Mostert 12-14). Holders of “old order rights” could either convert their rights into prospecting or mining rights or apply for such rights in terms of the MPRDA depending on whether prospecting/mining took place or not upon commencement of the MPRDA (see further Badenhorst & Mostert ch 25 3 1 - 4). Thus, some current day prospecting or mining right holders may trace their root of title back to land for which mineral rights were originally reserved in favour of the state.

Since the discovery of gold and diamonds during 1867 and 1870 in southern Africa (see further Badenhorst & Mostert 1-20 - 1-21) a division by successive southern African legislatures between –

- (a) precious metals and precious stones on the one hand and base minerals on the other hand; and
- (b) holders of prospecting and mining rights in respect thereof, created a half-way house between “complete State monopoly and unfettered private enterprise” (Franklin and Kaplan 1).

The final median position of the South African pendulum was reached during the 1960s. In terms of section 2(1)(a) of the repealed Mining Rights Act and section 2 of the Precious Stones Act, the following rights were vested in the state (*Benade v Minister van Minerale-en Energiesake* 2002 JDR 0769 (NC) 9; Badenhorst & Mostert 1-18):

- (a) The rights of prospecting and mining for and disposing of natural oil.
- (b) The rights of mining for and disposing of precious metals and precious stones.

The following rights were retained by the respective private holders (s 2(1)(b) of the Mining Rights Act; Badenhorst & Mostert 1-18 - 1-19):

- (a) The right of prospecting for precious metals and precious stones.
- (b) The rights of prospecting and mining for and disposing of base minerals.

In addition, the rights to prospect precious metals, base minerals (s 12(1) Mining Rights Act) and precious stones (s 5(1) Precious Stones Act) on “alienated State land” were reserved in favour of the owner of the land (Badenhorst & Mostert 1-19). In retrospect, the halfway-house position between the state and private enterprise was to some extent similar, and even broader than the royal prerogative. The right to mine precious metals (and precious stones) was vested in the state (publicly owned rights) whilst the right to mine base minerals was vested in private holders of mineral rights (privately owned rights). The underlying rights in South Africa were mineral rights whilst the underlying rights in English law were ownership of the minerals. In effect, a similar mineral régime existed in both systems. As part of a privatisation drive by the Apartheid government, the Minerals Act 50 of 1991 terminated the states’ statutory rights to certain classes of minerals, and former state-held rights were revested in the private holder of such mineral rights (s 5(1); Badenhorst “The revesting of state-held entitlements to exploit minerals in South Africa: Privatisation or deregulation?” 1991 *TSAR* 113 124-127, 130-131). The South African pendulum swung back to a system of “privately owned mineral rights”. Upon enactment of the MPRDA by the ANC led government, “mineral and petroleum resources” became the “common heritage” of all South Africans subject to “custodianship” by the State (s 3(1)). This meant that private law rights to minerals had been ousted by the “prevalence of State power of control over mineral resources” (*Meepo v Kotze* 2008 1 SA 104 (NC) par 8) or state custodianship. This policy decision resulted in an overnight change to state control or custodianship over mineral resources (see further Badenhorst 2010 *SALJ* 646 654). When compared with Australian law, the movement in the pendulum in South Africa took place at different times in history and for different reasons. Publicly owned minerals were created at almost the beginning of the creation of rights to minerals in Australia, whereas total state control or custodianship over mineral resources was established more than a century after the creation of privately held mineral rights in South Africa. The reader is referred to the policy reasons for the transformation of the mineral law régime in section 2 of the MPRDA.

With the achievement of a comparable end result in both systems, it is submitted that the *Cadia Holdings* decision, and Australian mining law for that matter, is relevant in the South African context:

First, the *Cadia Holdings* decision shows that royalties are payable by miners to the owner of minerals *in situ*, that is, the state in the case of “publicly owned minerals”, or to the freehold owner of the land in the case of “privately owned minerals”. It is conceded that payment of royalties by miners is regulated by a specific Australian mining statute. In South Africa royalties are now also payable by holders of mining rights to the state (s 3(2)(b) MPRDA; s 2 Mineral and Petroleum Resources Royalty Act 28 of 2008). Payment of royalties does not take place to owners of land or former holders of mineral rights under the previous dispensation (except in exceptional cases of continued payment of contractual royalties to a community in terms of item 11 Sch II MPRDA).

If royalties are, in principle, payable to an owner of minerals *in situ*, can one draw the inference that minerals *in situ* are owned by the state in South Africa? It looks like an attractive answer to the question: “In whom is ownership of minerals *in situ* vested in South Africa?” It is conceded that it will be argued that royalties are rather payable to the state because it merely acts as the custodial grantor of rights to minerals (see s 3(2)(a)). Playing devil’s advocate, should the custodian not make some repayment to former holders of mineral rights if it is not owned by the state?

Secondly, the MPRDA also binds the state (s 109). Prospecting or mining is, for instance, prohibited by the MPRDA unless a prospecting right or mining right (or mining permit) is obtained, an environmental management programme or plan is approved and notification and consultation with the owner of or lawful occupier of the land has taken place (s 5(4); *Kowie Quarry CC v Ndlambe Municipality* 2008 JDR 1380 (E) par 18). It is submitted that this prohibition also applies to the state (as prospector or miner). As illustrated in the *Cadia Holdings* decision, one can take it a step further by arguing that the state *per se* does not have the right to prospect and mine for minerals despite being state controlled or state owned. This may be a useful argument against direct or indirect attempts by the state to become actively involved in mining to the detriment of the private sector. A conflict of interest clearly arises if the state is grantor of rights to a state entity. The conflict of interest is increased if the state is to act as custodian. The application of the prohibition to the state would also mean that the state is not empowered to exempt applicants from compliance with section 5(4) or other provisions of the MPRDA. Exemption of state entities from compliance with the provisions of the MPRDA is only provided for “any activity to remove any mineral for road construction, building of dams or other purposes which may be identified” (s 106(1)). This exemption does not conflict with the interest of mining companies. During 2008 the Minister of Mineral Resources, relying on section 106(1) of the MPRDA, exempted (GN 1081 GG 31485 2008-10-10) the state-owned African Exploration Mining Finance Corporation from the provisions of applying for -

- (a) a prospecting right;
- (b) the right to remove minerals;
- (c) a mining right; or
- (d) a mining permit.

This exemption was said to apply “in so far as it relates to any activity to prospect, mine and the removal of any mineral for accumulating and stockpiling for purposes of security of supply and purposes incidental thereto” (GN 1081 GG 31485 2008-10-10). It was argued that the exemption of the state-owned African Exploration Mining Finance Corporation is *ultra vires* the power of the Minister to exempt state entities insofar as the Minister’s power of exemption is, in terms of the *eiusdem generis* rule of statutory interpretation, limited to the building of infrastructure (Badenhorst & Mostert 24-10; Leon “Creeping

expropriation of mining investments: an African perspective” 2009 *J of Energy and Natural Resources L* 597 625-626). It is submitted that the *Cadia Holdings* decision shows that a provision in a statute binding the state has legal consequences and the state should not directly or indirectly try to evade those provisions. Somehow, wisdom prevailed because the exemption of African Exploration Mining Finance Corporation has subsequently been withdrawn by the Government (GN 1081 GG 34115 2011-03-14). Nevertheless, a provision which binds the state can, as indicated in *Cadia Holdings*, be a useful instrument in limiting the parameters of the rights of the state. The state owned mining company still exists and with amendment of the MPRDA some preferential treatment may again be bestowed upon it or other state entities.

Thirdly, viewing the rights of the South African state through prerogative glasses, it would mean that all minerals are owned by the state and that the state is entitled to prospect and mine for such minerals, upon compliance with the provisions of the MPRDA. Since the enactment of the MPRDA, if the state grants ownership of land, no rights to minerals are conveyed to the transferee.

Fourthly, the *Cadia Holdings* decision has shown that upon granting of rights the content or parameters of those rights are dependent on the rights held by the grantor and the rights which were actually granted. The extent of any state grant may be circumscribed by the statutes (or the prerogative) applicable at the time of grant. The content and parameters of the South African state’s power of control or custody over mineral resources is not so clear. It has as its content considerable discretionary powers to attain the MPRDA’s broad socio-economic objectives (Leon *J of Energy and Natural Resources L* 597 627) which are difficult to circumscribe. A few pertinent questions remain in South Africa: Has common law ownership of minerals *in situ* by the owner of the land been replaced by state control or some form of public ownership of minerals *in situ* in favour of the state? Or, is common law ownership retained subject to the control or custody of the state? What exactly is the content of state power of control or custody over minerals? If rights to minerals are created upon granting thereof by the state, in whom was the content of these rights vested immediately before the grant by the state?

The courts are starting to provide answers to some of these questions. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (2011 4 SA 113 (CC) par 40) a possible change in ownership of minerals *in situ* was raised but not decided by the Constitutional Court. Two possible scenarios were only mentioned, namely, ownership of unsevered minerals residing in “custody of the state”, or ownership of the land including surface rights and what is beneath it “in all the fullness that the common law allows” (par 63; see, however, s 4(2) MPRDA which provides that if the common law is inconsistent with the MPRDA, the MPRDA prevails). In *Agri SA v Minister of Minerals and Energy* ((2011) 3 All SA 296 (GNP) par 94) the question of ownership of minerals *in situ* was left open. It was decided that upon commencement of the MPRDA

the state acquired the substance of the property rights of the erstwhile holder of common law mineral rights (par 82). The court reasoned that from a reading of sections 3 and 5 of the MPRDA, the Minister was “vested with the power to confer rights, the contents of which were substantially the same as, and in some respects, identical to, the contents of common law mineral rights” (par 82). The fact that the competencies of the state are collectively called “custodianship” was regarded as immaterial by the court (par 82; see further Badenhorst & Olivier “Expropriation of ‘unused old order rights’ by the MPRDA: you have lost it! *AgriSA v Minister of Minerals and Energy*” 2012 *THRHR* 329 335). Just as in Australia, compensation was found to be payable for termination of “privately owned minerals” (item 12 Sch II MPRDA; *Agri SA v Minister of Minerals and Energy* par 91-94).

It is submitted that the legislature utilised the vehicle of custodianship to deny that upon enactment of the MPRDA a form of property of mineral resources was acquired by the state. The denial is theoretically ineffective in the sense that control or the right of disposal (*ius disponendi*) of minerals *in situ* (by the state) can be construed as an entitlement of ownership in South African Property law. The existence of an entitlement of control requires the concomitant existence of a right, albeit a public law right. In other words, the state has control over mineral resources by virtue of some form of a public law right. Susceptibility to legal control is in turn an essential characteristic of a thing (Van der Merwe *Sakereg* (1989) 26) which would be present in respect of minerals *in situ*. The English common law rather perceives control as a feature to determine whether “something” qualifies as “property”. The dominion or control exercised by a legal subject over an object is perceived as one of the standard features of “property” in English law (Gray *et al* 3). Gray and others rely on the following definition by Blackstone in his *Commentaries on the Law of England* (Volume II page 2):

Property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

The custodianship of the state created in the MPRDA also seems to meet other English law features of property, such as excludability and transferability (see Gray *et al* 3-4). Externalisation of the object (of the right) takes place in both systems by statute. What has been created by the MPRDA would arguably meet the requirements of property in English common law. In other words, the state is holding such property. If the state’s power of control over mineral resources is equated in South Africa to the notion of publicly owned minerals, such notion, as developed in Australia, may assist in providing answers to the above questions. The Roman *res publicae* (public things) has also been suggested as an explanation of state control or custodianship (Badenhorst & Mostert 13-4; Van den Berg “Ownership of minerals under the new legislative framework for mineral resources” 2009 *Stell LR* 139 153). Originally, *res publicae* also meant state property but at the time of Justinian the term denoted only such public things that are devoted to the common use of

all, such as public roads, public places and public rivers (see *Sohm's Institutes of Roman Law* (translated by Ledlie) (1907) 303). Although anyone may apply for rights in terms of the MPRDA (unless a prior lesser right has been linked to acquisition of a subsequent right), the Justinian notion of *res publicae* is perhaps not entirely suitable to modern day mining. This is because eventually a right would be granted by the state to an applicant to the exclusion of other persons' entitlement of "common use". Whilst a public road may be used by all, for instance, a mining right once granted would only be exercisable by the holder thereof. In *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd* (Unreported, OPD case no 3215/06, 3215/06 (2007-12-13) par 38) counsel argued that minerals are not *res publicae*. They argued, by drawing an analogy with fishing resources, that because the state is also the custodian of fishing resources it does not mean that the state owns the fishing resources. The court did not decide as to whether minerals *in situ* constitute *res publicae* or not (par 38). Counsel's argument can be viewed in light of the decision of the High Court of Australia in *Yanner v Eaton* ((1999) HCA 53). The court had to consider the meaning of section 7(1) of the Fauna Conservation Act 1974 (Qld) which provided that all fauna "is the property of the Crown and under the control of the Fauna Authority" (par 15). At issue was the nature of the interest in fauna that was vested in the Crown by this provision (par 20). The court decided that the "property" conferred on the Crown cannot accurately be described as "full, beneficial, or absolute ownership" (par 22; as to the reasoning of the court, see par 22-27). It held that the property conferred was "no more than the aggregate of the various rights of control by the Executive that the legislation created" (par 30). It should be noted that the interest conferred by the Fauna Act was still regarded as some form of property even though not absolute ownership. Property was perceived by the High Court as not being "a monolithic notion of standard content and invariable intensity" (par 19). By analogy, the absence of *dominium* of minerals *in situ* by the state in South Africa does not mean the absence of "property" therein (even in the sense of "property" for purposes of section 25(1) of the Constitution of the Republic of South Africa, 1996). The ambiguity of section 3(1) of the MPRDA could perhaps be dealt with by asking "In whom is property of minerals *in situ* vested in South Africa?" The answer is "the state". The next logical step is that the state has deprived prior holders of such property which triggers section 25(1) of the Constitution.

Denial of the true legal position by creating the smokescreen of the state being a custodian over the common heritage of the people, that is, mineral resources, has to some extent backfired in the political arena. It has perhaps led to the clamour for nationalisation of mines (see, for instance, "Towards the transfer of mineral wealth to the ownership of the people as a whole: a perspective on nationalisation of mines", ANCYL discussion document Aug 2010) to the detriment of the economy and foreign investment (for instance, the Moodys rating agency has recently downgraded South Africa due to the likely nationalisation of mines (Anon "Moody's Downgrades South Africa" (2011-11-08) *Silverstackers* <http://>

goldstocksforex.com/2011/11/09/moodys-downgrades-south-africa/ (accessed on 2011-12-09)). Ulterior motives, such as the economic failure of beneficiaries of broad-based black economic empowerment and their hope of being rescued by nationalisation were also raised as reasons for the call for nationalisation. By working with the notion of “publicly owned minerals” it would be more apparent that such minerals are already owned by the state. Nationalisation of the mines is, of course, another more complex issue, to be distinguished from publicly owned minerals. (A report by the ANC on the feasibility of the nationalisation of mines is due at the end of 2012 (Anon “S.Africa ANC report on mines nationalisation due end-2012” (2001-11-28) allAfrica.com <http://www.reuters.com/article/2011/08/31/australia-mining-south-africa-idUSL4E7JV02U20110831>) (accessed on 2012-09-12)).

The true legal position in South Africa, namely, publicly owned minerals should be acknowledged simply by amendment of section 3(1) of the MPRDA by stating that ownership of minerals (*in situ*) is vested in the state. Notions such as “heritage” and “custodian” remain vague and without much substance.

6 Conclusion

It was decided in *Cadia Holdings* that, upon the grant of freehold in land by the Crown (in NSW prior to 1884), ownership of copper was conveyed to the grantee of the freehold in land. Upon such conveyance the copper qualified as “privately owned minerals” in terms of the Mining Act 1992, and for a repayment to the owners of the land of seven-eighths of the royalties paid by the mineral lessee. Ownership of gold or silver was not conveyed by such a Crown grant but was vested in the state of NSW. This was due to the reception of the royal prerogative into Australian law. The royal prerogative originated in the famous English decision the *Case of Mines* of 1568, but was modified over time by British legislation. In modern day Australia the Crown in right of the state, by prerogative and retention of ownership of minerals upon grant of freehold or statutory reservation, owns nearly all minerals making *Cadia Holdings* an interesting example of an exception to publicly owned minerals.

Perhaps more importantly, the decision of the High Court in *Cadia Holdings* provides an historical account of the movement from private ownership of minerals to public ownership of minerals in Anglo-Australian law. The interaction between the rules of law laid down in 16th and 17th century England and the Mining Act 1992 in NSW is indicated in this decision. The imprint of the royal prerogative and the thinking behind it on Australian land is shown and placed in its proper historical context.

In finding answers to the questions which arose in South Africa as to the nature of the power of state control or custody of mineral resources created by the MPRDA, the notion of publicly owned minerals as developed over centuries in Anglo-Australian law may be of assistance. The state’s custody or control over mineral resources may be equated to and identified for what it is, namely, publicly owned minerals, or

alternatively state held “property”. Denial of the truth by relying on vague notions such as custodianship and common heritage will cause further legal confusion. The true legal position in South Africa, namely, publicly owned minerals should be acknowledged by amendment of section 3(1) of the MPRDA by stating that ownership of minerals is vested in the state. In essence, in English common law speak, the state holds the “despotic dominion” over mineral resources in South Africa. Acknowledging and identifying restrictions on the discretionary exercise of dominion over mineral resources by the state to the (indirect) benefit of all South Africans remains the crucial next step.

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