

Topic 1: Ownership

Introduction

Note: This subject is mining and energy, therefore we only focus on minerals which are then used for energy (therefore we won't focus on iron ore as it is used to make steel not energy). The main minerals used to create energy are coal, gas and oil.

Mining is a vitally important industry for Australia.

The most economically significant onshore (on the land) mining exports to date have been iron ore, gold, nickel and alumina (made from bauxite). Other expanding resources include coal seam gas, shale seam gas and petroleum (shale). It is important to note these expanding resources as coal are typically considered has having lower carbon emissions which makes them better for the environment, and there is also plenty of it meaning it is sustainable. Gas is somewhat controversial because of the pipelines that we need to set up to transport it, and to transport it externally we turn it into liquid form and send it overseas via ships as a Liquidized Natural Gas (LNG).

The main offshore (from the ocean) mining item is oil. Issues with mining oil is that it isn't necessarily sustainable as it is terrible for the environment and there have also been issues with oil spills that have had severe consequences.

Note: In this subject whilst there is one topic on offshore mining, most of the topics focus on onshore mining.

Mining is a component of energy law – which covers all forms of energy regulation and policy.

****Energy Law is defined as:** 'the allocation of rights and duties concerning the exploitation of all energy resources between individuals, between individuals and the government, between government and the states'. That is, it focuses on who has the right to mine and exploit energy resources – can we ruin the agriculture and mine the land, can we invade on other people's land to extract the minerals, can we do this from an environmental perspective etc.

Energy law includes finite and non-finite energy reserves. For example, oil, natural gas, coal, uranium (nuclear energy), solar energy, wind energy, wave energy, tidal energy, ocean thermal energy conversion, hydro-electricity biomass, hydrogen and geothermal energy.

***The production of energy naturally affects the environment and, in some cases, can have a dramatic impact.** Fossil fuel extraction affects the environment as demonstrated when the Hazelwood power station (in Gippsland Vic) was forced to close where there was a coal fire which created a safety hazard and ruined the environment as it created a thick fog.

The production of land-based energy will affect land ownership and this includes the ownership rights of indigenous holders. Furthermore, mining impacts on agriculture and other industries such as tourism etc.

***Therefore, we need to balance the need for energy and gas both in Australia and for us to export overseas, as well as the need to uphold societal and environmental aims.**

***This course examines the different regulatory frameworks for mining and energy law. It provides an understanding in key areas of legal regulation in sustainable energy technologies and new markets.**

Energy Resources

Energy law regulates the exploitation of energy resources.

The methods of turning energy resources into productive and profitable use differ greatly and the involvement of the law must be separately considered.

*Both domestic and international law is applicable. Furthermore, treaties such as the GATT Treaty (General Agreement on Tariffs and Trade) and UNCLOS (United Nations Law of the Sea) may be relevant. It is therefore important to remember that international laws may also apply.

Important regulatory areas include pipelines regulation (especially for domestic gas), the protection of confidentiality and rights to intellectual property, project security, the construction of petroleum contracts, project financing, native title rights, and the scope and sufficiency of environmental safeguards.

We touch on these issues in the different topics we cover.

Note: Onshore energy production isn't regulated federally. Ownership of the resource is state based (state owns the resources not the Federal government). As it is state based, all the regulation and legislation is state based.

Ownership of Minerals and Natural Resources

Renewable and Non-Renewable Resources include: petroleum, oil, gas, minerals.

Renewable energy resources include: solar, wind energy, hydro-electricity etc.

In Australia, we have a public resource framework. The key matter we cover on this is 'Public ownership of minerals and petroleum' at 1.3 of the textbook. It provides "Towards the end of the 19th century, the private ownership of minerals and petroleum was rejected in Australia in favour of state ownership." This means that each state passed legislation passing all minerals in land for future crown grants. Most of these were to act prospective, however some of them were retrospective which is quite significant. **As such, the position in Australia is that the state on behalf of the crown owns all minerals and hydrocarbons. This ownership comes from statute.

***Common Law Rule/Maxim: '*cuius est solum eius est usque ad coelum et ad inferos*' - the person who owns the land owns it from the heavens above to the centre of the earth below. This maxim is traceable back to 1285 English land law.

Criticism of the maxim comes from the English Court of Appeal in *Star Energy Onshore Ltd v Bocardo Ltd* [2010] which described the latin phrase as 'not part of English law.' (see also *Commissioner for Railways v Valuer General* [1974] at p351: its use, "*whether with reference to mineral rights, or trespass in the air space by projections, animals or wires, is imprecise and it is mainly serviceable as dispensing with analysis*").

**Aikens LJ in *Bocardo* concluded that the 'correct' common law position is that the registered freehold proprietor of the surface will also be the owner of strata beneath the surface including minerals unless there has been an express or implied alienation to another (quoting from *Mitchell v Mosley* [1914]).

- The land owner Bocardo sued Star Energy Onshore in trespass that had been drilling for petroleum under the plaintiff's land.
- The wellhead (the facility at the surface of a gas or oil well providing the structural and pressure interface) was on neighbouring land.
- The drilling pipelines descended to a depth of 2,800 feet and extended under the adjoining plaintiff's land.
- The company had a licence to extract petroleum from the site but did not have the plaintiff's permission to go onto their land (couldn't go on the adjoining land).
- The plaintiff claimed that there was trespass.

Held: The *cuius est solum maxim* should not be taken literally as it would lead to absurdities (i.e. literally ownership to the centre of the earth). *The plaintiff's surface ownership did, however, extend sufficiently downwards to prevent others from interfering with minerals under the surface. *This meant Star Energy was in trespass by laying the pipelines.

*The right of the licensee to extract (i.e. pursuant to the licence) was only over the authorised area and this did not include Bocardo's land. The right includes a right to use reasonable (ordinary and proper) means to extract the resources including boring (*Re an Arbitration between Lord Gerard and London and North Western Railway Company* [1895]).

In this case however, the trespass was purely technical – it resulted in no loss of enjoyment for the plaintiff as it didn't impact on his activities. As such, damages were assessed in the same manner as cases of compulsory land purchase – they were only £1,000 (only a nominal figure).

Note: Subsequently, in *Star Energy Weald Basin Ltd v Bocardo SA* [2011], the Supreme Court affirmed the Court of Appeal decision. Lord Hope indicated that the latin maxim retained some utility as a general guide to the common-law position regarding sub-surface ownership.

****Lord Hope stated:** **The better view, as the Court of Appeal recognised is to hold that the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of it by a conveyance, at common law, or by statute to someone else. That was the view which the Court of Appeal took in Mitchell v Mosely. Much has happened since then, as the use of technology has penetrated deeper and deeper into the earth's surface. But I see no reason why its view should not still be regarded as good law. *There must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. But the wells that are at issue in this case, extending from about 800 feet to 2,800 feet below the surface, are far from being so deep as to reach the point of absurdity. Indeed, the fact that the strata can be worked upon at those depths points to the opposite conclusion. I would hold therefore that Bocardo's title extends down to the strata through which the three wells and their casing and tubing pass.*

This case therefore is relevant for several reasons. ****Firstly** it qualifies the scope of the maxim in saying that we need to take a reasonable and realistic approach, saying that you don't own your land literally to the centre of the earth as this is absurd. In the case of *Bocardo* they demonstrated that this reasonableness extends to at least 2,800 to where the pipes lay for the purposes of drilling of the gas. ***Secondly**, we know that trespass is an available action under common law, however it wouldn't have been available had the resource been transferred by conveyance or statute. This demonstrates that trespass is not available in a public resource environment, meaning you cannot

sue the state as the state owns the resources. *Finally, this case demonstrates the impact of location where the damage occurs. In this case, the court focused only on the impact of the owners of property and awarded only nominal damages as they were hardly impacted. Importantly though, they failed to consider the impacts on society and the environment. Thus, this demonstrates the common approach of the court to only consider the impact on those impacted at that location rather than society and the environment more broadly.

Public Ownership Framework: State Owns the Minerals

Common Law Rule: The surface estate owner owns minerals

*This rule is abrogated (overridden) by statute. **The public ownership framework sets out that all minerals and resources in the ground are owned by the state.

**That is, all states and territories passed legislation reserving all minerals in land for future Crown grants. There is prospective operation in all states apart from South Australia, Northern Territory, and importantly Victoria where it is retrospective (*retrospective in Victoria) (*Land Act 1891* (Vic) s12; *Mines Act 1891 (No 2)* (Vic) s3).

**In Victoria, all minerals are vested in the Crown pursuant to section 9 of the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (*MRSD*).

Section 4 of the *MRSD* defines 'mineral' to include oil, shale, coal, alluvial minerals (e.g. titanium and zirconium) and natural hydro-carbons contained in oil shale or coal. This would include coal seam gas so the *MRSD* will cover the regulation of CSG in Vic.

*It is important to note that petroleum is expressly excluded from this definition of minerals under s4 of the *Mineral Resources (Sustainable Development) Act*. Petroleum is defined broadly to include any naturally occurring hydro-carbon whether in a liquid, gaseous or natural state.

*Petroleum on or below the land is vested in the Crown pursuant to s13 of the *Petroleum Act 1998* (PA)(Vic). *Ownership of petroleum remains with the Crown despite any Crown grant of land suggesting otherwise – means even if you have a freehold, the Crown still owns petroleum (s14).

Section 6(2) of the *Petroleum Act* expressly excludes naturally occurring hydro-carbons contained within a deposit of coal or oil shale. This would appear to exclude coal seam gas from the application of the *Petroleum Act*.

**Importantly, today there is a notion of land as three dimensional, and this has facilitated the legal acceptance of subdivisions which can be either horizontal, or vertical, or both (*Superannuation Fund v Clough Property Fairmont Pty Ltd* [2010]). Effectively, this means that whilst the common-law maxim was that you owned your land to the centre of the earth, this isn't necessarily the case. *This means that today, the ownership of land can be divided in different ways and that the common-law maxim is purely the starting point. **As such, the common-law rights of a land-owner extend into the strata but how far it extends is a matter of interpretation.

For example, you might have ownership of your land 280 feet down, but then there may be a big bit of shale (which is obliterated and turned into gas). This horizontal block of land may in fact be subdivided from your land and it may belong to the state. As such, we now view land as a 3D shape which may be split both horizontally and vertically.