HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

CADIA HOLDINGS PTY LTD & ANOR APPELLANTS

AND

STATE OF NEW SOUTH WALES & ANOR RESPONDENTS

Cadia Holdings Pty Ltd v State of New South Wales [2010] HCA 27
25 August 2010
S367/2009

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 1 July 2009 and in lieu thereof order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

A J L Bannon SC with R C Scruby for the appellants (instructed by Marque Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales with H R Sorensen for the respondents (instructed by Crown Solicitor (NSW))

CATCHWORDS

Cadia Holdings Pty Ltd v State of New South Wales

Mining – Ownership of minerals – Crown prerogative – Section 379 of the *Mining Act* 1992 (NSW) ("the Act") preserved any Crown prerogative in respect of mines of gold and silver – Ore mined on appellants' lands contained intermingled gold and copper, incapable of being separately mined – Royalty payable under the Act on gold and copper – Section 284 of the Act required Minister to pay seven-eighths of royalty paid on minerals not owned by or reserved to Crown to mineral owner – Whether intermingled copper owned by or reserved to Crown – Whether common law prerogative rights, as received in colony of New South Wales, included Crown ownership of intermingled copper – Whether *Royal Mines Act* 1688 (1 Wm & Mar c 30) excluded "mines of copper" from scope of prerogative recognised in *Case of Mines* (1568) 1 Plowden 310 [75 ER 472] – Whether mines on appellants' lands were "mines of copper".

Words and phrases – "mine of copper", "mine of gold", "prerogative", "privately owned mineral", "publicly owned mineral", "royal mines".

Royal Mines Act 1688 (1 Wm & Mar c 30), s 3.
Statute 5 Wm & Mar c 6 (1693).
Mining Act 1992 (NSW), ss 282, 284, 379.

FRENCH CJ.

Introduction

1 In 1568, an English court held that the Crown had the prerogative right to mines of gold and silver and other metals, such as copper, with which gold or silver in those mines was mixed[1]. In a context of constitutional upheaval, that right was modified, in favour of the owners of base-metal mines, by an Act of the English Parliament in 1688[2]. It was modified again in 1693[3]. Those events, which occurred more than three centuries ago, determine today the amount of royalties payable to the New South Wales Minister for Mineral Resources ("the Minister") in respect of copper mined by Cadia Holdings Pty Ltd ("Cadia") from land near Orange which is owned by it and Newcrest Operations Ltd ("NOL").

2 The entitlement of the Minister, debated in this appeal, to more than $8 million of royalties on copper mined from the land at Orange depends upon the interaction between the rules of law laid down in the 16th and 17th centuries and the *Mining Act* 1992 (NSW).

3 When the Crown's prerogative right to mines of gold and silver was judicially recognised in 1568 it was as an aspect of the Crown's fiscal prerogatives. It was justified by the Crown's need to obtain precious metal for the making of coins, a monopoly which was another aspect of the royal prerogative, and by the need to pay military defence forces. It was also justified by the need to avoid undue concentrations of private power within the realm. The 1688 Act protected private interests in copper mines which contained gold. It allowed their owners to retain the copper.

4 The prerogative right to gold and the 1688 and 1693 Acts formed part of the law of the colony of New South Wales, probably from the time of its establishment and at least from 1828, and affected the scope of Crown grants of land, including the land on which the copper and gold mining operations the subject of this appeal are conducted. The Minister says that he is entitled to retain royalties payable in respect of copper recovered from Cadia's mines on the basis that the quantity and value of gold in the ore body means that the mines cannot be regarded as mines of copper protected by the 1688 Act. The copper is said therefore to be a "publicly owned mineral" within the meaning of the *Mining Act* 1992.

---

1 *Case of Mines* (1568) 1 Plowden 310 [75 ER 472].

2 1 Wm & Mar c 30 ("the 1688 Act").

3 5 Wm & Mar c 6 ("the 1693 Act").

5 In my opinion, the 1688 Act 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. 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. The appeal against the decision of the Court of Appeal of the Supreme Court of New South Wales[4], which held the copper to be a "publicly owned mineral" and effectively subject to higher royalties, should be allowed.

Factual and procedural history

6 Cadia and NOL are both wholly owned subsidiaries of Newcrest Mining Ltd. Between them they hold 10 certificates of title to pieces of land near Orange, each subject to "reservations and conditions in the Crown grant(s)"[5]. Cadia holds four mining leases over the land pursuant to the *Mining Act* 1992[6]. Under the authority of those leases, it operates two mines from which it recovers ore in which copper and gold are so intermingled that they cannot be mined separately. The weight of copper extracted from the mines vastly exceeded the weight of gold extracted[7]. The value of gold recovered, however, substantially exceeded the value of copper recovered[8]. The land upon which Cadia operates the mines was originally the subject of nine Crown grants made between 12 April 1852 and 28 November 1881, only one of which expressly reserved minerals, in that case, "all gold and mines of gold"[9].

---

4 *New South Wales v Cadia Holdings Pty Ltd* (2009) 257 ALR 528.

5 The certificates were issued pursuant to the *Real Property Act* 1900 (NSW). The history of the title to the lands and its interaction with the Torrens system in New South Wales are set out in the joint judgment at [68]-[71].

6 *Mining Act* 1992, Pt 5. The leases permit the mining of copper and of gold on the land to which they relate.

7 Counsel for Cadia and NOL indicated that between 1998, when the mines commenced, and 31 December 2007 approximately 0.2 per cent of the metal extracted was gold and 99.8 per cent was copper.

8 The value of the gold recovered was $1.39 billion and that of the copper $907 million during the period from 1998 until 31 December 2007.

9 Three grants were made on 12 April 1852, two on 24 September 1856 and one on each of 22 October 1856, 19 May 1859, 10 November 1877 and 28 November 1881. The grant of 28 November 1881 contained the reservation.

7 The *Mining Act* 1992 renders the holder of a mining lease liable to pay royalty to the Minister on minerals recovered under the lease which are "publicly owned minerals"[10]. The term "minerals" includes copper and gold[11]. A "publicly owned mineral" is defined as "a mineral that is owned by, or reserved to, the Crown"[12]. If the minerals recovered are privately owned the lessee is nevertheless liable to pay royalty as if they were publicly owned[13]. In that case, however, the Minister must pay seven-eighths of the royalty to the owner of the minerals[14]. The Act does not, except as expressly provided, affect any prerogative of the Crown in respect of gold mines and silver mines[15]. The noun "mine" is broadly defined. It includes any "excavation" and also any "vein, lode, [or] reef … in, on or by means of which, any mining operation is carried on"[16].

8 Cadia paid royalties to the Minister for the period from 1 July 1998 to 31 March 2008. Cadia and NOL sought repayment of seven-eighths of the royalties paid on the copper mined during that time, claiming that it was a privately owned mineral. The State of New South Wales ("the State") and the Minister resisted the claim on the basis that the copper, although not reserved by the original Crown grants, was vested in the Crown pursuant to its prerogative right to mines of gold and was therefore a publicly owned mineral. That contention depended upon the proposition that, although the mines contained copper, they were properly characterised as mines of gold.

9 Cadia and NOL sued the State and the Minister in the Supreme Court of New South Wales for the amount of the repayment claimed[17]. For reasons

---

10 *Mining Act* 1992, s 282.

11 Mining Regulation 2003 (NSW), cl 5 and Sched 2.

12 *Mining Act* 1992, Dictionary. Pursuant to s 4, the definitions in the Dictionary are incorporated into the Act.

13 *Mining Act* 1992, s 284(1).

14 *Mining Act* 1992, s 284(2)(a).

15 *Mining Act* 1992, s 379.

16 *Mining Act* 1992, Dictionary. A substantially similar definition appeared in s 3 of the *Mining Act* 1906 (NSW).

17 A liquidated amount payable by statute is recoverable in an action for debt: *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 31 [38] per French CJ, 65-66 [140] per Gummow, Crennan and Bell JJ, 155 [452] per Heydon J; [2009] HCA 23; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 313 [65]

(Footnote continues on next page)

published on 30 May 2008 and by orders made on 16 June 2008, the primary judge (Hamilton J) declared that the copper in the Cadia mines[18] was a privately owned mineral. He ordered that the Minister pay to Cadia and NOL the sum of $8,030,949, being seven-eighths of the royalty payments made during the period 1 July 1998 to 31 March 2008 in respect of the copper extracted from the mines. He also awarded Cadia and NOL $2,859,725 by way of pre-judgment interest. The State and the Minister were ordered to pay the costs of Cadia and NOL.

10 The State and the Minister appealed, and on 1 July 2009 the Court of Appeal, by a majority decision (Basten JA and Handley AJA, Spigelman CJ dissenting), allowed the appeal and set aside the orders made by the primary judge. It declared that the copper was a publicly owned mineral for the purposes of the *Mining Act* 1992. The Court ordered Cadia and NOL to repay to the Minister all of the moneys paid to them in execution of the judgment of the primary judge together with interest.

11 Special leave to appeal to this Court from the judgment of the Court of Appeal was granted on 11 December 2009.

12 Cadia and NOL submitted in the Court of Appeal, and on appeal to this Court, that the copper in the Cadia mines was a "privately owned mineral". They put two alternative arguments in support of that submission:

1. The copper had been granted away at the time of the original Crown grants of the land.

2. Even if the copper were not granted away, the Crown's title to it was abrogated by the *Mining Act* 1992.

Before turning to those submissions and to the decisions of the courts below, it is necessary briefly to review the content and nature of the prerogative right to mines of gold and silver and its application in Australia and in New South Wales.

The prerogative right to mines of gold

13 The existence of the right in the Crown to mines of gold and silver was judicially recognised by all the justices of England and Barons of the Exchequer

---

per McHugh and Gummow JJ; [1998] HCA 20; *Shepherd v Hills* (1855) 11 Ex 55 at 67 per Parke B [156 ER 743 at 747].

18 The declaration referred to "copper contained in or beneath the Specified Land", the land being identified in an annexure to the orders.

in the *Case of Mines* in 1568[19]. The judges also held, by majority, that "all ores or mines of copper … containing or bearing gold or silver belong to the King"[20]. No rationale was set out in Plowden's report of the reasons for judgment[21]. However, his lengthy report of the argument disclosed that the Crown supported its assertion of the prerogative by reference to the excellence of the monarch's person, which "draws to it things of an excellent nature"[22], the need to finance defence forces[23] and the royal right to control coinage[24]. A further justification offered was the need to avoid undue concentration of financial power in the King's subjects[25]. Commentators after the *Case of Mines* focused on one or other of these justifications. Coke and Blackstone relied upon the prerogative power over coinage[26]. Chitty referred to the danger, absent the prerogative, of allowing a subject to become "too formidable"[27]. The rationales advanced by the Crown were relevant to the nature of government when the *Case of Mines* was decided.

---

19 (1568) 1 Plowden 310 [75 ER 472]. The right was classified in Hale's scheme of the prerogatives as *Census Regalis* ("of the King's Revenue"): Yale (ed), *Sir Matthew Hale's The Prerogatives of the King*, Selden Society, vol 92 (1976) at xvii-xix; see also Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 8 at 284-285.

20 (1568) 1 Plowden 310 at 336 [75 ER 472 at 511].

21 The report was based on an account given some time after the event by counsel who argued the case for the Crown: (1568) 1 Plowden 310 at 336 [75 ER 472 at 510]; see also Parmiter, *Edmund Plowden*, (1987) at 96-99.

22 (1568) 1 Plowden 310 at 315 [75 ER 472 at 480].

23 (1568) 1 Plowden 310 at 315 [75 ER 472 at 480].

24 (1568) 1 Plowden 310 at 315-316 [75 ER 472 at 480-481]. It was a prerogative incidental to sovereignty: "our Lord himself reckoned Caesar's coin amongst those things that were of Caesar's rights" (Yale (ed), *Sir Matthew Hale's The Prerogatives of the King*, Selden Society, vol 92 (1976) at 299).

25 (1568) 1 Plowden 310 at 316 [75 ER 472 at 481].

26 Coke, 2 *Inst* 577; Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 7 at 266-267.

27 Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820) at 145.

The exhaustion of their relevance in later times[28] did not affect the continuing existence of the prerogative as a settled part of the common law of England[29].

14 Although they recognised the existence of the prerogative, the judges in the *Case of Mines* rejected the contention that a royal mine was "an incident inseparable to the Crown" and could not be granted or severed from it even by express words[30]. Royal ores and royal mines could be conveyed but only by "patent precise words"[31]. It was this "rule" that was referred to in *Woolley v Attorney-General of Victoria* when Sir James Colvile, delivering the judgment of the Privy Council, said[32]:

> "Now whatever may be the reasons assigned in the case in *Plowden* for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that decision it has been settled law in *England* that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass."

The rule of construction enunciated by the Privy Council was applicable to legislation and to executive grants of land. It is an aspect of the more general proposition that the prerogative may only be abrogated or abridged "by express words, [or] by necessary implication"[33].

---

28 They were described by Chief Justice Field in the Supreme Court of California in 1861 as "without force at the present time": *Moore v Smaw* 17 Cal 199 at 220 (1861).

29 *Woolley v Ironstone Hill Lead Gold Mining Co* (1875) 1 VLR (E) 237 at 248 per Molesworth J; *Woolley v Attorney-General of Victoria* (1877) 2 App Cas 163 at 166.

30 (1568) 1 Plowden 310 at 335, 336 [75 ER 472 at 510, 511].

31 (1568) 1 Plowden 310 at 337 [75 ER 472 at 512].

32 (1877) 2 App Cas 163 at 166.

33 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508 at 576; see *Barton v The Commonwealth* (1974) 131 CLR 477 at 488 per Barwick CJ, 491 per McTiernan and Menzies JJ, 501 per Mason J, 508 per Jacobs J; [1974] HCA 20. See, in relation to prerogative rights of property, *Booth v Williams* (1909) 9 SR (NSW) 421 at 440 per Street J; *Ling v Commonwealth* (1994) 51 FCR 88 at 92; see also *Oates v Attorney-General (Cth)* (2001) 181 ALR 559 at 569 [40] per Lindgren J.

15 The rule of construction was applied by the Privy Council in *Attorney-General of British Columbia v Attorney-General of Canada* to reject the contention that the conveyance of "public lands" by the Province of British Columbia to the Dominion of Canada pursuant to Art 11 of the Articles of Union was sufficient to convey precious metals in the land[34]. It was also applied in *Esquimalt and Nanaimo Railway Co v Bainbridge* in relation to the inclusion in a grant of land of "all … mines, minerals, and substances whatsoever thereupon, therein, and thereunder"[35]. Their Lordships said[36]:

> "Not one of these expressions can be rightly described as precise, or, in other words, as necessarily including the precious metals."

16 At the time of the *Case of Mines*, it was an incident of the prerogative that the Crown had the right to enter upon land in which there were mines of gold and silver to extract the minerals. So much follows from the unanimous holding that the Crown's right to royal mines came "with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore"[37].

17 The Crown's prerogative right did not extend to base-metal mines[38]. But precious and base metals were generally found together[39]. The inconvenience that the *Case of Mines* visited upon those who had base-metal mines containing gold and/or silver was mitigated by a statute passed by the Convention Parliament in 1688 and by a clarifying statute in 1693[40]. By the 1688 Act, no mine of copper, tin, iron or lead would thereafter be taken to be a royal mine on

---

34 (1889) 14 App Cas 295 at 305-306.

35 [1896] AC 561 at 565.

36 [1896] AC 561 at 566.

37 (1568) 1 Plowden 310 at 336 [75 ER 472 at 510].

38 *Case of the Stannaries* (1606) 12 Co Rep 9 [77 ER 1292].

39 There were at the time no known mines of copper, tin, iron or lead that did not also contain gold and/or silver. There was doubt about what was to be characterised as a royal mine. On one view it depended upon the relative values of the base and precious metals: Heton, *Some Account of Mines, and the Advantages of Them to this Kingdom*, (1707) at 17-18, 19-20; Pettus, *Fodinae Regales*, (1670) at 9, 52-54.

40 1 Wm & Mar c 30; 5 Wm & Mar c 6. The precise dating of the 1688 Act is discussed in the joint judgment at [98].

the basis that gold or silver might be extracted from it[41]. Such gold and silver was to be sold to the Crown at the Tower of London[42]. The 1693 Act sought to avoid taxonomical difficulties arising from the 1688 Act[43] by allowing that the owner of a mine containing copper, tin, iron or lead could work the mine even though it might be claimed to be a royal mine[44]. The Crown could acquire the base metals from such mines at specified rates[45]. Blackstone declared the combined statutes to be "an extremely reasonable law"[46]. The private owner was not discouraged from working a mine for fear it might be claimed as a royal mine and the King retained his right to the gold and silver[47].

18 The dramatic historical context of legislative constraints on royal powers in which the 1688 and 1693 Acts found their place is discussed in the joint judgment[48]. As Heton, writing in 1707, put it[49]:

> "The Subjects of the Crown of *England* have in the last *Century* put restraints upon the *Prerogative* in many things, or rather *the Crown* has thought fit to make *Concessions* and *limit* it self in many particulars relating to the *Liberties* and *Properties* of the *Subject*; an instance whereof we have in the case of *Mines*, which *anciently* belonged to the *Crown*, whether they were of *Gold*, *Silver*, *Copper*, *Lead*, *Allum* &c. But *now* the *common Law* of *England* fixes and settles the Right and Title of all Mines of *Baser* Metals, as *Copper*, *Lead*, *Iron*, &c. in the *Owner* of the Soil,

---

41 1 Wm & Mar c 30, s 3.

42 1 Wm & Mar c 30, s 2.

43 The preamble to the 1693 Act referred to "great suits and troubles", a reference, inter alia, to litigation between Sir Carbery Price and the Society for Royal Mines (which held, by letters patent, the right to exploit royal mines) bearing upon the relative value of lead and silver in Sir Carbery's land: Heton, *Some Account of Mines, and the Advantages of Them to this Kingdom*, (1707) at 14, 27-29.

44 5 Wm & Mar c 6, s 1.

45 5 Wm & Mar c 6, s 2.

46 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 8 at 285.

47 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 8 at 285.

48 At [91]-[99].

49 Heton, *Some Account of Mines, and the Advantages of Them to this Kingdom*, (1707) at 25-26.

where they grow, and the *Crown* claims *only Gold* and *Silver-Mines*; those only at this time being properly called *Royal Mines*".

19 Although the 1688 Act affected the Crown's prerogative right in relation to base-metal mines containing gold, it did not affect the Crown's prerogative right to mines of gold and silver. The Court of Appeal of England and Wales, which so held in *Attorney-General v Morgan*[50], construed the Act as directed to mines of copper, tin, iron and lead. The Act did not confer on an owner a right to recover base metals from a gold or silver mine[51]. Kay LJ considered the hypothesis, not factually distant from the present case, in which the value of the gold and copper in a mine were nearly the same and in which it was commercially necessary to work the mine for both. In such a case, "it might be difficult … to say whether the mine should be called a copper mine or a gold mine"[52]. However, he thought that a court faced with that question would be inclined to give the owner of the mine the benefit of the doubt[53].

20 This Court was not referred to any case in which the possibility has been raised that a mine might be characterised as both a copper mine and a gold mine for the purposes of the 1688 Act. Kay LJ in *Morgan* evidently assumed that characterisation was binary. It is that question of construction of the 1688 Act, and its effect upon the scope of the prerogative rights, that determines the outcome of this appeal.

Reception of the prerogative as part of the common law of the colonies

21 The application of the prerogative in mines of gold and silver in British colonies depended upon the application to those colonies of the common law of which the prerogative was part[54]. 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. It was subject to modification by Imperial statutes or local statutes made under their authority[55]. The application of the prerogative in mines

---

50 [1891] 1 Ch 432.

51 [1891] 1 Ch 432 at 456 per Lindley LJ, 459 per Lopes LJ, 462 per Kay LJ; and see Bainbridge and Brown, *The Law of Mines and Minerals*, 5th ed (1900) at 115.

52 [1891] 1 Ch 432 at 463.

53 [1891] 1 Ch 432 at 463.

54 See, generally, McPherson, *The Reception of English Law Abroad*, (2007) at 78-80.

55 Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), Introduction §4 at 107; Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820)

(Footnote continues on next page)

of gold and silver to the Australian colonies was acknowledged in New South Wales in *R v Wilson*[56] and in Victoria in *Millar v Wildish*[57].

22 In *Woolley*, it was said by the Privy Council to have been "fairly conceded" that the rule of construction established in the *Case of Mines* had been introduced as part of the common law of England into the colony of Victoria[58]. In truth, the common law was introduced into the colony of New South Wales, of which Victoria was part until 1851, when it was separated from New South Wales pursuant to the *Australian Constitutions Act* 1850 (Imp)[59].

23 There was a question in the early years of the colony of New South Wales about the application of the common law and Imperial statutes to the colony[60]. In 1828, the *Australian Courts Act* 1828 (Imp)[61] was enacted. It provided, inter alia, that all laws and statutes in force in England on 25 July 1828 should be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land "so far as the same can be applied within the said Colonies"[62]. It was effective, if needed, to apply, to New South Wales and Tasmania, English laws and statutes applicable to the conditions of the colony at the time of its enactment[63].

---

at 32-33; *Cooper v Stuart* (1889) 14 App Cas 286 at 291-292; *R v Kidman* (1915) 20 CLR 425 at 435-436 per Griffith CJ; [1915] HCA 58.

56 (1874) 12 SCR (L) (NSW) 258 at 269-271 per Martin CJ, 280 per Hargrave J, 281 per Faucett J.

57 (1863) 2 W & W (E) 37 at 43 per Molesworth J.

58 (1877) 2 App Cas 163 at 166. In *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 App Cas 295 at 302-303, the Privy Council held the same rule of construction to have been introduced into the Province of British Columbia.

59 13 & 14 Vict c 59.

60 Windeyer, *Lectures on Legal History*, 2nd ed (rev) (1957) at 304. Sir Victor Windeyer suggested that the doubt may have had its foundation in the status of New South Wales as a penal colony and in the limits upon the power of its Governors.

61 9 Geo IV c 83.

62 9 Geo IV c 83, s 24.

63 *Quan Yick v Hinds* (1905) 2 CLR 345 at 356 per Griffith CJ, 367-368 per Barton J, 378 per O'Connor J; [1905] HCA 10; and see *Delohery v Permanent Trustee Co of*

(Footnote continues on next page)

24 The *Waste Lands Act* 1842 (Imp) prohibited alienation of Crown lands in the Australian colonies other than by sale conducted pursuant to regulations made under the Act[64]. The Governor of each of the colonies was authorised to convey Crown lands to purchasers[65]. The question for the Privy Council in *Woolley* was whether the *Waste Lands Act* had modified the common law rule of construction stated in the *Case of Mines* so that a grant of land from the Crown could pass the right to gold and silver under the land[66]. The answer to that question was in the negative[67]. The Act had to do with the mode of sale of Crown lands and the application of their proceeds. There was no reference in it to the rights of the Crown to precious metals under the soil[68]. Those rights could only be affected by express words or necessary implication. The grants made under the authority of the Act did not convey them.

25 From 1855 there was clear legislative power to grant away the Crown's prerogative rights over mines of gold and silver in New South Wales. By s 2 of the Imperial statute[69] authorising the *New Constitution Act* 1853 (NSW)[70], the management and control of waste lands of the Crown in the colony and the revenues arising from them, "including all Royalties, Mines, and Minerals", were vested in the legislature of the colony. The Privy Council in *Woolley* characterised that provision as a formal transfer by the Crown of "its rights in the gold and silver in the colony to be dealt with by the Colonial Legislature"[71].

26 In *Wade v New South Wales Rutile Mining Co Pty Ltd*[72], Windeyer J, outlining the history of mining law in New South Wales, viewed the decision in

---

NSW (1904) 1 CLR 283 at 313; [1904] HCA 10; *Mitchell v Scales* (1907) 5 CLR 405; [1907] HCA 66.

64 5 & 6 Vict c 36, s 2.

65 5 & 6 Vict c 36, s 5.

66 (1877) 2 App Cas 163 at 166-167.

67 (1877) 2 App Cas 163 at 167.

68 (1877) 2 App Cas 163 at 167.

69 *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54).

70 17 Vict No 41.

71 (1877) 2 App Cas 163 at 167.

72 (1969) 121 CLR 177; [1969] HCA 28.

Woolley as establishing beyond doubt that "[g]old in the Australian colonies belonged always to the Crown, whether it was in Crown land or in lands alienated by the Crown", that "[n]o express reservation was necessary to preserve the Crown's rights" and that "[t]hey depended upon prerogative rights recognized by the common law"[73].

27 The 1693 Act and all but s 3 of the 1688 Act were repealed by the *Imperial Acts Application Act* 1969 (NSW)[74]. It was, however, common ground before the primary judge and in the Court of Appeal that the 1688 and 1693 Acts were part of the law in force in the colony of New South Wales at the time of the Crown grants of the land now owned by Cadia and NOL.

28 Consideration of the subsistence of the prerogative in the settled colony of New South Wales requires acknowledgment of the effect of this Court's decision in *Mabo v Queensland [No 2]*[75] on the characterisation of the Crown's rights in respect of the lands of the colony at settlement. Prior to that decision, there was "formidable support" for the proposition that, in a British colony acquired by settlement, the beneficial ownership of the land of the colony vested in the Crown at the time of acquisition[76]. In *Mabo [No 2]*, Brennan J, with whom Mason CJ and McHugh J agreed[77], referred to the distinction drawn by Sir Kenneth Roberts-Wray[78], Sir John Salmond[79] and Professor O'Connell[80] between

---

73 (1969) 121 CLR 177 at 186.

74 The repeal was effected by s 8 and the preservation of s 3 of the 1688 Act by s 6. The *Imperial Acts Application Act* was enacted pursuant to the recommendations of the *Report of the Law Reform Commission on the Application of the Imperial Acts*, Report No 4, (1967). The Law Reform Commission referred briefly to s 3 of the 1688 Act as "a provision in favour of the subject" (at 60). The 1693 Act was said to have been superseded by s 70(12) of the *Mining Act* 1906 (as amended) and to be obsolete and unnecessary (at 101); see the reference to s 70(12) below at [40].

75 (1992) 175 CLR 1; [1992] HCA 23.

76 (1992) 175 CLR 1 at 27-28 per Brennan J, citing *Attorney-General v Brown* (1847) 1 Legge 312 at 316-319; *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71 per Windeyer J; [1959] HCA 63; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 194 per Windeyer J; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 438-439 per Stephen J; [1975] HCA 58; *Mabo v Queensland* (1988) 166 CLR 186 at 236 per Dawson J; [1988] HCA 69.

77 (1992) 175 CLR 1 at 15.

78 Roberts-Wray, *Commonwealth and Colonial Law*, (1966) at 625.

79 Salmond, *Jurisprudence*, 7th ed (1924) at 554.

acquisition of a "country" by the acquisition of sovereignty over it and acquisition of property rights in relation to the land itself[81]. In relation to colonies already inhabited, the acquisition of sovereignty by settlement gave rise to a radical title, "a postulate of the doctrine of tenure and a concomitant of sovereignty"[82]. In explaining the concept of radical title, Brennan J said[83]:

> "As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne."

Deane and Gaudron JJ and Toohey J arrived at similar conclusions[84].

29 The outcome of this case is not affected, however, if, at the time of the Crown grants, the Crown held no more than the radical title to the land granted. It is sufficient that the rule of construction accepted in the *Case of Mines* and applicable to the colony 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.

The effect of Federation upon the prerogative

30 The Constitutions of the former colonies, the powers of the former colonial Parliaments and the laws in force in the former colonies relating to matters within the powers of the Commonwealth Parliament were continued after Federation subject to the Constitution of the Commonwealth[85]. No distribution of prerogative powers and rights between the Commonwealth and the States is spelt out in the Constitution. Indeed the word "distribution" may mislead. Prerogative powers and rights enjoyed by the Crown in the colonies before Federation may be seen as informing, or forming part of, the content of the

---

80 O'Connell, *International Law*, 2nd ed (1970), vol 1 at 378.

81 (1992) 175 CLR 1 at 43-44.

82 (1992) 175 CLR 1 at 48.

83 (1992) 175 CLR 1 at 48.

84 (1992) 175 CLR 1 at 81 per Deane and Gaudron JJ, 180-182 per Toohey J. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 88-94 per Brennan CJ, 127-129 per Toohey J, 186-190 per Gummow J, 233-235 per Kirby J; [1996] HCA 40.

85 Constitution, ss 106-108.

executive powers of the Commonwealth and the States according to their proper functions[86].

31 In some cases, the location of particular prerogative powers and rights in, or as an incident of, the executive power of the Commonwealth or of the States is straightforward. As Professor Zines has observed, there is no difficulty in determining the repository of the prerogative power relating to a subject matter within the exclusive legislative competence of the Commonwealth or a State[87]:

> "Clearly only the Commonwealth can declare war, or enter into treaties. Similarly where a prerogative power, or a particular exercise of it, is concerned with a subject that is not within Commonwealth legislative power, it is exercisable only by the Governor of a State, such as the incorporation by royal charter of a school or the dissolution of State Parliament."

A prerogative power or right concerned with a subject within the area of concurrent legislative power of the Commonwealth and the States may become an element of concurrent power or rights in both polities. This was the case with the Crown's priority in respect of debts, held in *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* to be enjoyed concurrently by the Commonwealth and the States[88].

32 In *Farley*, Evatt J referred to the prerogative right in relation to royal metals[89], classified it as a proprietary right of the King and said[90]:

> "It seems plain that, as a general rule, those prerogatives which, prior to federation, were exercisable through the King's representative in the area of a colony, are, so far as they partake of the nature of proprietary rights, still exercisable by the executives of the various States and for the benefit thereof".

---

86 With respect to s 61 of the Commonwealth Constitution, see *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60-64 [126]-[133] per French CJ, 83-92 [214]-[245] per Gummow, Crennan and Bell JJ.

87 Zines, "Commentary", in Evatt, *The Royal Prerogative*, (1987) at C13.

88 (1940) 63 CLR 278; [1940] HCA 13.

89 (1940) 63 CLR 278 at 321.

90 (1940) 63 CLR 278 at 322.

33 The original justification for the prerogative in mines of gold and silver as ancillary to prerogative powers with respect to coinage and the raising of military forces might suggest, having regard to the exclusive nature of Commonwealth powers in these two areas, that it could logically have found its place as an element or incident of Commonwealth executive power[91]. On the other hand, the prerogative right appears to have subsisted at Federation independently of the original justifications proffered in argument in the *Case of Mines*. Moreover, the constitutional powers of the States to dispose of waste lands of the Crown and the proprietary character of the prerogative weigh in favour of the view that it remained with the States after Federation.

34 Consistently with longstanding assumptions about its retention by the States, Cadia and NOL submitted that "[f]ollowing federation, the prerogative right under consideration was held by the Crown in right of the State of New South Wales". Not surprisingly, the submission was not contradicted by the State. Having regard to the established understanding of the law in this respect, and the absence of any challenge to it, the appeal falls to be disposed of on the basis that at Federation the relevant prerogative right continued with the executive governments of the States[92]. As appears from what follows, this right was not affected in New South Wales in any way relevant to the outcome of this appeal by colonial and State legislation regulating mining.

Regulation of mining in New South Wales

35 Legislative regulation of mining in New South Wales did not commence until after gold was discovered there in significant quantities in 1849[93]. In 1840, the Secretary of State for the Colonies, Lord Russell, had issued a direction to the Governor of New South Wales that deeds of grant should convey to the purchaser everything above and below the surface[94]. The direction was given

---

91 Constitution, ss 51(xii) and 115; ss 51(vi) and 114. See *The Attorney-General for New South Wales v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195.

92 The reference to "the Crown in right of the State of New South Wales" in the submissions by Cadia and NOL directs attention to the observations by McHugh and Gummow JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 293; [1996] HCA 32 that the Constitution speaks of the Commonwealth or the States not the Crown in any one or other right.

93 Forbes and Lang, *Australian Mining and Petroleum Laws*, 2nd ed (1987) at 2.

94 Veatch, *Mining Laws of Australia and New Zealand*, United States Geological Survey, Bulletin 505 (1911) at 118, cited extensively in O'Hare, "A History of Mining Law in Australia", (1971) 45 *Australian Law Journal* 281. See also,

(Footnote continues on next page)

effect by regulations of 1 March 1843 issued under the *Waste Lands Act* 1842 and reserved only coal. The regulations provided that "precious minerals or metals may be also reserved if it be known that they greatly abound in any district but not otherwise"[95].

36 The first step in the direction of regulation was a proclamation by Governor Fitzroy on 22 May 1851 asserting, unnecessarily in the light of the *Case of Mines*, the right of the Crown to all gold found in New South Wales and prohibiting mining for gold in the colony without a licence[96]. The *Gold Fields Management Act* 1852 (NSW)[97] put the licence system on a statutory footing (s 4) and expressly preserved "prerogative rights and powers" (s 29). It was repealed by the *Gold Fields Management Act* 1857 (NSW)[98]. That Act followed Victoria's example in the wake of the Eureka rebellion and replaced the licence system with "the miner's right"[99]. The 1857 Act also preserved the prerogative rights[100]. Successive mining statutes[101] culminated in the *Mining Act* 1874

---

generally, Alford, *Mining Law of the British Empire*, (1906) at 208-224; Opas, "Lecture I – Mining Law in Australia: Its Development and Future", in University of Sydney, Committee for Post Graduate Studies in the Department of Law, *The Law of Mining in Australia*, (1970) at 1; Crommelin, "Mineral Exploration in Australia and Western Canada", (1974) 9 *University of British Columbia Law Review* 38 at 38-39; Forbes and Lang, *Australian Mining and Petroleum Laws*, 2nd ed (1987); *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 186-195 per Windeyer J.

95 Veatch, *Mining Laws of Australia and New Zealand*, United States Geological Survey, Bulletin 505 (1911) at 118.

96 Veatch, *Mining Laws of Australia and New Zealand*, United States Geological Survey, Bulletin 505 (1911) at 119-120; O'Hare, "A History of Mining Law in Australia", (1971) 45 *Australian Law Journal* 281 at 285; Crommelin, "Mineral Exploration in Australia and Western Canada", (1974) 9 *University of British Columbia Law Review* 38 at 38-39; Forbes and Lang, *Australian Mining and Petroleum Laws*, 2nd ed (1987) at 2.

97 16 Vict No 43.

98 20 Vict No 29.

99 *Gold Fields Management Act* 1857, ss 3 and 4; Forbes and Lang, *Australian Mining and Petroleum Laws*, 2nd ed (1987) at 2-4.

100 *Gold Fields Management Act* 1857, s 31.

101 *Gold Fields Act* 1861 (NSW) (25 Vict No 4); *Gold Fields Act* 1866 (NSW) (30 Vict No 8).

(NSW)[102], "introduced as a stabilizing conclusion to a period of prolific legislative exercise"[103].

37 Although New South Wales, of all the Australian colonies, had led the way in the development of the legislative regulation of mining, it was overtaken in the 1850s by "the much larger and more rapid developments in Victoria [which] soon made its mining law of more importance because [it was] based on greater experience"[104]. Victoria's *Mining Statute* 1865 (Vic)[105] was the model for the *Gold Fields Act* 1866 (NSW)[106].

38 There had been some provision for mining on private land in 1852[107], but this was not replicated in the *Gold Fields Management Act* 1857, s 9 of which prohibited mining for gold on any private land without the consent of the owner. No provision was made for mining on private land until the *Mining on Private Lands Act* 1894 (NSW)[108]. Unlike the previous mining statutes that Act did not contain a provision for the preservation of the prerogative but recited in its preamble that "it has been held from time immemorial that the royal metal gold does not pass from the Crown unless by express conveyance in the grant of such lands". The *Crown Lands Act* 1884 (NSW) provided that all lands granted under the authority of that Act "shall contain a reservation of all minerals in such land"[109].

39 Under s 8 of the *Mining on Private Lands Act*, mining wardens were empowered to grant the holder of a miner's right an authority to enter private

---

102 37 Vict No 13.

103 O'Hare, "A History of Mining Law in Australia", (1971) 45 *Australian Law Journal* 281 at 287.

104 Veatch, *Mining Laws of Australia and New Zealand*, United States Geological Survey, Bulletin 505 (1911) at 120.

105 29 Vict No 291.

106 30 Vict No 8; Forbes and Lang, *Australian Mining and Petroleum Laws*, 2nd ed (1987) at 4. Also influential were the decisions of Molesworth J, Chief Judge of the Court of Mines in Victoria from 1866 to its abolition in 1883: see the remarks of Griffith CJ in *Theodore v Theodore* (1897) 8 QLJ 76 at 78.

107 *Gold Fields Management Act* 1852, ss 22 and 30.

108 57 Vict No 32.

109 48 Vict No 18, s 7.

lands where minerals were reserved to the Crown and to search there for gold, silver, lead, tin and antimony. Windeyer J said of this statute[110]:

> "The earlier Acts had dealt only with mining on Crown lands. The new Act in one sense reflected the same basic policy; for it dealt only with mining for minerals belonging to the Crown. For these the miner must pay by royalties. The landowner might suffer in his enjoyment of his land; and for this he was to be compensated by the miner. But he was not deprived of any property which was his. All that could be taken from the land by the authorized miner were minerals which had belonged, not to the landowner, but to the Crown."

The authority which mining wardens were empowered to grant was expanded by amending legislation in 1896[111].

40 The *Mining Act* 1906 (NSW) was a consolidating statute. It maintained what Windeyer J described in *Wade* as "the basic principles of the two existing systems: one relating to mining on Crown land, the other to mining for Crown minerals on private land"[112]. His Honour said[113]:

> "The common law rights of a freeholder in minerals which were his – because they were not royal metals or not minerals which had been reserved by the Crown when it had granted the land in fee – were still not impaired or in any way interfered with."

Section 70(12) of the Act, inserted in 1952[114], authorised the mining of gold and other minerals reserved to the Crown if such minerals were associated with privately owned minerals and the value of the gold or other reserved minerals did not exceed one half of the total value of the minerals combined. The provision did not, however, affect the ownership of base metals in association with gold or silver, which is at issue in this appeal.

---

110 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 189.

111 *Mining Laws Amendment Act* 1896 (NSW) (60 Vict No 40), s 2; see *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 189-190 per Windeyer J.

112 (1969) 121 CLR 177 at 189.

113 (1969) 121 CLR 177 at 189.

114 *Mining (Amendment) Act* 1952 (NSW), s 5(i).

41 The *Mining Act* 1906 was replaced in respect of minerals other than coal or shale by the *Mining Act* 1973 (NSW). The prerogative right in respect of gold mines or silver mines was preserved except as expressly enacted[115]. It provided, inter alia, that a mining lease could be granted over land in respect of any minerals in the land whether or not reserved to or vested in the Crown[116]. The Act was not expressed to bind the Crown.

42 The *Mining Act* 1973 was repealed and replaced by the *Mining Act* 1992, the relevant provisions of which are referred to elsewhere in these reasons. The history of mining regulation in New South Wales did not affect the disposition of minerals in the land at Orange effected by the original Crown grants. That disposition, in respect of copper and gold in the land, was therefore determined by the scope of the prerogative. Decisions in the courts below turned upon their views of its scope.

The reasoning of the primary judge

43 The primary judge held that upon the true construction of the 1688 Act mines of gold and mines of copper should not be construed as mutually exclusive categories. On the facts of the case, he held that the Cadia mines should be categorised as mines of copper as well as mines of gold. On that basis, and by operation of the 1688 Act, at the time of the grants the copper under the land was owned by the grantee and not by the Crown.

The decision of the Court of Appeal

44 The appeal against the decision of the primary judge was allowed by the Court of Appeal by a majority comprising Basten JA and Handley AJA; Spigelman CJ dissented[117].

45 Basten JA held that nothing in the 1688 and 1693 Acts changed the principle that the royal mine to which the Crown was entitled was an indivisible ore body[118]. The case could be determined on the basis of three factual premises, namely, that the ore for the Cadia mines contained gold, which was a publicly owned mineral; the copper could not be recovered from the mines separately from the auriferous ore; and the Crown's ownership of the gold was not affected

---

115 *Mining Act* 1973, s 4.

116 *Mining Act* 1973, s 12(2).

117 (2009) 257 ALR 528.

118 (2009) 257 ALR 528 at 550 [120].

by the 17th-century statutes[119]. A major concern to which those statutes were addressed was the protection of the proprietor of lands from arbitrary intrusion by the Crown or its licensees if gold and silver were to be found in the refining of recovered ore[120]. His Honour would have also, if necessary, applied to the 17th-century statutes the principle that the prerogative is not to be displaced or restricted by statute in the absence of clear words[121].

46 Handley AJA, with whose reasons Basten JA agreed[122], held that the 17th-century statutes withdrew mines fairly able to be described as copper mines from the prerogative even though their ore contained commercially valuable quantities of gold and silver. Mines which could fairly be described as gold mines remained within the prerogative even though they may have contained small quantities of copper[123]. On the evidence and the findings made by the primary judge, the Cadia mines were not fairly able to be described as copper mines. They were gold-copper mines[124]. Restrictively interpreted, the 17th-century statutes withdrew copper mines from the prerogative but not gold-copper mines[125]. Since the Cadia mines could not be described as copper mines, they remained gold mines within the reduced range of the prerogative, and the Crown was entitled to their copper as well as to their gold[126].

47 Spigelman CJ took the view that the 1688 Act was of constitutional significance and was not to be interpreted in a narrow or technical way[127]. His Honour held that a mine containing a substantial amount of copper could answer the statutory description of a "mine of copper" under the 1688 Act as clarified by the 1693 Act. It could do so even if the quantity of gold was such that the mine was capable of "dual characterisation as a gold mine"[128]. On that basis, the Chief

---

119 (2009) 257 ALR 528 at 550 [121].

120 (2009) 257 ALR 528 at 551 [124].

121 (2009) 257 ALR 528 at 550 [122].

122 (2009) 257 ALR 528 at 551 [125].

123 (2009) 257 ALR 528 at 555 [144].

124 (2009) 257 ALR 528 at 555 [145].

125 (2009) 257 ALR 528 at 556 [154].

126 (2009) 257 ALR 528 at 556 [156].

127 (2009) 257 ALR 528 at 540 [58]-[60].

128 (2009) 257 ALR 528 at 544 [91].

Justice held that at the date of the grants of the land the Crown ownership of the gold was not affected but the ownership of the copper passed. It was a "privately owned mineral" within the meaning of the *Mining Act* 1992[129].

The effect of the *Mining Act* 1992 on the prerogative

48 The provisions of the *Mining Act* 1992 defining "publicly owned mineral", preserving the prerogative and imposing liabilities for the payment and repayment of royalties were outlined at the commencement of these reasons. The Act, unlike its predecessors, binds "the Crown in right of New South Wales"[130]. It imposes a broad prohibition on any "person" prospecting for or mining any publicly owned mineral on land otherwise than in accordance with an authority in respect of the relevant mineral and land[131]. The prohibition extends to prospecting or mining for a privately owned mineral on land over which some other person is the holder of an authority[132]. No authority will issue where there are, as in this case, subsisting mining leases on the land[133].

49 Cadia and NOL submitted that the prohibitions in the *Mining Act* 1992 against any "person" mining without the relevant authority apply to the State because the Act binds the Crown in right of the State. The State accepted that the Crown no longer has the right to enter land and mine for gold or silver in New South Wales. The application of the prohibitions in the *Mining Act* 1992 to the Crown is assisted by the definition of "person" in s 21 of the *Interpretation Act* 1987 (NSW), which includes "a body corporate or politic". There are no expressed limitations upon the binding effect of the *Mining Act* 1992 on the Crown which would render the word "person" inapplicable to it[134].

50 Contrary to the submissions made by Cadia and NOL, the proposition that the Crown has no right of entry for the purpose of exercising its prerogative right to mines of gold does not mean that the prerogative has been abrogated. The right of entry, while a logical incident of the prerogative right, is not a necessary condition of its existence. In *Hutchinson v Scott*, Griffith CJ, after referring to

---

129 (2009) 257 ALR 528 at 544 [92].

130 *Mining Act* 1992, s 3.

131 *Mining Act* 1992, s 5.

132 *Mining Act* 1992, s 6(1).

133 *Mining Act* 1992, ss 19(1)(b), 37(1)(b), 58(1)(b) and 183(1)(b).

134 cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 347-349 [20]-[24] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9.

the unanimous holding in the *Case of Mines* concerning the prerogative ownership of mines of gold and silver and the associated liberty to dig and carry away their ores, remarked[135]:

> "The first part of that passage has never been dissented from; as to the second part, 'with liberty to dig and carry away,' &c. I know of no instance recorded in which the Crown has exercised that right."

That approach is consistent with Windeyer J's observations concerning the *Mining Act* 1874 as an Act which did nothing to interfere with a freeholder's common law right in the land[136]:

> "What had been done was all done to authorize, encourage and regulate the recovery by private enterprise of the mineral wealth of the Crown from the Crown lands of the colony in return for royalties payable to the revenue."

51 Allowing the right of the Crown to mines of gold and silver has to be understood, insofar as it relates to unalienated Crown lands, in light of the concept of "radical title" considered in *Mabo [No 2]*. The existence of the right, whether it be characterised in terms of sovereign authority to deal with the mines or beneficial ownership of them, is unaffected by the Crown's inability to enter, without a relevant authority, the land in which they are located.

The construction of the 1688 Act

52 The primary contention by Cadia and NOL was that, at the time of the Crown grants of the land the subject of Cadia's mining leases, the prerogative right of the Crown did not extend to the copper in a mine containing both copper and gold in commercially significant quantities so intermingled that the one could not economically be extracted without the other. The proposition directs attention to the content of the prerogative declared in the *Case of Mines*, as modified by the 1688 Act, understood in the light of the 1693 Act (both of which Acts were applicable to the colony of New South Wales at the time of the grants).

53 Consistently with the approach adopted by Spigelman CJ in dissent in the Court of Appeal, Cadia and NOL submitted that the 1688 Act was passed as part of a broader constitutional settlement concerned with the proper source of Crown revenues. Some of the grievances of the Convention Parliament which related to that aspect of the settlement appear from the reference in the *Bill of Rights* to the

---

135 (1905) 3 CLR 359 at 367; [1905] HCA 59.

136 *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 187.

levying of money "by pretence of Prerogative" and "keeping a Standing Army … without Consent of Parlyament"[137]. The latter concern was connected to an important rationale, enunciated in the *Case of Mines*, for the existence of the prerogative. Cadia and NOL submitted that the 1688 Act, being constitutional in character, should be construed broadly, as Spigelman CJ construed it.

54 The application of the term "constitutional" to a statute which is not a written constitution must be approached with some care. The content of the term "constitutional" was not the subject of any significant elaboration in the submissions to this Court or to the Court of Appeal. Care is necessary not least because a State statute, or an Imperial statute in force in a State, might be an element of the Constitution of the State at the establishment of the Commonwealth for the purposes of s 106 of the Commonwealth Constitution. By way of example, Gummow J in *McGinty v Western Australia* referred to "Imperial, colonial and State legislation together comprising the written provisions of the Western Australian Constitution"[138].

55 The designation "constitutional" seems to have been used in a wide, generic sense by Spigelman CJ[139]. Indeed the classification of some statutes as "constitutional" in the United Kingdom has been used, albeit not without controversy[140], to attract to them the protection of a rule constraining their amendment by mere implication in a way which is analogous to the operation of the principle of legality in respect of common law rights and freedoms[141]. However, the classification proposed in the United Kingdom did not attract a rule for the construction of statutes so classified.

56 A written constitution or organic document attracts a rule of broad construction of the powers which it confers. The authorities cited by Spigelman CJ are to that effect[142]. This is in no small measure because a written

---

137 1 Wm & Mar Sess 2 c 2.

138 (1996) 186 CLR 140 at 259; [1996] HCA 48.

139 (2009) 257 ALR 528 at 540 [58].

140 See *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 at 419-420 [62] per Lord Rodger of Earlsferry; "Editorial – Constitutional Statutes", (2007) 28(2) *Statute Law Review* iii; Marshall, "Metric Measures and Martyrdom by Henry VIII Clause", (2002) 118 *Law Quarterly Review* 493 at 495-496, 501.

141 *Thoburn v Sunderland City Council* [2003] QB 151 at 185-187 [60]-[64] per Laws LJ; Greenberg (ed), *Craies on Legislation*, 9th ed (2008) at 581-582.

142 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J; [1908] HCA 95; *Edwards v Attorney-General for*

(Footnote continues on next page)

constitution is "*a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be*"[143]. The application to a statute of a broad construction will depend upon the characteristics of the statute rather than its designation as "constitutional". Indeed, in a country with a written constitution the utility of such a designation, which is not amenable to precise definition, may be debatable. The primary question is whether the content and purpose of the statute warrant attribution of a legislative intent in favour of a broad construction. The answer to that question in relation to the 1688 Act is in the affirmative.

57 The 1688 Act, having regard to its purposes and its historical context, required a broad construction. Although it is not necessary to say so in order to reach that conclusion, the statute, in the context of a country without a written constitution, was properly characterised as "constitutional". The common law of the prerogative right to mines of gold and silver, declared in the *Case of Mines*, allocated to the Crown, without parliamentary sanction, the right to important natural resources including base-metal mines containing gold or silver. Associated with that substantive right, the judges declared a common law rule of interpretation which effectively imposed upon the Parliament a formal requirement of "patent precise words" (and possibly necessary implication[144]) if Parliament wished to abrogate or qualify the prerogative in any way. The change brought about by the 1688 Act altered, in favour of private interests, the balance of private and public rights in relation to base metals associated with gold and silver. The Act was expressly directed to the scope of the prerogative right and so provided the "patent precise words" required by the common law rule of interpretation stated in the *Case of Mines*.

58 There can be no doubt about the large and beneficial purpose of the 1688 and 1693 Acts. The purpose of the 1693 Act, as expressed in its preamble, was to "prevent the discourageing" of mining for copper, tin and lead, which had resulted from the *Case of Mines*. It is not surprising in that context that Kay LJ in *Morgan* suggested that, where there was difficulty in determining whether a mine should be called a copper mine or a gold mine, "any Court before which the question came would be inclined to give the mine-owner the benefit of such a doubt"[145]. A binary answer to the characterisation question is not necessary in

---

Canada [1930] AC 124 at 136; *British Coal Corporation v The King* [1935] AC 500 at 518-519.

143 *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 612 per Higgins J (emphasis in original); [1908] HCA 94.

144 *Woolley v Attorney-General of Victoria* (1877) 2 App Cas 163 at 168.

145 [1891] 1 Ch 432 at 463.

order to meet the purpose of the Acts. If a mine be properly characterised as a mine of copper for the purposes of the 1688 Act and the determination of the ownership of the copper, its dual characterisation as a mine of gold allows the 1688 Act to apply without affecting the prerogative rights of the Crown to the gold.

59 Spigelman CJ in his dissent relied ultimately upon the proposition that a mine containing a substantial amount of copper answers the statutory description even if the quantity of gold in the mine is such that it is capable of a dual characterisation as a gold mine. In this, he and the primary judge were correct. The effect of that conclusion is that the 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* 1992.

Conclusion

60 For the preceding reasons, the appeal should be allowed. I agree with the orders proposed in the joint judgment.

61 GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. The *Mining Act* 1992 (NSW) ("the 1992 Act") is expressed by s 3 to bind "the Crown in right of New South Wales". Part 14 (ss 282-292) imposes upon the holders of mining leases granted under Pt 5 of that statute liability to pay royalty to the second respondent ("the Minister"). The provisions dealing with the payment of royalty distinguish between recovery of a "publicly owned mineral" and recovery of a "privately owned mineral". A "publicly owned mineral" means "a mineral that is owned by, or reserved to, the Crown" whilst privately owned minerals are those "not owned by, or reserved to, the Crown"[146].

62 The term "mineral" relevantly means those substances so prescribed by the regulations made under the 1992 Act and these include copper and gold[147].

63 The expression "the Crown" is a reference to "the Crown in right of New South Wales"[148], and that in turn is to be read as identifying the body politic created by the Constitution as the State of New South Wales ("the State")[149]. This is the first respondent.

64 The genesis of the present litigation lies in s 284 of the 1992 Act. This states:

> "**Liability to pay royalty**
>
> (1) The holder of a mining lease is liable to pay royalty to the Minister on privately owned minerals recovered from the land as if those minerals were publicly owned minerals.
>
> (2) If royalty (including any interest on royalty) is paid to or recovered by the Minister in respect of a privately owned mineral, the Minister is to pay:
>
> (a) seven-eighths of the amount so paid or recovered to the owner of the mineral, and

---

146 *Mining Act* 1992 (NSW), s 4, Dictionary.

147 Mining Regulation 2003 (NSW), cl 5, Sched 2.

148 *Interpretation Act* 1987 (NSW), s 13.

149 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363; [1948] HCA 7; *Sue v Hill* (1999) 199 CLR 462 at 498 [84], 501-502 [90]-[91]; [1999] HCA 30.

(b) one-eighth of the amount so paid or recovered to the Treasurer for payment into the Consolidated Fund."

65 The first appellant ("Cadia") is the holder of mining leases and lawfully mines copper and gold at the Cadia Valley Mines near Orange on lands owned by it and by the second appellant ("Newcrest"). Royalty must be paid by Cadia to the Minister, and there is no dispute respecting the royalty payable in respect of the gold as a publicly owned mineral. However, if, as the appellants contend, the copper is a privately owned mineral, being owned by or reserved to either or both of them, the Minister is obliged by s 284(2)(a) of the 1992 Act to pay to the relevant appellant seven-eighths of the royalty received. An action in debt lies against the Minister to recover the amount in question[150]. Cadia and Newcrest contend for and the State and the Minister deny the existence of an obligation under s 284(2)(a) to repay royalty in respect of the copper as a privately owned mineral.

The litigation

66 By suit in the Equity Division of the Supreme Court of New South Wales[151], Cadia and Newcrest recovered, pursuant to par (a) of s 284(2) of the 1992 Act, $8,030,949 (plus interest) in respect of royalty payments made during the period 1 July 1998 to 31 March 2008 in respect of copper recovered. The primary judge (Hamilton J) also declared that copper contained in or beneath the lands of Cadia and Newcrest was a privately owned mineral within the meaning of the 1992 Act. An appeal by the State and the Minister to the Court of Appeal (Basten JA and Handley AJA; Spigelman CJ dissenting) was successful[152].

67 For the reasons which follow, the decision of the primary judge was correct and, accordingly, the appeal to this Court by Cadia and Newcrest should succeed.

The title to the lands

68 It is convenient first to identify the history of the title to the lands on which Cadia conducts its operations. The lands are held by the appellants under

---

150 See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 31 [38], 65-66 [140], 155 [452]; [2009] HCA 23.

151 *Cadia Holdings Pty Ltd v State of New South Wales* [2008] NSWSC 528.

152 *New South Wales v Cadia Holdings Pty Ltd* (2009) 257 ALR 528.

the provisions of the *Real Property Act* 1900 (NSW) ("the 1900 Act"). However, the titles may be traced to Crown grants, all but two of which were made between 1852 and 1859. This was before the introduction of the Torrens system in New South Wales by the *Real Property Act* 1862 (NSW) ("the 1862 Act"). The last two grants were made in 1877 and 1881. The evidence includes details of a primary application made in 1868 to bring under the Torrens system the lands the subject of the earlier grants. The 1862 Act provided for such applications (s 13) and grants in fee simple made after the commencement of the 1862 Act were subjected to its provisions (s 12).

69 Only the 1881 grant appears to have contained an express reservation to the Crown of minerals, in this case of gold and mines of gold. This accords with the statement by Griffith CJ in *Colon Peaks Mining Co v Wollondilly Shire Council*[153]:

> "Before the *Crown Lands Act* 1884 [(NSW)] Crown grants of land in New South Wales did not usually contain any express reservation of minerals. Royal mines were, however, held to be reserved or excepted by the common law. By sec. 7 of that Act it was provided that all grants of land issued under the authority of the Act should contain a reservation of all minerals in the land. No provision for working minerals so reserved was made until 1894, when the *Mining on Private Lands Act* [1894 (NSW) ('the 1894 Act')] was passed. The scheme of that Act (now replaced by Part IV of the *Mining Act* 1906 [(NSW) ('the 1906 Act')] without material alteration) was that all private lands, *i.e.*, lands which the Crown had granted or contracted to grant in fee, should be open for mining for silver and gold, and that private lands containing a reservation of all minerals should be open for mining for all minerals."

70 Thereafter, in *Wade v New South Wales Rutile Mining Co Pty Ltd*[154], Windeyer J explained:

> "The mining law of Australia begins with the gold rushes and the roaring days of last century. Gold, the 'royal metal', has always had a special position in law: a position which silver is perhaps entitled to share. Gold in the Australian colonies belonged always to the Crown, whether it was in Crown land or in lands alienated by the Crown. No

---

153 (1911) 13 CLR 438 at 443-444; [1911] HCA 70.

154 (1969) 121 CLR 177 at 186; [1969] HCA 28.

express reservation was necessary to preserve the Crown's rights. They depended upon prerogative rights recognized by the common law. Thus gold did not pass by a Crown grant of the land in which it lies. If this were once debatable, all doubts were dispelled, for Victoria, by the decision of the Privy Council in *Woolley v Attorney-General (Vict)*[155]. And in New South Wales the position was expressly recognized by the legislature when in the Preamble to the [1894 Act] it was recited that:

> '... certain other lands have from time to time been alienated without express reservation of any minerals which might afterwards be found therein, but having regard to the well established laws of England whereby it has been held from time immemorial that the royal metal gold does not pass from the Crown unless by express conveyance in the grant of such lands. ...'"

71 The 1862 Act defined "land" for the purposes of the new Torrens system as including all "minerals ... unless any such are specially excepted" (s 3). The definition reappears in the 1900 Act (s 3(1)(a)). The phrase "specially excepted" appears apt to have included the particular operation of the common law with respect to 19th century Crown grants later described by Griffith CJ in *Colon Peaks Mining Co* and by Windeyer J in *Wade*.

Matters of history

72 The dispute between the parties does not turn upon these matters of Australian legislative history. However, the parties are at odds regarding the extent of the prerogative rights recognised by the common law in England, and then in Australia, and now reflected in the term "publicly owned mineral" in the royalty provisions in the 1992 Act, as a mineral owned by or reserved to the Crown in right of the State.

73 The respondents point to s 379 of the 1992 Act. This states:

> "Except as expressly provided by this Act, this Act does not affect any prerogative of the Crown in respect of gold mines and silver mines."

There is no such relevant exception in the 1992 Act.

---

155 (1877) 2 App Cas 163.

74 Section 379 reproduces the substance of s 8 of the 1906 Act. The 1992 Act is cast in a form which recognises the distinction drawn by Windeyer J when considering s 8 of the 1906 Act in *Wade*[156]. His Honour said:

> '"Mine' is an ambiguous word. The Act defines it by stating that it 'includes any place, pit, shaft, drive, level, or other excavation, drift, gutter, lead, vein, lode, or reef, whereon, wherein, or whereby any operation for or in connection with mining is carried on'. This predicates a working for the extraction of minerals from the earth. In this sense 'mining' connotes operations for getting at and getting out minerals. But in old instruments, including some of the statutes I have mentioned, a mine often means an unopened and unworked seam, lode, or deposit of metallic ore in the ground: see per Lord Watson in *Lord Provost and Magistrates of Glasgow v Farie*[157]; also *Attorney-General v Brown*[158]. It is in this sense that statutes which I have mentioned spoke, and the present Act in s 8 speaks, of the royal prerogative in respect of mines of gold and silver."

75 Blackstone[159] described the prerogative as part of the common law of England but, given its nature, as being out of the ordinary course of the common law. The "prerogative" in the context of the present case concerns the enjoyment by the executive government of preferences, immunities and exceptions peculiar to it and denied to the citizen[160] or, more specifically, of an exceptional right which partakes of the nature of property[161].

76 Determination of issues respecting the scope of the prerogative identified in s 379 of the 1992 Act calls for consideration of some general facts of the history of English constitutional development in the 16th and 17th centuries. The

---

156 (1969) 121 CLR 177 at 194-195.

157 (1888) 13 App Cas 657 at 676, 677.

158 (1847) 1 Legge 312 at 322.

159 *Commentaries on the Laws of England*, (1765), bk 1, c 7 at 232.

160 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 83 [214].

161 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 320-321; [1940] HCA 13; *The Attorney-General for New South Wales v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195 at 246-247.

expression "general facts" is used here in the sense given it by Dixon J in *Australian Communist Party v The Commonwealth*[162], namely what may be ascertained from the work of "serious historians". The history bears also upon the proper construction of relevant 17th century legislation by assisting an understanding of the mischief to which the legislation was directed.

The issue

77 The issue springs from the important finding by the primary judge that in the ore mined by Cadia, gold and copper are intermingled. Neither can be mined separately and they are separated only during the processing of the ore. Mining operations could not be conducted profitably to recover one mineral but not the other. However, the value of the gold extracted exceeds that of the copper by more than fifty per cent. Cadia is one of Australia's largest gold producers.

78 The 1992 Act provides that upon severance from the land of the material from which it is recovered, any lawfully mined mineral becomes the property of the miner (s 11(1)). It is common ground between the parties that before severance of the ore from the appellants' lands the gold therein is owned by or reserved to the State, and is a "publicly owned mineral" which attracts a liability to pay royalty pursuant to s 282, which, unlike s 284(2)(a), does not require the Minister to pay any portion of that royalty to the owner of the mineral.

79 The dispute turns on the characterisation of the intermingled copper. The State and the Minister persuaded the majority in the Court of Appeal that the copper also is a publicly owned mineral. Although not reserved to the State by the terms of any relevant land grant, the copper was held to be owned by the State by reason of the operation in New South Wales of the prerogative recognised by decision in 1568 and not abrogated or abridged by any post-1568 English or United Kingdom statute enacted before the common law was received in the colony of New South Wales[163], nor by any subsequent New South Wales legislation.

---

162 (1951) 83 CLR 1 at 196; [1951] HCA 5. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 512 [614]; [2007] HCA 33; Selway, "The Use of History and Other Facts in the Reasoning of the High Court of Australia", (2001) 20 *University of Tasmania Law Review* 129 at 140-141.

163 Whether this be taken to have been on settlement or only on 25 July 1828 in accordance with s 24 of the *Australian Courts Act* 1828 (Imp) (9 Geo IV c 83). The former is the better view: Castles, *An Introduction to Australian Legal*

(Footnote continues on next page)

The *Case of Mines*[164]

80 The respondents submit that the phrase in s 379 of the 1992 Act "any prerogative of the Crown in respect of gold mines and silver mines" identifies the prerogative rights established in Tudor England by the *Case of Mines*. The effect of that decision was described by the primary judge in the present case in the following terms[165], which we adopt:

> "[T]he royal prerogative in respect of gold mines has two aspects. The first is that gold belongs to the Crown and that a grant of land containing gold will not convey the gold to the subject unless there is a specific grant or conveyance of the gold. The second aspect is that the Crown has the right to enter the land of the subject to dig and carry away the ore of gold. If the ore also contains copper and the Crown cannot extract the gold from the ore 'without melting the copper', then the copper also is the property of the Crown."

81 Gold had not been discovered and mined in significant quantities in 16th century England, although the country had significant deposits of ores of the baser metals of iron, zinc, copper, lead and tin[166]. Writing in 1841, Bainbridge said it was "very questionable whether gold or silver have ever been found in a pure state in England"[167].

82 One significant result of the *Case of Mines* decision in 1568 was that in England, in contrast to the pretensions of some of the European monarchies to all mines[168], the rights of the Crown were pared down to the scarce royal metals.

History, (1971) at 135-142. See also McPherson, *The Reception of English Law Abroad*, (2007) at 364-365.

164 (1568) 1 Plowden 310 [75 ER 472].

165 [2008] NSWSC 528 at [17].

166 Heaton, *Economic History of Europe*, rev ed (1948) at 316; Lewis, *The Stannaries*, (1908) at 76.

167 *A Practical Treatise on the Law of Mines and Minerals*, (1841) at 42-43.

168 Lewis, *The Stannaries*, (1908) at 69-74; Holdsworth, *A History of English Law*, 7th ed (1956), vol 1 at 151-152.

This made all the more important to the Crown the qualification in the *Case of Mines* which brought within its rights ore containing gold with an admixture of copper.

Gold in New South Wales and Victoria

83 Shortly after Bainbridge wrote, there came the discoveries in the colonies of New South Wales and Victoria. These disclosed a very different state of affairs from that which engaged the prerogative respecting gold in England.

84 Professor Jenks later wrote[169] that the "squatting question" had demonstrated that, beyond a certain point, the theory of Crown occupation of waste lands was apt to break down, and that advisers of Governor Fitzroy suggested a compromise, which was adopted in May 1851. Jenks continued:

> "Falling back on a still older feudal doctrine, they asserted the indefeasible right of the Crown to all gold found *either on private or public lands*, but recommended that licenses to dig should be granted on easy terms, which would have the double effect of providing a revenue and of preserving an acknowledgement of the Crown's title." (emphasis in original)

The upshot of the turmoil, particularly in Victoria, in administration of the licensing system that ensued in the years that followed was the replacement of the substantial miner's licence fees by the "miner's right" open to all upon payment of a small fee[170], and the imposition in New South Wales and Victoria of an export duty on gold in its natural state[171]. The 1894 Act, to which reference has been made earlier in these reasons, implemented a policy with respect to private lands whereby authority to enter might be granted and mining processes conducted by lessees[172].

---

169 *The History of the Australasian Colonies*, (1895) at 210.

170 O'Hare, "A History of Mining Law in Australia", (1971) 45 *Australian Law Journal* 281 at 286-287; Crommelin, "Mineral Exploration in Australia and Western Canada", (1974) 9 *University of British Columbia Law Review* 38 at 38-41.

171 This was done in Victoria by Act No 27 of 1855 of the Lieutenant Governor and Legislative Council (18 Vict No 27), and in New South Wales by Act No 17 of 1857 (20 Vict No 17).

172 O'Hare, "A History of Mining Law in Australia", (1971) 45 *Australian Law Journal* 281 at 288-290.

The prerogative in Australian conditions

85 Justice Field, when Chief Justice of California during the gold-rush period, wrote in *Moore v Smaw*[173]:

> "The right of the Crown, whatever may be the reasons assigned for its maintenance, had in truth its origin in an arbitrary exercise of power by the King, which was at the time justified on the ground that the mines were required as a source of revenue."

He also observed that in modern times it is taxation which furnishes the means for the expenses of government, and while the right of coinage does pertain to sovereignty, the exercise of the right does not require ownership of the precious metals by a State. In any event, the right of coinage in the United States was that of the federal government. On the establishment of federation in Australia, while s 91 of the Constitution permitted States to grant aid to and bounty on mining for gold, silver and other metals, s 115 forbad the States to coin money. Further, insofar as the reasoning in the *Case of Mines* supported the prerogative of ownership as necessary to provide for national defence, s 114 of the Constitution forbids a State, without the consent of the federal Parliament, to raise or maintain any naval or military force.

86 The executive power of the Commonwealth of which s 61 of the Constitution speaks enables the Commonwealth to undertake executive action appropriate to its position under the Constitution and to that end includes the prerogative powers accorded the Crown by the common law[174]. Dixon J spoke of common law prerogatives of the Crown in England, specifically the prerogative respecting Crown debts, as having been "carried into the executive authority of the Commonwealth"[175].

87 However, the creation of the federation presented issues still not fully resolved of the allocation between the Commonwealth and States of prerogatives which pre-federation had been divided between the Imperial and colonial

---

173 17 Cal 199 at 222 (1861); 79 Am Dec 123 at 135.

174 *Barton v The Commonwealth* (1974) 131 CLR 477 at 498; [1974] HCA 20; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 61-62 [130], 83 [214].

175 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 304.

governments, and of their adaptation to the division of executive authority in the federal system established by the Constitution. If regard be had to the treatment by Justice Field of the rationale for the *Case of Mines*, it might well have been thought that if the prerogative respecting royal metals survives at all today under the common law of Australia it accrues to the executive authority of the Commonwealth.

88 The reasons of Isaacs J in *The Commonwealth v New South Wales*[176] suggest that he was alive to these questions but did not need to pursue them. That case assumed the vesting at federation of royal metals in the States but decided that (i) the vesting in the Commonwealth of State property by operation of s 85(i) of the Constitution carried with it any royal metals, and (ii) subsequent acquisitions under federal land acquisition legislation also included any royal metals[177]. Thereafter, Evatt J said that "as a general rule" prerogatives which partook of the nature of proprietary rights and which before federation had been exercisable by the executive governments of the colonies were exercisable by the executives of the various States[178].

89 The present litigation was conducted on the same assumption, identifying the State as the repository of the relevant prerogative; the dispute was as to the scope of the prerogative with respect to the copper mined by Cadia. Accordingly, it is inappropriate to consider the matter further here.

90 The area of dispute in submissions to this Court centred upon what the appellants contended (and Hamilton J had decided in their favour) was the removal in England of the prerogative with respect to gold and copper admixture by statute in the immediate wake of the Revolution of 1688, namely by s 3 of the *Royal Mines Act* 1688 ("the Royal Mines Act")[179].

---

176 (1923) 33 CLR 1 at 46-47; [1923] HCA 34.

177 Cf *Attorney-General of British Columbia v Attorney-General of Canada* (1889) 14 App Cas 295.

178 *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278 at 322.

179 1 Wm & Mar c 30 (*Statutes of the Realm*). This is sometimes referred to as s 4; see, for example, *Statutes at Large*, Ruffhead ed, vol 3.

The English legislation

91 The *Case of Mines* had been decided in 1568 at a time when a strong and vigilant, and relatively well resourced, executive government was prepared to meet circumstances of prolonged national emergency. It may be said that the prerogatives of the Tudor monarchy were at their zenith[180]. But by the end of the 16th century friction between the executive and the House of Commons was developing towards the breakdown of the next century.

92 As Spigelman CJ emphasised in his dissenting reasons in the Court of Appeal, in the 17th century no issue was more significant than the sources of wealth and revenue available to the Crown without parliamentary appropriation[181] and, given that context, the Royal Mines Act was legislation of constitutional significance and is not to be narrowly construed in the manner advocated by the respondents[182].

93 It is thus appropriate here to note the course of significant legislative curtailment of prerogative fiscal powers in the years before 1688. This curtailment perhaps began with the *Statute of Monopolies* of 1623[183], which effectively put an end to the raising of Crown revenue from franchising by letters patent the manufacture, distribution or sale of a wide range of articles of commerce. The laws which followed dealt with such matters of fiscal significance as the levying of a substantial fine in place of acceptance of a compulsory knighthood[184], and the right of "purveyance and pre-emption", being the buying up by the Crown of provisions at a valuation without consent of the owner[185]. The mischief with which legislation such as this dealt was of a particular intensity because it reflected the struggle between the executive and the House of Commons, which came to be seen as having reached its climax with the flight of James II to France late in 1688 and the consequent legislative activity of the Convention Parliament.

---

180 Bainbridge, *A Practical Treatise on the Law of Mines and Minerals*, (1841) at 42.

181 (2009) 257 ALR 528 at 539.

182 (2009) 257 ALR 528 at 540.

183 21 Jac I c 3, ss 1, 6.

184 Abolished by 16 Car I c 20 (1640).

185 Finally abolished by ss 12 and 13 of the *Tenures Abolition Act* 1660 (12 Car II c 24).

94 Despite the subsequent development of responsible and representative government in Britain, and the exercise of prerogative authority only on advice, it remains an orthodox approach by the courts to statutory construction to say that the prerogative of the Crown is not displaced except by express words or by necessary implication[186]. The present respondents rely upon this precept for their construction of the Royal Mines Act.

95 However, several points should be made here. The first is that the general presumption that statutes did not bind the Crown was put on the basis that, *prima facie*, laws were made only for subjects[187]. The second is that the rule, as explained by Griffith CJ[188], was that the Crown could not be stripped of any part of its "ancient prerogative" by a statute which did not specifically name it. The third is that there can be no real doubt that the Convention Parliament saw the fiscal pretensions of the executive government as a mischief with which it should deal.

96 The *Case of Mines* had been followed by the incorporation under letters patent issued by Elizabeth I of the Society for Royal Mines and the Society for Mineral and Battery Works. The former was granted the privilege in eight counties and in Wales to dig and search for gold and silver while the latter applied itself chiefly to the manufacture of copper and brass for use of braziers and other artificers[189]. Questions arose as to the proportion of gold to base metal sufficient to attract the decision in the *Case of Mines*. A compromise seems to have been reached in 1640-41 to the effect that the base metal belonged to the Crown if the value of the gold exceeded the cost of refining the gold, or if the value of the gold exceeded that of the base metal spent in refining the gold[190].

---

186 *Barton v The Commonwealth* (1974) 131 CLR 477 at 488, 501.

187 *Attorney-General v Donaldson* (1842) 10 M & W 117 at 123-124 [152 ER 406 at 408-409]; *British Broadcasting Corporation v Johns* [1965] Ch 32 at 78-79; *Bropho v Western Australia* (1990) 171 CLR 1 at 18-19; [1990] HCA 24.

188 *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358 at 365; [1911] HCA 64.

189 Heton, *Some Account of Mines*, (1707) at 14-15.

190 *Attorney-General v Morgan* [1891] 1 Ch 432 at 444.

97 In the period before the Revolution of 1688 there was considerable expansion in mining for other minerals[191], and Bainbridge later recorded two sources of dissatisfaction before the Revolution[192] which had constrained commercial activity. The right of entry upon private lands to search for royal mines was oppressive, no damages being paid, and any mines found seemed liable to be claimed under the prerogative. Further, valuable mines were concealed by land owners and there was distrust of royal refiners and assayers, given the continued differences of opinion as to what constituted the admixture with gold sufficient to engage the prerogative.

98 The Royal Mines Act was passed, along with 33 other public Acts, in the first session of the Convention Parliament in what under the New (Gregorian) Calendar[193] would be reckoned as three weeks early in 1689. The first was a statute regularising the irregular circumstances in which the Convention Parliament had been called without writs of summons issued under the Great Seal[194]. Laws were passed to grant supply to the Crown[195], prescribing the form of coronation oath[196], and for the relief of Dissenters[197] and the Protestant Irish clergy[198]. The *Bill of Rights*[199] was not passed until the second session.

99 This legislative activity in the first session included measures to deal with what no doubt were seen as pressing matters of commerce and industry. Laws

---

191 Pincus, *1688: The First Modern Revolution*, (2009) at 55-57.

192 *A Practical Treatise on the Law of Mines and Minerals*, (1841) at 43.

193 Under the Old (Julian) Calendar then in force it was still 1688 when the Convention Parliament assembled on 22 January 1689. See Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", in Finn (ed), *Essays on Restitution*, (1990) 164 at 165.

194 *Convention Parliament Act* 1688 (1 Wm & Mar c 1).

195 1 Wm & Mar c 3.

196 *Coronation Oath Act* 1688 (1 Wm & Mar c 6).

197 *Toleration Act* 1688 (1 Wm & Mar c 18).

198 1 Wm & Mar c 29.

199 1 Wm & Mar sess 2 c 2.

were passed to repeal the Hearth Tax[200], to encourage the export of corn[201], beer, ale and cider[202], and leather[203], and, on the other hand, to prevent the export of wool[204] and to prohibit trade and commerce with France[205].

100 These laws respecting commerce and industry included the Royal Mines Act. Section 3 stated:

> "That no mine of copper, tin, iron, or lead, shall hereafter be adjudged, reputed, or taken to be a royal mine, although gold or silver may be extracted out of the same."

The provision was directed immediately to the prerogative by stating a limitation upon what otherwise might be adjudged, reputed or taken to be its content. The term "although" is used in the sense of "even if" or "notwithstanding that".

101 The two societies incorporated in the reign of Elizabeth I had been combined in 1668 into the Mines Royal Societies. The new body, although lingering until the mid-19th century[206], was severely weakened after 1688 by this narrowing of the definition of mines royal[207].

102 In the present case, the primary judge concluded[208]:

> "There is no doubt ... that the purpose of the [Royal Mines] Act was to remove the Crown's prerogative right to the specified metals where the

---

200 1 Wm & Mar c 10.

201 1 Wm & Mar c 12.

202 1 Wm & Mar c 22.

203 1 Wm & Mar c 23.

204 1 Wm & Mar c 32.

205 1 Wm & Mar c 34.

206 See *Mines Royal Societies v Magnay* (1854) 10 Ex 489 [156 ER 531].

207 Lewis, *The Stannaries*, (1908) at 42.

208 [2008] NSWSC 528 at [52].

> subject would be discouraged from working deposits of them because they also contained royal metals. It is to be borne in mind that, at that time, the Crown's prerogative rights included the right to enter and mine on the subject's land for gold and any other metal intermixed with it in the ore. That aspect of the prerogative destroyed entirely the right the subject would otherwise have had to the other metal. It was this that discouraged the subject from revealing or working mines of copper, etc where any amount of gold was mixed with the other metal. It is clear that the purpose of the [Royal Mines] Act was to permit and encourage the owner of the specified metal to reveal and operate the mine, certainly when the specified metal was of considerable value, as in the present case."

103 We agree. Hamilton J went on to reject the submission by the State and the Minister (which later appears to have been favoured by the majority in the Court of Appeal[209]) that s 3 of the Royal Mines Act was to be construed as if a "mine of gold" and a "mine of copper" are mutually exclusive characterisations, so that a mine must be the one or the other and cannot be both. On the contrary, a mine, such as those exploited by Cadia, which is both a copper mine and a gold mine is not to be classified as a third class of mine and one not mentioned in s 3 of the Royal Mines Act. Nor was this dual characterisation denied by the circumstance that it would not be a commercial enterprise to extract one metal without the other. Accordingly, his Honour concluded, and we agree, that a mine may be characterised for the operation of s 3 of the Royal Mines Act as a "mine of copper" as well as a "mine of gold", and that each of the Cadia mines should be classed as a "mine of copper".

104 Hamilton J reached his conclusion upon the construction of s 3 of the Royal Mines Act, without any need for support from later legislation, 5 Wm & Mar c 6 ("the 1693 Act"). This confirmed that the proprietor of any mine in which there was copper might hold and work the mine notwithstanding that the mine might be claimed to be a royal mine. The 1693 Act was not one of the "Constitutional enactments" saved from the operation of the *Imperial Acts Application Act* 1969 (NSW) ("the Application Act"), which reduced the corpus of Imperial laws that may otherwise have had a continued operation in New South Wales. Section 3 of the Royal Mines Act (along with the *Bill of Rights* and some provisions of the *Statute of Monopolies*) was one of the saved constitutional enactments. Insofar as it was in force in England on 25 July 1828, s 3 of the Royal Mines Act was declared by s 6 and Sched 2 Pt 1 of the Application Act to have been in force in New South Wales on that day.

---

209 (2009) 257 ALR 528 at 550, 556.

105 But this litigation does not turn simply upon the operation of the Application Act. By operation of s 3 of the Royal Mines Act, a mine of copper thereafter could not be characterised 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. As Hamilton J acknowledged, the English Court of Appeal later held that there was no "mine of copper" (or iron or lead) within s 3 of the Royal Mines Act where those minerals were not extracted and were commercially valueless[210]. But that is not the present case.

Conclusions

106 The significant consequence of the enactment of s 3 of the Royal Mines Act, as the appellants submit, is that by the time the common law was received in the colony of New South Wales, and well before any of the grants from which stem the titles of the appellants, that part of the common law of England represented by the prerogative identified in the *Case of Mines* had been abridged. What later was received in New South Wales was the common law in its condition at the time of reception. Section 3 of the Royal Mines Act had done its work long before and forthwith, as the Convention Parliament plainly intended, and as an element in the constitutional rearrangements made at that time.

107 It is to that abridged form of the prerogative in respect of gold mines and silver mines that s 379 of the 1992 Act speaks. The consequence is that the copper upon which royalty was payable to the Minister by Cadia was a privately owned mineral within the meaning of s 284 of the 1992 Act.

Orders

108 The appeal should be allowed with costs, the orders of the Court of Appeal made on 1 July 2009 should be set aside and in place thereof the appeal to that Court should be dismissed with costs.

---

210 *Attorney-General v Morgan* [1891] 1 Ch 432.