This is the published version:


Available from Deakin Research Online:

http://hdl.handle.net/10536/DRO/DU:30032544

Reproduced with the kind permission of the copyright owner.

Copyright: 2010, JUTA Law
OWNERSHIP OF MINERALS IN SITU IN SOUTH AFRICA: AUSTRALIAN DARNING TO THE RESCUE?

PJ BADENHORST
Associate Professor of Law, Deakin University; Visiting Professor of Law, Nelson Mandela Metropolitan University

1 INTRODUCTION

When it comes to minerals, South Africa and Australia have the following common features: (a) both countries are endowed with rich mineral resources; (b) both countries have a highly developed mining industry; (c) both their common law systems adhere to the curiæ est solum rule as rule of departure; and (d) both legal systems have developed over time towards a regime of public ownership of minerals in situ (still in their original position).

Unlike South Africa, which adheres to the Roman law notion of full ownership (dominium) of land, the doctrine of tenure forms the foundation of Australian land law. The doctrine of tenure entails that the Crown is the original owner of all land and no person holds a title in land except ‘of or from’ the Crown. In order to distinguish between the two property systems, further references in this article will be to the ‘owner/ownership of land’ in the South African instance, and to ‘owner/ownership in fee simple of the land’ in relation to Australia. The term alodial ownership, which means land which is owned independently of any superior landlord, will also be used in the case of ownership of land in South Africa to distinguish it from Australian land tenure. However, the differences in the types of land ownership between the two countries do not really impact on the question of ownership of minerals in situ.

* HLC LLB (Pretoria) LLM (Wits) LLM (Yale) LLB (Pretoria). I wish to acknowledge the valuable comments and suggestions during drafting and finalisation by Samantha Hepburn of Deakin University and two anonymous referees, respectively. I, however, remain responsible for the correctness of the final product. My discussion of III(ii)(ii) below is based upon my original draft of the chapter on ‘Minerals’ in Henri Mostert & Anne Pope (eds) The Principles of the Law of Property in South Africa (2009). I have updated it with reference to and with recognition of the edited text of the editors.

1. Attorney-General (NSW) v Brown (1847) 2 Legge 312; Milligan v Namake Pty Ltd (1971) 17 FLR 141; Mahon v Queensland (No 2) (1992) 175 CLR 1 at 47.

This article examines the theoretical framework and policy reasons for the legal development that took place from private ownership to public ownership of minerals in situ. The holders of the respective rights are explained and an attempt is made to identify the unknown holders of ownership of minerals in situ in the South African law by comparing it with the Australian system. In the theoretical analysis, the rights, entitlements and objects to be found in both systems are set out. An attempt is made to find answers in Australian law for the omissions in the present day mining law of South Africa. The methodology attempts to fill the gaps where necessary rather than provide a complete comparative analysis of the two systems.

Ownership of minerals in situ in present day South Africa is determined by the Mineral and Petroleum Resources Development Act 28 of 2002 ('MPRDA'). In terms of s 3(1) of the MPRDA the 'mineral and petroleum' resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans. The Minister of Minerals and Energy is empowered by s 3(2) to grant rights in respect of minerals and the land to applicants. According to South African common law the owner of land owns the whole of the land, including the air space above and everything below the surface. This principle is derived from the maxim cuius est solum eius est usque ad coelum et ad inferos. The question remains to what extent s 3(1) of the MPRDA has changed the common law position relating to land ownership. I will show that the use and incorporation of notions of 'custodianship' and 'common heritage' with reference to the common law notion of ownership of minerals in situ in s 3(1) of the MPRDA, whilst drawing inspiration from the public trustee encountered in the National Water Act 36 of 1998 ('NWA'), has caused a theoretical problem. It remains unclear in whom ownership of such minerals in situ vests, and in what capacity. This uncertainty also leaves it unclear in whom ownership of minerals vests upon unlawful extraction of minerals. The uncertainty also relates to the broader issue of possible nationalisation of minerals in situ and mineral rights against the background of the empower-

2 Although the MPRDA deals with minerals and petroleum alike, all further references are to minerals only.


ment of the Minister to grant rights in respect of minerals by s 3(2) of the MPRDA.

In this article the meaning of s 3(1) is examined against the background of ownership of minerals in situ in Australian law. ‘Mineral rights’ that have been separated from (allodial) ownership of land were recognised by the southern African legislatures since early times and registration of an independent limited real right by registration in the Deeds Office was possible.

Ownership of minerals in Australia is determined by legislation, royal prerogative and land grants. In terms of English common law, the owner in fee simple of the land surface owns all the subsoil, including minerals down to the centre of the earth. This rule is also based upon the maxim of cuius est solum eius est usque ad coelum et ad inferos. The rule is subject to the exception that gold and silver (‘royal minerals’) belong to the Crown by prerogative. A grant of an estate in land by the Crown did not include the gold and silver unless the grant specifically stated otherwise. It has always been possible to exclude minerals from the scope of a conveyance, either by express grant or reservation, and English common law has always recognised the possibility of separate ownership of the subsoil and/or any minerals lying beneath the surface.

During the period from the first settlement in Australia until the mid-nineteenth century, control over natural resources remained with the British Government. The common law position applied to the grants of title to land by the colonial governors. Since 1855 the respective Colonial governments were empowered by Imperial Act to legislate for ownership of minerals (other than royal minerals) to be retained by the Crown in future grants of freehold title. The general pattern which developed in both jurisdictions was progressively to reserve various other minerals from Crown grants by legislation. As will be seen in III(b)(iii) below, in most of the states and territories ownership of other minerals is reserved to the Crown by statute, resulting in the abolition of private mineral ownership. Thus, the

---

6 C G van der Merwe Sahara 2 ed (1989) 553; See generally, Badenhorst & Mostert Mineral Law op cit note 5 ch 3.2.
8 The Case of Mines (R v Earl of Northumberland) (1568) 1 Plowden 310 336, 75 ER 472 at 510; Hunt ibid at 36.
9 Commonwealth v New South Wales (1923) 33 CLR 1 at 56; Robert Chambers An Introduction to Property Law in Australia 2 ed (2008) at 176.
10 Bradbrook, MacCallum & Moore op cit note 7 at 653–4. In South African law it is not possible to divide the ownership of land into separate layers: Anglo Operations Ltd v Sadihuz Estates (Pty) Ltd 2007 (2) SA 363 (SCA) at 371.
11 Hunt op cit note 7 at 1.
12 Ibid at 1–2.
13 Commonwealth v New South Wales supra note 9 at 19, 22; Hunt ibid.
14 Bradbrook, MacCallum & Moore op cit note 7 at 654.
situation which has developed throughout Australia means the Crown owns nearly all the minerals by statutory reservation and prerogative. ¹³

Today, a grant of land by the Crown does not include minerals unless they are specifically included as part of the estate. ¹⁴ It should, however, be kept in mind that, in most cases, the legislation reserving Crown ownership of minerals does not apply retrospectively. Thus, the dates of the original Crown grant and the various statutes assume significance in determining in each instance whether landowners own a particular mineral beneath their land. ¹⁵

II PRIVATE OWNERSHIP OF MINERALS IN SITU

In terms of the cuius est solum eius est usque ad coelum et ad inferos rule, ownership of minerals in situ is vested in the owner of land or owner in fee simple of the land in both systems. ¹⁶ Not only ownership of the minerals but also the entitlements to search, mine and appropriate such mineral are vested in the owner of land ¹⁷ or owner in fee simple of the land. ¹⁸ The rule was accepted by the South African ²¹ and Australian ²² courts as part of the common law of the respective systems.

(a) Minerals in situ in South Africa

Ownership of minerals in situ in South Africa was subject to the development of a separate mineral right by severance from (allodial) ownership of land. ²³ A mineral right could be reserved in favour of the transferor of ownership of

¹³ Hunt op cit note 7 at 2.
¹⁴ Commonwealth v New South Wales supra note 9 at 20, 56, 57; Chambers op cit note 9 at 176.
¹⁵ Bradbrook, MacCallum & Moore op cit note 7 at 654.
¹⁶ In South African law the rule was ascribed by Franklin & Kaplan op cit note 4 at 4 to Accursius, a thirteenth century Italian commentator. But op cit note 7 at 11 provides an interesting account of the origins of the rule in English common law: "The cuius est solum maxim's use in England can be traced back at least to 1285, where it appears in a contract of sale of a house in Norwich. Its origins may lie in Jewish law at least 1,000 years earlier. It first appears in English law reports in a note to the 1356 case of Bury v Pope."
¹⁷ Franklin & Kaplan op cit note 4 at 7; Van der Merwe op cit note 6 at 562; Badenhorst & Mostert Mineral Law op cit note 5 at 3-11.
¹⁸ Hunt op cit note 7 at 38.
²¹ London and SA Exploration Co v Rendler (1891) 8 SC 74 at 91; Rochester v Register of Deeds 1911 TPD 311 at 315; Es casa and Leegarm v Union Government 1954 3 SA 415 (O) at 417D; Union Government (Minister of Railways and Harbours) v Motas & others 1920 AD 240 at 246; Anglo Operations v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA) at 371.
²² Commonwealth v New South Wales supra note 9 at 22, 23. Ironically, in Commonwealth v New South Wales the cuius est solum rule was applied to include the royal metals.
²³ Franklin & Kaplan op cit note 4 at 5-6.
land and/or transferred to a transferee of the mineral right. Even though the owner of land remained owner of the minerals in situ, albeit in name only, the holder of the mineral right was entitled to search for minerals and to remove and appropriate such minerals. Mineral rights were recognised as limited real rights (ius in re alieno) and were classified by drawing an analogy with servitudes. A servitude is a limited real right (or res in re alieno) which entitles its holder either to the use and enjoyment of another person’s property or to insist that such other person shall refrain from exercising certain entitlements flowing from his or her ownership which he or she would have if the servitude did not exist. Servitudes are either pradial or personal; pradial servitudes relate to at least two pieces of land, whereas personal servitudes are constituted in favour of a particular person. Mineral rights were accordingly classified as personal servitudes, quasi-servitudes, personal quasi-servitudes, real rights analogous to a servitude, or sui generis rights. Mineral rights, however, were not regarded as pradial

24 As to the different modes of severance of mineral rights that existed before the introduction of the MPRDA, see generally, P J Badenhorst Die juridische Begwendi on die Suid-Afrikaanse Reg (LLD thesis, University of Pretoria, 1993) 16–75; Badenhorst & Mostert Mineral Law op cit note 5 ch 3.2.
25 Van Vuuren v Registrar of Deeds 1907 TS 293 at 294, 295; Roche v Registrar of Deeds supra note 21 at 316; Ex parte Pierce 1950 (3) SA 628 (O) at 634C–D; Ensussus v Afrikander Property Mines Ltd 1976 (1) SA 950 (W) at 956E; Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A) at 509G–H; Anglo Operations v Sandhurst Estates (Pty) Ltd supra note 21 at 368C.
26 Taylor and Clulidge v Van Janssew and Nellnagpers (1885) 2 SAR 137; McDonald v Vergeld (1888) 2 SAR 234; Peerce v Olivier and Noye (1889) 3 SAR 79; Van Vuuren v Registrar of Deeds supra note 23; Lazzanus and Jackson v Wessels, Oliver and the Conovation Freehold Estates, Town and Mines Ltd 1903 TS 499 at 510; Collinson v Registrar of Deeds 1903 ORC 63 at 64; Roche v Registrar of Deeds supra note 21 at 316. See also Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A) at 509.
29 Lazzanus and Jackson v Wessels, Oliver and Conovation Freehold Estates, Town and Mines Ltd supra note 26 at 510.
30 Roche v Registrar of Deeds supra note 21 at 316; Webb v Beaver Investments (Pty) Ltd 1954 (1) SA 13 (T) at 25A; Ex parte Marchini 1964 (1) SA 147 (T) at 151B–C; Nolle v Johannesburg Consolidated Investment Co Ltd 1943 AD 295 at 307; South African Railways and Harbours v Transval Consolidated Land and Exploration Co Ltd 1961 (2) SA 467 (A) at 481G–H; Du Preez v Beyers 1989 (1) SA 320 (T) at 324G; see also Conovation Collieries v Molan 1911 TPD 577 at 591.
31 Webb v Beaver Investments supra note 30 at 25B; Ex parte Marchini supra note 30 at 150G; Manganese Corporation Ltd v South African Manganese Ltd 1964 (2) SA 185 (W) at 189A; Johannesburg Investment (Pty) Ltd v De Aar Douwenveld (Lichten) Bpk 1969 (2) SA 117 (C) at 126D; see also Assenbjer Diamant (Pty) Ltd v Nance (Pty) Ltd 1980 (3) SA 896 (SWA) at 902C–903B.
32 Witbank Colliery Ltd v Molan Conovation and Colliery Co Ltd 1910 TPD 667.
33 Ex parte Pierce 1950 (3) SA 628(O) 634D; Ensussus v Afrikander Propriancy Mines Ltd supra note 25 at 956E. See also Du Preez v Beyers supra note 30 at 324G–H; Apex
servitudes, because they are created in favour of a person, not a dominant property. Because mineral rights are freely assignable and transferable and are able to be passed on to the heirs of a holder of mineral rights, this feature was cited as justification for the traditional view that a mineral right is analogous to, but also different from, a personal servitude. The construction of a mineral right as a quasi-servitude was finally accepted as the correct label by the Supreme Court of Appeal. Prior to the MPRDA, mineral rights were held in a private capacity, were freely transferable and constituted valuable assets. A holder of mineral rights could also grant prospecting rights by virtue of a prospecting contract, or a mining right by virtue of a mining lease, to another person. Such rights were registrable in the Deeds Office.

As will be discussed in III(a)(ii) below, as part of the movement towards public holding of rights to minerals, the rights to prospect or mine certain classes of minerals were reserved to the state from the earliest mining laws in South Africa. A restitution of these statutory prospecting and mining rights in the holders of mineral rights took place with the introduction of the Minerals Act 50 of 1991. The most comprehensive list of entitlements in respect of all classes of minerals was held by holders of mineral rights during this period until the introduction of the MPRDA during 2004.

(b) Minerals in situ in Australia

In the very few cases in Australia where ownership of minerals (other than royal minerals) remains with the owner in fee simple of the land, such owner is entitled to mine and deal with such minerals as he or she wishes. It is


1 Van Vloos v Registrar of Deeds supra note 25 at 295; Shaw v Registrar of Deeds 1912 TPD 407 at 415; Roche v Registrar of Deeds supra note 21; Webb v Beavers Investments (Pty) Ltd supra note 31 at 25A; Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd supra note 26 at 509H; Franklin & Kaplan op cit note 4 at 609.
2 Lazzus and Jackson v West, Oliver and Connoon Freehold Estates, Town and Mines Ltd supra note 26 at 510; Van Vloos v Registrar of Deeds supra note 25 at 294; Webb v Beavers Investments (Pty) Ltd supra note 31 at 25A-B; Ex parte Mundini supra note 20 at 151C; Ex parte Pierce supra note 33 at 634C; Da Pieve v Bowers supra note 30 at 324H-I; Trojan Exploration Company (Pty) Ltd v Rustenburg Platinum Mines Ltd supra note 26 at 509H-I.
3 Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd supra note 26 at 509H; Anglo American Ltd v Southworth Estates (Pty) Ltd supra note 26 at 3711-E.
4 Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy 2010 (1) SA 104 (GNP) para 7.
6 See generally Badenhorst & Mostert Mineral Law op cit note 5 ch 5.1.
7 The repealed ss 3(1)(a) and 3(1)(m) and 77 of the Deeds Registries Act 47 of 1937.
possible for the owner in fee simple of the land to reserve the minerals in a
transfer of the land, or to transfer the minerals without transferring the land.\textsuperscript{41}
Where a right to minerals is separated from the estate, it exists as a
non-possessory right.\textsuperscript{42} The owner in fee simple of the land may grant a
profit à prendre to someone to enter and take the minerals.\textsuperscript{43} A profit à
prendre is a right to take from the servient tenement of another some part of
the soil of that tenement or minerals under it or some of its natural produce,
or the animals (fere naturae) existing upon it.\textsuperscript{44} In relation to minerals a
profit à prendre is to some extent similar to the civil law mineral right that
was recognised in terms of the common law in South Africa\textsuperscript{45} and
Louisiana.\textsuperscript{46} A profit à prendre is recognised as a proprietary interest which
can be disposed of by sale or gift, and can pass under a will or by the law of
intestacy.\textsuperscript{47} A pradial servitude in civil law has an easement as its equivalent
in the English common law which also requires a dominant and servient
tenement. The equivalent of a civil law personal servitude, namely an
easement in gross, which is lacking a dominant tenement, is not recognised
by the English common law and it only to be found in statutes.\textsuperscript{48} Unlike an
easement, which requires a dominant and servient tenement for its legal
existence, a profit à prendre in gross is also recognised at common law.\textsuperscript{49} A
profit in gross is one where the use of the profit does not need to have a
connection with the ownership of other land.\textsuperscript{50} If public ownership of
minerals in situ had not become the general rule in Australia, the develop-
ment of the mining system would probably have been along the lines of these
few instances, namely, the vehicle of a profit in gross, and would be very
similar to the South African system of mineral rights by virtue of the South
African common law prior to the introduction of the MPRDA.

c) Comparison

Both systems, therefore, recognise private ownership of minerals in situ,
although in different degrees, coupled with a privately held right to search,
remove and appropriate the minerals which right is real or proprietary in
nature and constitutes a quasi-personal servitude or a profit à prendre in gross.
Even though it is perceived as the exception rather than the rule, private
ownership of a mineral and a separate property interest is possible in Australia.

\textsuperscript{41} Hunt op cit note 7 at 38.
\textsuperscript{42} Chambers op cit note 9 at 175.
\textsuperscript{43} Hunt op cit note 7 at 38; Chambers ibid. See generally Emerald Quarry Industries
Pty Ltd v Commissioner of Highways (1976) 14 SASR 486 at 491.
\textsuperscript{44} Bradbrook, MacCallum & Moore op cit note 7 at 776.
\textsuperscript{45} See P J Badenhorst 'Klasifikasie en kenmerke van mineralrege' (1994) 57
THRHR 34.
\textsuperscript{46} See Badenhorst op cit note 33 at 297.
\textsuperscript{47} Bradbrook, MacCallum & Moore op cit note 7 at 776.
\textsuperscript{48} See generally Bradbrook, MacCallum & Moore ibid at 734–5.
\textsuperscript{49} Bradbrook, MacCallum & Moore ibid at 776.
\textsuperscript{50} Ibid.
OWNERSHIP OF MINERALS IN SITU IN SOUTH AFRICA

In the final stage of development of the notion of a mineral right in the South African system, such right contained the most complete list of entitlements to exploit a mineral, which rights were held privately.

III PUBLIC OWNERSHIP OF MINERALS

The development from private ownership of minerals in situ to public ownership of such minerals took different forms and took place at different times in each system.

(a) From private minerals to public minerals in South Africa

At the outset an explanation of the historical development how private minerals became public minerals in South Africa will be given, followed by a discussion of the different meanings attributed to s 3(1) of the MPRDA. The policies underlying the MPRDA will be briefly set out. The grant of rights to minerals in terms of s 3(2) of the MPRDA will be discussed at the end of this part of the article.

(i) Historical development

A royal prerogative with an even broader scope than the original English law concept surfaced in the former Cape Colony during British colonisation. Section 4 of Sir John Cradock’s Proclamation on Conversion of Loan Place to Quietrent Tenure, dated 6 August 1813, preserved the English law concept of the Crown prerogative in the Cape Colony by reserving rights to ‘mines of precious stones, gold or silver’ to the Crown.51 Its operation was limited to the former Cape Colony or Cape Province. The origin and content of the royal prerogative will be discussed in III(b)(i) below in more detail as an important early example of the establishment of public ownership of minerals in situ. As indicated it has also impacted on the Cape Province. It will be argued that the ownership of minerals in situ in South Africa is similar to the royal prerogative as a form of public ownership.

Since the early South African mining statutes, mineral rights could also be subject to statutory reservation of the right to prospect or mine certain classes in favour of the state. This century-old development culminated in s 2(1)(a) of the Mining Rights Act 20 of 1967 and s 2 of the Precious Stones Act 73 of 1964, which vested the following rights in the state: (a) the right of prospecting and mining for and disposing of natural oil; and (b) the right of mining for and disposing of precious metals and precious stones.52 The following rights were retained by holders of mineral rights: (a) the rights of prospecting for precious metals and precious stones; and (b) the rights of


52 Benade v Minister van Mineral- en Energiezake supra note 51 at 9.
prospecting and mining for and disposing of base minerals. The basic policy regarding the exploitation of natural resources in South Africa was considered as being somewhere between 'the two absolutes of complete state monopoly and unfettered private enterprise'. The state, as holder of these statutory mineral rights, could grant different kinds of statutory prospecting and mining rights to applicants. As part of the former National Party government's drive towards privatisation, the Minerals Act 50 of 1991 terminated the statutory mineral rights, and the entitlements contained by such rights were vested in the holder of such mineral rights. The revesting of the former state-held entitlements to exploit minerals in registered holders of mineral rights has been regarded as a form of privatisation, a return to a former common law position or, in retrospect, as an attempt to deprive the future ANC government of 'state assets'. As will be seen, this mineral law regime was dramatically changed by the ANC-led government with the introduction of the MPRDA in 2004. Mineral rights, prospecting rights, mining rights and statutory prospecting and mining rights are recognised in terms of the transitional arrangements in the MPRDA, as categories of 'old order rights'. These old order rights have disappeared after periods of transition ranging between one and five years.

A huge jump was made towards public ownership of minerals with the introduction of the MPRDA on 1 May 2004. In terms of s3(1) of the MPRDA, the mineral resources are 'the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all

53 Section 2(1)(b) of the Mining Rights Act 20 of 1967.
54 Franklin & Kaplan op cit note 4 at 1.
55 Statutory prospecting and mining rights which survived in terms of the transitional measures of the Minerals Act 50 of 1991 and other mining laws are also recognised as categories of old order rights.
56 See generally the White Paper on Privatisation and Deregulation in the RSA (1987); G N Barrie 'Privatisation: the legal issues are as important as the economic ones' 1988 De Rebus 407; R G Evans 'Some economic and legal aspects of the privatisation of the public sector with specific reference to the South African Transport Services' 1989 S A Maint J 373.
57 Minerals Act 50 of 1991, s 5(1); P J Badenhorst 'The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation?' 1991 T S A R 113 at 124–7 and 30–1.
58 Badenhorst ibid at 125; Badenhorst v Minister van Minaar-en Energieseke supra note 51 para 15.
60 The compensation standard for expropriation of a registered mineral right was also improved from actual financial loss to market value by s 11(a) and (b) of the Expropriation Amendment Act 45 of 1992 to safeguard holders of mineral rights against possible nationalisation by the new ANC led government. As to early views on possible nationalisation of mineral rights, see Badenhorst, Van der Vyver & Van Heerden 'Proposed nationalisations of mineral rights in South Africa' 1994 Journal of Energy and Natural Resources Law 287.
61 See generally, Badenhorst & Mostert Mineral Law op cit note 5 ch 25.3.1 to 25.3.4.
South Africans'. The Minister of Minerals and Energy is empowered by s 3(2) to grant rights in respect of minerals and the land to applicants. In particular, the absence of an express reservation of minerals in favour of the state in the MPRDA makes it unclear where ownership of minerals in situ lies. The same applies to the absence of a reservation of the right to grant minerals by the state. An interpreter of the MPRDA is required to adopt any reasonable interpretation which is consistent with the objects of the MPRDA rather than any other interpretation which is inconsistent with such objects. When interpreting the Act, the MPRDA must prevail to the extent that the common law is inconsistent with the MPRDA. The provisions of the MPRDA should be interpreted with due regard to the constitutional rights, norms and values that the legislature sought to encapsulate, protect and advance in the MPRDA.

(ii) Views on s 3(1) of the MPRDA

Ownership of minerals in situ has received scant attention from the courts. Academic views regarding the issue of ownership of minerals in situ in terms of s 3(1) of the MPRDA differ.

According to one view, ownership of minerals in situ vests in the state. The court's estoppel rule of the common law, which implies that a landowner is the owner of the minerals in the land, may have been abrogated by s 3(1) of the MPRDA. Support for this view is sought in the rule of interpretation in s 4(2) of the MPRDA, which states that to the extent that the common law is

---

63 Section 4(1). These objects are listed below.
64 Section 4(2).
65 Aeppla v Kruger 2008 (1) SA 104 (NC) at 113; see also at 114B-C.
66 For instance, in De Beers Consolidated Mines Ltd v Auras Mining (Pty) Ltd [2009] JOL 24502 (C) para 67 it was held that 'the MPRDA leaves no doubt that mining rights in respect of minerals which have not been mined, have been taken out of private hands, and that such rights vest in the custodianship of the state... As indicated by P J Badenhorst, and C N van Heerden 'The status of tailings dumps: Let's go working in the past?' (2010) 21 S Ill LR 116 at 121-2 the court did not express itself about ownership of unsevered minerals in terms of s 3(1). In Joubert v Marula Mining Company (Pty) Ltd 2010 (1) SA 198 (SCA) para 2 Mlambo JA just stated that 'when the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) came into effect on 1 May 2004 the State became the custodian of all minerals in the whole of the Republic of South Africa'. See also De Beers Consolidated Mines Ltd v Regional Manager, Mineral Resources Regulation Five State Region, Department of Minerals & Energy [2019] JOL 23667 (C) para 6 where it was merely stated without further investigation: 'Since 1 May 2004 all mineral resources belong to the nation and the state is vested with the custodianship and control of such mineral resources.'
67 Badenhorst & Mostert 2007 TRANSJUR op cit note 5 at 476; M O Dale 'Mining law' in 2002 ASSAL 573 at 574; however, points out that such vesting in the state is not clear as far as the MPRDA does not expressly refer to ownership of minerals.
inconsistent with the MPRDA, the latter prevails. According to this view, the use of the term ‘custodianship’ with reference to the state’s power over the mineral resources is perceived as a misnomer, as the view propagates the idea that the MPRDA proposes actual vesting of the minerals in the state. Perhaps the literal meaning of s 3(1) of the MPRDA is that ownership of minerals in situ is vested in the state, but the state has to own such minerals as a custodian for the benefit of the people of South Africa. State ownership is thus encumbered by a custodial duty. The difficulty with the term custodianship is, however, than a custodian or curator does not hold property for himself, but on behalf of other persons. What the literal meaning of state custodianship is in the context of the law pertaining to natural resources continues, however, to be a contested question.

Another view seeks to distinguish mineral resources from minerals as such. The collective wealth of mineral resources ‘belongs’ to the nation, whilst ownership of minerals in situ still vests in the owner of the land, even though the owner may not be able to exploit such minerals. It is maintained there is no provision in the MPRDA whereby minerals in situ on individual properties vest in anyone other than the owner of the land. It is argued that since no provision of the MPRDA actually vests ownership of minerals in situ in the state or in the public, it cannot be vested in anyone but the landowner. No private-law rights are vested in the general public to use the country’s mineral resources. This view is supported by the definitions of ‘land’ and ‘owner’ in the MPRDA. In the conventional common law sense, ‘land’ refers to a parcel of land as indicated on a diagram in the deeds registry. It includes the geological components of the land; for instance, the soil and

68 Badenhorst & Mostert Mineral Law op cit note 5 at 13–4. Contra, Dale et al op cit note 5 at MPRDA-4, MPRDA-10, MPRDA-121, where it is argued that the provisions of the MPRDA do not warrant such departure from the common law. For a clarification of their view, see Badenhorst & Mostert 2007 TsAR op cit note 5 at 476. Watson op cit note 5 at 17 is of the view that it is evident s 3(1) does point to the land owner losing ownership of minerals in situ. Watson maintains that proponents of the abrogation of the custodianship rule need to show that such interpretation is a reasonable interpretation and consistent with the objects of the MPRDA (bid at 18).

69 Chamber of Mines Memorandum to the Director-General: Mineral and Energy Affairs (1989) part 3 ch 2 para 2.2.2.1.

70 Dale et al op cit note 5 at MPRDA-115.

71 Mostert & Pope op cit note 62 at 270.

72 Dale et al op cit note 5 at MPRDA-122. Watson op cit note 5 at 16 argues that when ‘mineral resources’ is used in s 3 it does not refer to a collective but the various instances that make up the collective. See further the criticism of Watson 14–16 against the view that ‘mineral resources’ is to be interpreted as the collective wealth of the country.

73 Dale et al op cit note 5 at MPRDA-10.

74 Dale et al op cit note 5 at MPRDA-12; contra Badenhorst & Mostert 2007 TsAR op cit note 5 at 478–9.

75 Dale et al op cit note 5 at MPRDA-121 and MPRDA-123.
minerals under the surface.\(^\text{76}\) 'Land' is defined in the MPRDA as including the 'surface of the land and the sea'.\(^\text{77}\) The sea is the water of the sea, the bed of the sea and the subsoil of the sea below the low-water mark.\(^\text{78}\) The word 'land' must be understood in a wider sense in the MPRDA to include the surface and subsurface of the land and the 'sea'. Moreover, the definition of 'land', read with the definition of 'owner' in the MPRDA, suggests that the owner of the land is regarded to be the owner of the minerals in the land.\(^\text{79}\) Ownership of 'dry' land (ie land that is not sea) lies with the person in whose name the land is registered, and so the minerals in situ also belong to such owner.\(^\text{80}\) If the land is owned by the state, the state (together with the occupant of the land) is regarded as the owner,\(^\text{81}\) and by implication is owner also of the minerals in situ. In relation to the sea, the state is the owner of the sea,\(^\text{82}\) and, as a result, also the minerals in it.\(^\text{83}\) According to this standpoint, the cuinis estolum rule has not been abrogated.\(^\text{84}\) Ownership of mineral resources, however, is not vested in the 'nation' or 'people', because the nation and the people do not have legal personality in public or private law enabling them to acquire or to hold ownership or any rights to the resources.\(^\text{85}\) Surely the reference to 'the common heritage of all the people of South Africa' could not be read as an acknowledgement that ownership of minerals in situ is vested in some of the people of South Africa, namely, owners of land. Such literal reading would clearly be in conflict with the objects of the MPRDA and the prescribed principle of interpretation of the MPRDA. The problem with the view that ownership of minerals in situ is still vested in the owners of land is that while it acknowledges that ownership of minerals is vested in the owner of land, it does not deal with the fact that the MPRDA excludes the ability of the owner to exploit the minerals beyond the legislative parameters.\(^\text{86}\) This exclusion leads to a hiatus in the MPRDA in relation to situations where unlawful or illegal extraction of minerals takes place. The MPRDA is silent about ownership of minerals upon severance from the land either by virtue, or in absence, of a right to do so.\(^\text{87}\) As will be indicated in III(b)(v) below, Australian mining statutes expressly deal with acquisition of ownership of minerals upon lawful and unlawful separation from the land. According to the South African common


\(^{77}\) Section 1.

\(^{78}\) Definition of 'sea' in s 1.

\(^{79}\) Mostert & Pope op cit note 62 at 273.

\(^{80}\) Definition of 'owner' in s 1.

\(^{81}\) Definition of 'owner' in s 1.

\(^{82}\) Mostert & Pope op cit note 62 at 273.

\(^{83}\) Dale et al op cit note 5 at MPRDA-4.

\(^{84}\) See Dale et al op cit note 5 at MPRDA-4; Watson op cit note 5 at 28.

\(^{85}\) Mostert & Pope op cit note 62 at 271.

\(^{86}\) Ibid at 273.
law, only when the holder of the right to minerals severs minerals from the land do they become moveables owned by the holder of the right to minerals.\textsuperscript{88} As the MPRDA states nothing to the contrary, it is assumed that the common law position prevails and that the holder of prospecting rights, mining permits or mining rights, who is entitled to remove and dispose of the mineral, becomes the owner of the mineral upon severance thereof.\textsuperscript{89} Therefore, a provision of ownership of minerals upon severance, similar to the Australian statutes, should be added to the MPRDA. The MPRDA is silent about the contentious issue of minerals that are mined illegally. Not only ownership of minerals in situ but also ownership upon lawful, and especially, unlawful severance of minerals from the land ought to be clearly stated in the MPRDA, because of the value of such resources and the serious problems caused by illegal mining in South Africa.

A third view engages with the notion of state custodianship. It is argued that custodianship does not amount to ownership of minerals in situ. According to this view, the landowner remains the owner of minerals in situ, subject to the public trust doctrine.\textsuperscript{90} This doctrine forms part of Anglo-American law.\textsuperscript{91} Because the phrase ‘public trust’ is used explicitly in the National Environmental Management Act 107 of 1998\textsuperscript{92} and the National Water Act,\textsuperscript{93} some scholars assume that the doctrine has become part of South African law.\textsuperscript{94} In terms of this approach the doctrine is extended to include mineral law.\textsuperscript{95} It should be noted that the use of the phrase ‘public trust’ in one statute cannot justify inclusion of it in another statute which uses the term ‘custodian’. Mostert and Pope reject public trust doctrine approach:

’South African courts have referred to “public trust” to mean that where property is held in public trust, the sovereign takes on the role of custodian. The problem with this view is that the public trust doctrine finds application only when the resource in question vests ‘sovereign ownership’ in the state. Whether this can be derived from the MPRDA is contested.’\textsuperscript{96}

Mostert and Pope\textsuperscript{97} further doubt whether the public trust doctrine, which originates from Anglo-American law, is suitable for importation into

\textsuperscript{88} Van Vuren v Registrar of Deeds supra note 25 at 295; Tofair Exploration Co v Rattenberg Platinum Mines Ltd supra note 26 at 509(1)-510A.

\textsuperscript{89} Dale et al op cit note 5 at MPRDA-122.

\textsuperscript{90} J Glazewski Environmental Law in South Africa 2 ed (2000) at 464, 468.


\textsuperscript{92} Sections 2(4)(a), 28(5)(c) and 30(6)(d).

\textsuperscript{93} Section 3(1).

\textsuperscript{94} Glazewski op cit note 90 at 464, 468; Van der Schyff op cit note 91 at 53 and op cit note 5 at 765n63.

\textsuperscript{95} Mostert & Pope op cit note 62 at 271.

\textsuperscript{96} Ibid.

\textsuperscript{97} Ibid. The wisdom of introducing the foreign public trust doctrine into South African law is also questioned by Watson op cit note 5 at 24 in so far as he maintains that it serves the same purpose and has similar consequences than the res publica doctrine
South African law. They propose that South African law can rather deal with the issue by relying on the mechanisms of constitutionally entrenched environmental rights and the concept of public things (res publicae).

It should also be noted that the public trust doctrine is contentious even in American law. Due to these arguments against adoption of the public trust doctrine, a detailed analysis of the differing viewpoints regarding public trusteeship will not be undertaken in this article.

As to the notion of ‘custodian’, the legislature has indeed drawn inspiration from s 3 of the NWA. A principle fundamental to the NWA is that the national government acts as public trustee of the nation’s water resources.

As the public trustee of the nation’s water resources, the national government, acting through the Minister of Water Affairs and Forestry, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate. The national government, acting through the Minister, is empowered to regulate the use, flow and control of all water in South Africa. It is the responsibility of the Minister to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

Members of the public are entitled to use water for specified purposes such as reasonable domestic use, domestic gardening, animal watering, fire-fighting and recreational use. The fundamental difference between the MPRDA and the NWA is that, prior to the introduction of the respective statutes, minerals in situ were held in private ownership, whilst public rivers were vested in the state. According to classical Roman-Dutch law, all public rivers were controlled by the state as dominus fluminis. Riparian owners had no right to divert water from a public river except by virtue of concessions granted by the state. Water in private streams belonged to the owner of the land through which it flowed.

The Water Act 54 of 1956 distinguished between public and private water. In regard to public streams, the state had again become the

which form part of South African law. See further the concerns of Watson ibid 24–6 against the public trust doctrine.

---

103 See further Dale et al op cit note 5 at MPRDA 124; Badenhorst & Mostert 2017 TSAF op cit note 5 at 478.
104 Mostert & Pope op cit note 62 at 272.
106 Section 3(1) of the National Water Act.
107 Section 3(2).
108 Section 3(3).
109 See further 4.
111 Ibid, Private ownership of water has been abolished by the National Water Act: see Mostert and Pope op cit note 62 at 288.
112 Public water was basically water that was capable of irrigation of two or more riparian pieces of land, whilst private water is land which was not capabile of such irrigation: see Schoeman ibid at 347–9.
dominus illumini in so far as s 6(1) of the Water Act categorically provided “that there shall be no right of property in public water”. Thus, ownership of public water was always vested in the state and it could be held in custodianship by the state. Minerals in situ could not be held by the state in terms of s 3(1) of the MPRDA unless some form of expropriation of ownership of minerals in situ took place. By virtue of acquisition of public ownership of minerals in situ, or if such mineral become res publicae, control of minerals in situ by the state is possible. The adoption of the NWA construction in the MPRDA is thus not free of problems, due to the underlying difference in ownership of the resources of water and minerals.

A fourth view is that it is of lesser importance whether ownership of minerals in situ is vested in the people of South Africa, the state, or private landowners (as in the past), because ownership would, in any event, be subject to old order rights in terms of the transitional measures contained in the MPRDA, and new prospecting rights, mining permits and mining rights granted in terms of the MPRDA. According to this view, minerals in situ have value only once they can be and are extracted. The Minister of Minerals and Energy is empowered to grant rights in respect of minerals and the land to applicants, thereby activating these rights. However, it is not merely an academic issue where the ownership of minerals in situ lies. The recent decision of AgriSA v Minister of Minerals and Energy demonstrates that minerals in situ can be valuable because they are not extracted. In this way, the holders of such rights can secure monopolies over a specific resource, or protect the land surface for agricultural use.

A fifth point of view is that, because of the wording of s 3(1) of the MPRDA, mineral and petroleum resources in South Africa have become a (new) type of public thing (res publicae). Public things are things which belong (though not in private ownership) to an entire civil community, and are also referred to as state property. Public things belong to the state but

---

108 Schoeman ibid at 350. As to a member of the public’s specific rights to use public water that were recognised, see further Schoeman ibid.


110 Section 3(2)(a) of the MPRDA. See further Badenhorst & Mostert 2007 TSAR op cit note 5 at 479.

111 Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy supra note 57 para 17.

112 Mostert & Pope op cit note 62 at 272.

113 Badenhorst & Mostert Mineral Law op cit note 5 at 13–4, 2007 TSAR op cit note 5 at 479, Contra Dale et al op cit note 5 at MPRDA-115, MPRDA-120 to MPRDA-121, where it is argued, inter alia, that minerals were not regarded as res publicae in Roman law. For a clarification of their view, see Badenhorst & Mostert 2007 TSAR 477–8; Van der Schyff op cit note 91 at 237(n4). The notion of res publicae is possible in terms of property theory only if individuality is a characteristic of a thing is also disregarded in respect of minerals in situ. See further the concerns of Watson op cit note 5 at 24–5 against the res publicae approach.

114 Badenhorst, Piemar & Mostert op cit note 27 at 26.
are nevertheless destined to be used by the general public.\(^{112}\) There is no historical justification in South African common law for treating mineral resources as res publicae. However, because new categories of res publicae have been acknowledged in modern South African law,\(^ {116}\) and rights to minerals were reserved to the state in the past, this is a possibility.\(^ {117}\) In De Beers Consolidated Mines Ltd v Angora Mining (Pty) Ltd\(^ {118}\) it was argued by counsel that minerals are not public things (res publicae). They reasoned, by drawing an analogy with fishing resources, that because the state is also the custodian of fishing resources it does not mean that the state owns fishing resources.\(^ {119}\) The court, however, did not decide whether minerals in situ constitute res publicae or not.\(^ {120}\) The res publicae argument seems to be an acceptable explanation of the ownership regime introduced by the MPRDA.

(iii) Policy

The MPRDA has as a policy the objective of giving effect to the principle of the state’s custodianship of the nation’s mineral resources.\(^ {121}\) The state is inter alia tasked with the duties of promoting equitable access of the nation’s mineral resources to all the people of South Africa,\(^ {122}\) and expanding the opportunities for historically disadvantaged persons to enter the mineral industry and to benefit from the exploitation of the nation’s resources.\(^ {123}\)

(iv) Grant of permissions, rights or permits to minerals

As the custodian of the nation’s mineral resources, the state, acting through the Minister of Minerals and Energy, may, in terms of s 3(2) of the MPRDA, ‘grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit’ in respect of minerals.\(^ {124}\) The prevalence of state power of control over the mineral resources and the concomitant ousting of the mineral rights of the landowner and/or the holder of mineral rights by s 3(2) of the MPRDA was recognised in Mepa v Katsa\(^ {125}\) as a fundamental mining law principle. The creation of the state power of control is, however, not explained. The ousting of mineral rights, prospecting rights and mining rights took place subject to the transitional measures contained in the

\(^{112}\) Van der Merwe op cit note 76 para 214.

\(^{116}\) See the examples given by Badenhorst & Mostert 2007 TSAR op cit note 5 at 477.

\(^{117}\) Mostert & Pope op cit note 62 at 272.

\(^{118}\) [2009] JOI 24502 (O) para 38.

\(^{119}\) Ibid.

\(^{120}\) See further Watson op cit note 5 at 21–2.

\(^{121}\) Section 2(b).

\(^{122}\) Section 2(c).

\(^{123}\) Section 2(d).

\(^{124}\) Section 3(2) of the MPRDA.

\(^{125}\) 2008 (1) SA 104 (NC) para 8.3.
(b) From royal minerals to public minerals in Australia

In this section the origin and development of the royal prerogative in England and its reception in Australia will be discussed, followed by an overview of the statutory reservation of ownership of minerals in situ. Remaining exceptions to public ownership of minerals in situ and new statutory reservations of ownerships of minerals in situ and provision for payment of compensation will be indicated. The reason for discussing the new statutory reservations of ownership of minerals in Australia is simply to show that such reservations took place subject to payment of compensation. The grant of different rights to minerals by the state will briefly be explained at the end of the discussion of Australian law.

(i) Royal prerogative in England

A royal prerogative to gold and silver was recognised in the Case of Mines (R v Earl of Northumberland) decided in 1568 in England during the reign of Queen Elizabeth I. Copper miners found a mixture of gold and silver in copper mined from lands belonging to the 7th Earl of Northumberland. A suit was brought by the Queen claiming prerogative rights to the gold. It was held unanimously by twelve judges in the Court of Exchequer that 'by the law all mines of gold and silver within the realm, whether they be in the lands of the Queen, or of subjects, belong to the Queen by prerogative, 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'.

The right over mines of gold and silver is the subject of a proprietary prerogative. Other proprietary prerogatives of the Crown are in respect of ownership of lands, to treasure trove, to escheats, to the ownership of the foreshore and the bed of the sea within territorial limits and to royal fish (whale and sturgeon). The prerogative of the Crown did not merely confer on the Crown ownership of royal minerals, but with it the right to enter upon lands held in freehold by subjects of the Crown, to search and recover gold and silver and to cause disruption and destruction of valuable land.

The counsel for the Crown in the Case of Mines, in support of the prerogative right to mines of gold and silver, relied mainly on the fact that it appeared by several old charters and patents that the Crown had in past times

---

126 See Badenhorst & Mostert Mineral Law ch 25.3.5.
127 Case of Mines (R v Earl of Northumberland) supra note 8. The quotation in the text is to be found at 336.
130 New South Wales v Cinta Holdings Pty Ltd (2009) 257 ALR 528 para 123.
exercised this right. There was, however, no Act of Parliament or any decision cited in favour of this right of prerogative. It was argued that the Queen did not claim the gold on the basis that the land in which it was belonged to her (in terms of the doctrine of tenure). It was rather claimed by the prerogative of the Crown. Alienation of (an estate in) land by the Crown does not amount to alienation of the prerogative right to gold and silver. It was submitted by the counsel who supported the prerogative that the right to gold and silver was on exactly the same footing as the right to treasure trove. The prerogative, being no right to the soil, therefore, existed irrespective of ownership in fee simple of the land.

The policy reasons advanced for the recognition of the royal prerogative in respect of gold and silver were threefold. First, because of the excellence of gold and silver contained in the soil, the common law has appointed them to the person that is most excellent, and that is the King. Secondly, because of the necessity of gold and silver, the King will be able to defend his subjects with an army against hostilities and with good laws. Thirdly, because of the convenience of gold and silver for mutual commerce, trafficking, coinage and other like purposes.

The majority of the court (three judges dissented) also decided that if gold and silver are found in mines of copper, tin, lead or other base metals in the soil of subjects, the copper, tin, lead or other base metals, and the gold and silver, belongs by prerogative to the Crown. The Crown has the liberty to dig for it, and to put it upon the land of the subject and to carry it away, even if the gold or silver is of less value than the other minerals and metals. In other words, ‘all ores or mines of copper or other base metal, containing or bearing gold or silver, belong to the King’. Justices Harper, Southcote and Weston only recognised the royal prerogative to copper, tin, lead or other base metals contained in gold and silver if the value of gold and silver

131 Case of Mines supra note 8 at 315ff.
132 Q v Willow (1874) 12 SC NSW 258 at 269–70.
133 Ibid at 270.
134 Ibid.
135 Ibid.
136 Case of Mines supra note 8 at 315–16.
137 Ibid at 316.
138 Ibid.
139 Ibid.
140 The report of the Case of Mines, Plowden, noted at 339 that even in Roman times, Agricola had identified that gold and silver is ‘naturally in copper’ and that ‘silver is naturally in iron and lead’, so that ‘there is naturally in these base metals some portion of gold or silver’. New South Wales v Cadia Holdings Pty Ltd supra note 130 para 101. Agricola was a Roman general responsible for much of the Roman conquest of Britain. He was made consul and governor of Britannia in 77 AD. See http://en.wikipedia.org/wiki/Gaius_Julius_Agricola, accessed on 12 November 2009.
141 Case of Mines supra note 8 at 337; New South Wales v Cadia Holdings Pty Ltd supra note 130 paras 16, 57 and 101.
142 Case of Mines Ibid at 337.
exceeded the value of the copper or other base metal.\textsuperscript{115} This view was rejected by the majority and was never adopted.\textsuperscript{142}

The position of the majority in respect of mixed ore was modified by an opinion obtained in 1640 from fifteen leading counsel, so that the Crown would only acquire the whole of the ore if the value of the royal metal exceeded the cost of separation.\textsuperscript{115} Attempts were also made by the legislature to limit the scope of the royal prerogative with regard to mixed ore. The Royal Mines Act of 1688 (UK) and the Royal Mines Act of 1693 (UK) modified the prerogative with respect to any mine of copper, tin, iron or lead. The statutes of 1688 and 1693 withdrew copper mines from the prerogative, although the ore contained appreciable quantities of gold and silver which were of commercial value, provided the mines could fairly be described as copper mines. Mines that could fairly be described as gold mines remained within the prerogative, although they contained small non-commercial quantities of copper.\textsuperscript{159}

\textbf{(ii) Reception of the royal prerogative in Australia}

The Royal prerogative was received in Australia as part of the English common law. During 1863 Justice Molesworth\textsuperscript{147} of the Supreme Court of Victoria held, as follows, in \textit{Millar v Wildish}:\textsuperscript{146}

"By the law of England, which is also the law of this country, all gold mines belong to the Crown; and that though the Crown may have granted the lands containing them to a subject without reservation. This was so decided in \textit{Reg. v Northumberland} (ib); and so far, that case has never been questioned. The same case decided that the Crown may enter upon such land to mine for gold, though no right of entry was reserved."\textsuperscript{119}

In \textit{Wolley v Attorney-General of Victoria}\textsuperscript{159} it was held by the Judicial Committee of the Privy Council that the prerogative of the Crown to gold and silver found in mines must have been introduced as part of the common law of England into the Colony of Victoria upon settlement. At issue in this decision was "whether upon the sale of waste lands of the Crown . . . the gold that may be found in such lands passed to the purchasers, there being no words in the grants from the Crown expressly granting it."\textsuperscript{154} Despite it being

\textsuperscript{115} Case of Mines ibid at 336.
\textsuperscript{144} \textit{Plant v Attorney-General} (1893) 5 QLJ 57 (QLD) 61.
\textsuperscript{145} \textit{New South Wales v Cadia Holdings Pty Ltd} supra note 130 paras 17 and 76.
\textsuperscript{146} \textit{Ibid} paras 144, 154 and 156.
\textsuperscript{147} In \textit{Plant v Rollison} (1894) 6 QLJ 98 (QLD) 98 101 Justice Molesworth is referred to as the father of Australian mining law.
\textsuperscript{148} (1863) 2 W & W VIC (E) 37 43.
\textsuperscript{149} See also \textit{Attorney-General v Brown} (1847) 2 NSW SCR (app) 30. The Crown's ownership of gold was accepted in passing in \textit{Ahl v Web} 1872 3 VR (E) Vic 112 115. The royal prerogative to silver and gold, as established in the \textit{Case of Mines} supra note 8, was also accepted as part of law of Australia by the Supreme Court of New South Wales in \textit{Q v Wilson} supra note 132 at 269–70, 281.
\textsuperscript{150} (1877) L.R. 2 App Cas 163 166.
\textsuperscript{151} \textit{Ibid}.
argued that the principle in decisions such as the *Case of Mines* was wholly inappropriate, the Judicial Committee of the Privy Council decided as follows:

'Now whatever may be the reasons assigned in the case in *Powder* for the rule thereby established, and whether they approve themselves or not to modern mind, 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 act and precise words the intention of the Crown be expressed that it shall pass.'

The royal prerogative, as amended by the 1688 and 1693 statutes, has been treated as part of the common law introduced into the former Australian colonies on settlement. Royal metals, like treasure trove, belong to the Crown by virtue of a prerogative. Gold and silver in situ, unless expressly alienated by the Crown, is the absolute property of the Crown. The title to royal metals is absolutely distinct from the title to royal lands — as distinct as the titles of the King’s land and the King’s horses thereon. Upon actual discovery of gold or silver the Queen acquires a right in the land or anything contained in it. Apart from silver, what remained within the range of the royal prerogative after the 1688 and 1693 Acts were all gold mines falling within the decision in the *Case of Mines* which were not copper mines fairly characterized as such. A mine described as a gold-copper mine, for instance, remains within the scope of the reduced range of the royal prerogative and the Crown is entitled to the gold as well as the copper.

As indicated in III(i)(i) above, the royal prerogative was introduced into South Africa by statute.

(iii) **Statutory reservation of ownership of minerals in situ**

The mining statutes of the Australian States and Territories reserve ownership of other minerals in situ in the Crown (in right of the State). By
implication, such reserved ownership of minerals includes the right to
prospect and mine such minerals. In modern times the following policy
reasons have been advanced for the retention of ownership of minerals by the
Crown: the first is the economic value of the minerals to the States and
Territories. The second is that it enables the government to have greater
control over the development of mineral resources. This can be used to
encourage that development and to regulate it to protect the environment,
heritage sites and the interests of other members of society. It is not clear if
justification for the reservation of other minerals by the legislature is to be
based on the doctrine of tenure or an extension of royal prerogative. The
document of tenure provides more justification for such statutory reservation
than alodial ownership, such as in South Africa. In terms of the doctrine of
tenure all property interests have their origin in a Crown grant and if
(ownership in minerals) has not specifically been granted it must still be
retained by the Crown.

The Crown's right to minerals in the earth is a property right, which can
be transferred to and enforced against other members of society. This right
is, however, not regarded as a right of possession of minerals. Possession
of a royal mine over freehold land is vested in the holder of the freehold as
against others than the Crown and persons claiming under the Crown.

As indicated in III(a)(i) above an express reservation of ownership of
minerals in situ or the right to prospect and mine such minerals is absent in
the South African MPRDA.

(iv) Exceptions to (and new) statutory reservation of ownership of minerals in situ
Private ownership of minerals in land (other than the royal minerals) granted
(without a reservation of ownership of such minerals to the Crown) prior to a
statute which reserved ownership of minerals in the Crown is possible in
limited instances. Three examples will suffice.

First, in respect of titles of estates in land granted in Western Australia
before 1899 by virtue of the Lands Act of 1898 (WA), the owner of the land
retained the ownership of the minerals (except the royal minerals) unless the
owner or the owner's predecessor in title had transferred the minerals rights
to someone else.

Secondly, in New South Wales, private ownership of minerals could exist
if the Crown grant was dated prior to the Crown Lands Act of 1884 (NSW)

Mining Act 1978 (WA) confirm the Crown's prerogative to gold and gold and silver,
respectively. Reservation of ownership of minerals took place in mining statutes
which preceded the respective statutes which will not be examined in this article.
Similar reservation of ownership of petroleum also took place by statute which,
however, falls beyond the scope of this article.

162 Chambers op cit note 9 at 176.
163 Chambers ibid.
164 Chambers ibid.
165 Plant vs Rolleston supra note 147 at 98, 101-102, 112.
166 Hunt op cit note 7 at 56.
and the minerals had not expressly been exempted prior to that date by the terms of an express grant or by the Crown Lands Alienation Act 1864 (NSW). The Crown has, however, asserted its rights to coal by vesting all coal in the State of New South Wales in the Crown (in right of that State) and abolishing private ownership of coal. Provision is made for the Governor to make arrangements for the payment of compensation to owners of land for the loss of ownership of coal in situ. Such arrangements could differentiate between the persons to whom compensation was payable, by providing that specified persons, or persons of a specified class, were not entitled to be paid more than a specified amount. In *Duham Holdings Pty Ltd v New South Wales* the issue was whether or not the right to receive 'just' or 'properly adequate' compensation is such a deeply-rooted right as to operate as a restraint upon the legislative power of the New South Wales Parliament. The High Court, per Gaudron, McHugh, Gummow and Hayne JJ, held that a State Parliament has the legislative power to deprive a person of property without just compensation. Having regard to the federal system of Australia and the text and structure of the Constitution of each State, the court held that there are implicit limits to the exercise of legislative powers conferred upon the Parliament which are not spelled out in the constitutional text. However, the right to receive just and/or properly adequate compensation for the acquisition of property was not perceived by the court as such a limitation. The compensation scheme was, thus, held to be within the powers of the State Parliament. Kirby J held:

"The present case, although apparently involving discrimination and arguably injustice to the applicant, falls far short of the extreme instance that would enliven any of the foregoing constitutional implications, assuming they had been invoked. By the Act, and the Arrangement, compensation is provided to the applicant. It can be recovered by due process of law... The law of the State is formally valid. It is not inconsistent with the express terms of the federal Constitution or any applicable federal law. But neither is it invalid as incompatible with the Constitution Act of the State." Thirdly, in the Northern Territory the Minerals (Acquisition) Ordinance 1953-1954 (NT) provides for acquisition by the Crown in the right of the Commonwealth of all minerals not already owned by the Crown or Commonwealth and provides for compensation to disposed owners upon certain conditions. In *Keem v Commonwealth of Australia* it was decided

---

165 *Bradbrook, MacCallum & Moore op cit note 7 at 655.*
166 Coal Acquisition Act 1981 (NSW) s 5.
167 Coal Acquisition Act 1981 (NSW) ss 6 and 6A; *NSW Coal Compensation Board v NSW Coal Compensation Review Tribunal* [2002] NSWSC 326.
168 Section 6(3).
170 Ibid at 408 paras 7–8.
171 Ibid at 410 paras 14–15.
172 Section 3.
173 Section 4.
that the compensation provision in the Ordinance satisfied the 'just terms' requirement for compensation because it is judicially determined in the absence of an agreement.

The relevance of the new statutory reservations of ownership of minerals in situ in Australia to South Africans is that these reservations were accompanied by payment of compensation. The sheltered reservations in terms of s 3 of the MPRDA do not provide for compensation beyond the transitional measures of the MPRDA. The reason could be either the argument that reservations did not take place or, even if they did, compensation is not payable in these circumstances.

(v) Grant of statutory rights to minerals
A wide variety of statutory rights to explore for or mine minerals are granted by the Crown in terms of the respective mining statutes.\(^{176}\) The mining laws\(^{177}\) determine that property in minerals passes from the Crown to the prospector or miner when the minerals are separated from the land in accordance with the right to prospect or to mine. If minerals are separated from the land otherwise than in accordance with the right to prospect or mine, property in the minerals remains in the Crown. The wording of the South African MPRDA is not blessed with clarity in respect to the ownership of minerals upon lawful and unlawful extraction.

IV CRITICAL ANALYSES
The uncertainties in South Africa as to in whom ownership of minerals in situ vest do not exist in the Australian mineral law. It is submitted that the shortcomings in South African law could be viewed against the background of Australian mining law, which was probably selectively relied upon in the drafting of the MPRDA. It is not suggested that the MPRDA should be dressed in a metaphorical rugby jersey of which one half is Springbok and the other half is Wallaby.\(^{178}\) The small holes in the Springbok jersey could be mended by weaving Wallaby gold across the holes. In short, Australian mining law can shed light upon the omissions of the MPRDA.

\(^{176}\) (1963) 5 FLR 432 at 441.

\(^{177}\) For a brief summary of the various statutory rights to minerals, see Chambers op cit note 7 at 177-80.

\(^{178}\) Mineral Resources (Sustainable Development) Act 1990 (Vic), s 11; Mining Act 1992 (NSW), s 11; Mineral Resources Act 1989 (Qld), s 310; Mining Rights Act (SA), s 18; and the Mining Act 1978 (WA), s 85.

\(^{179}\) Bertos De Villiers 'Jolle het my droom gested' in Breed (21 January 2010) available at http://www.breed.com/Content/bb-Depot/1978/e8ba7ce039b-f0e972a3b85f93df4/21-01-2010-06-31/jolle_het_my_droom_gested, accessed on 4 February 2010 tells the following story (translation): 'I have a rugby jersey of which one side is a Springbok jersey and the other half is a Wallaby jersey. At the Subiaco Stadium in Perth the blokes laugh and say: "Mate, you got your bets hedged." At Loftus a guy said to me: "Take off that **** jersey or I will hit you."' I would suggest that the accommodative Perth approach to the make up of the jersey is followed, rather than the protective Loftus approach.
In an attempt to analyse these omissions of the MPRDA, a distinction can be made between a right, its content (entitlements) and the object to which the right pertains (legal object). With reference to South African and Australian mining law, the following distinctions can, respectively, be made by means of the following diagram:

<table>
<thead>
<tr>
<th>Number</th>
<th>South African law</th>
<th>Australian law</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)(i)</td>
<td>Ownership of land (minus minerals)</td>
<td>Fee simple of the land (minus minerals);</td>
</tr>
<tr>
<td>(b)(i)</td>
<td>Entitlement of ownership of land</td>
<td>Entitlements of fee simple of land</td>
</tr>
<tr>
<td>(ii)</td>
<td>Ownership of minerals in situ</td>
<td>Ownership of minerals in situ</td>
</tr>
<tr>
<td>(ii)</td>
<td>Entitlement to prospect, mine and remove minerals by virtue of ownership of minerals in situ</td>
<td>Entitlements to prospect, mine and remove minerals by virtue of ownership of minerals in situ</td>
</tr>
<tr>
<td>(c)(i)</td>
<td>Public power or statutory right to minerals in land</td>
<td>Royal prerogative to certain minerals in land</td>
</tr>
<tr>
<td>(ii)</td>
<td>Entitlement to prospect, mine and remove minerals</td>
<td>Entitlement to prospect, mine and remove minerals</td>
</tr>
<tr>
<td>(d)(i)</td>
<td>A quasi-servitude in respect of minerals in land</td>
<td>A profit à prendre in respect of minerals in land</td>
</tr>
<tr>
<td>(ii)</td>
<td>Entitlement to prospect, mine and remove minerals</td>
<td>Entitlement to prospect, mine and remove minerals</td>
</tr>
<tr>
<td>(e)(i)</td>
<td>Right (granted) to prospect or mine for and remove minerals</td>
<td>Right (granted) to prospect or mine for and remove the minerals</td>
</tr>
<tr>
<td>(ii)</td>
<td>Entitlement to prospect, mine for and remove the minerals</td>
<td>Entitlement to prospect, mine for and remove the minerals</td>
</tr>
<tr>
<td>(f)(i)</td>
<td>Ownership of minerals severed from the land</td>
<td>Ownership of minerals severed from the land</td>
</tr>
<tr>
<td>(ii)</td>
<td>Entitlements by virtue of ownership of severed minerals</td>
<td>Entitlements by virtue of ownership of severed minerals</td>
</tr>
</tbody>
</table>

Regarding the legal object of the respective rights, a distinction can be drawn between land minus minerals and minerals in situ. It should, however, be noted that, in accordance with South African property theory, minerals in situ do not qualify as a 'thing', because of the absence of the requirement of an independent entity.180 A 'thing' is conventionally defined as 'a corporeal object external to man which is an independent legal entity susceptible to private ownership and valuable and useful to mankind'.181 It is, however, arguable that the South African legislature has created a new legal object in the MPRDA, namely, minerals in situ. The recognition of a new object is a precursor to the notion of minerals in situ being res publicae. In Australian law, minerals in situ would constitute property182 and are also recognised by

181 Van der Merwe ibid para 205.
182 Some of the features of 'property' as identified by Janice Gray, Brendan Edgeworth, Nell Foster & Scott Grant: Property Law in New South Wales, 2 ed (2007) 3–6
the respective statutes. Property is legally defined as "an exclusive and private relationship which an individual or corporation has with an object or resources which is enforceable against the rest of the world." There is a link between the respective rights (mentioned in (i) of the above diagram) and the content of the right (entitlements) (mentioned in (ii)).

It should be further noted that it is not always easy to determine whether the land or the minerals in situ is the legal object of a particular right. Because it is debatable what constitutes the legal object, the legal object is, for convenience's sake, stated as an alternative in such instances. The legal object in this regard may differ in the two systems but does not need to be further examined, at this stage.

Ownership in (a)(i) and (b)(i) of the above diagram is vested in a private individual or a holder in a private capacity. An individual or holder in a private capacity can also be the holder of quasi-servitude or profit à prendre in (d)(i) above. Due to the abolition of the notion of mineral rights in South Africa, a private individual can no longer be the holder of such a quasi-servitude. In Australia, the Crown (in person of a State) is the holder of the statutory right or royal prerogative in (c)(i) of the above diagram. It is unclear whether the state in South Africa is such a holder because of the absence of an express reservation of minerals in favour of the state in the MPRDA. The right to prospect for or mine and remove the minerals mentioned in (e)(i) of the diagram is upon a grant by the Crown vested in a private holder or a holder in a private capacity. The reason why the Crown may grant such a right is because it is the holder of a statutory right or royal prerogative in (c)(i) of the diagram. Although it is unclear whether the state in South Africa is the holder of a statutory right or public power in (e)(i), it is empowered by s 3(2) of the MPRDA to grant a right to prospect or mine to a private holder or a holder in a private capacity. In Australia, the holder of a profit à prendre in respect of land/minerals in situ may grant a right to prospect for or mine and remove the minerals, as mentioned in (c)(i). The former holder of a mineral right in South Africa cannot longer grant a right to prospect for or mine and remove the minerals, as mentioned in (c)(i). The common law or statute determines the holder of ownership in the case of (i)(i). In Australia, it is clear that the holder of the right to prospect for or mine minerals acquires ownership of the minerals in the case of lawful extraction thereof. In the case of unlawful extraction of minerals, the Crown retains ownership. In South Africa, the holder of the right to prospect or

and B J Edgworth, C J Rossier, M A Stone and P A O'Connor Saleville and Neave: Australian Property Law 8 ed (2008) 3–6 are present, namely: dominion (right to use and enjoy), the right to exclude others, external things, right to alienate or transfer, and a relationship between persons in relation to things or resources. See also Milhous v Nhabako supra note 1 at 171.

mine acquires ownership during lawful extraction but, in the case of unlawful mining, it is unclear whether the state acquires or retains ownership of such minerals. The holder of the respective rights mentioned in this paragraph is, thus, entitled to exercise the correlative entitlements. The entitlements do not exist without an encompassing right.

Working backwards with the rights and entitlements set out above, it is submitted that because the state in South Africa is empowered to grant a right to prospect or mine to an individual in (c) of the above diagram, it has to have the entitlements to prospect, mine and remove certain minerals in (c)(ii) above. To have such an entitlement (which cannot exist without an encompassing right), the state must have a right or public power over minerals in situation (c)(i). To have such a right or power, the state must have the entitlements to prospect, mine and remove minerals in (b)(iii). To have such an entitlement (which cannot exist without an encompassing right), the state has ownership of minerals in situ in (b)(i). Ergo, public ownership of minerals in situ is vested in the state.

By drawing a comparison between the respective rights and entitlements listed in the above diagram, the gaps in MPRDA can be filled up. The power of the state in South Africa to grant rights to minerals seems similar to the royal prerogative to minerals or the statutory reservation of ownership of minerals in situ in Australia. If it is similar to the royal prerogative, it is based upon a form of public power. If it is based upon an implicit statutory reservation of ownership of minerals, it is based upon a reservation of something which the state owned before, which is, of course, not the case. The royal prerogative is based upon the construction of ownership of minerals in situ and the entitlement to prospect, or mine and remove such minerals. The entitlement to grant the right to prospect or mine and remove minerals also forms part of the royal prerogative. Like the royal prerogative, the state in South Africa is empowered to grant the right to prospect or mine and remove minerals. The legal holes in the metaphorical MPRDA garment surrounding ownership of minerals could be darned by recognising a public power similar to the royal prerogative. After all, the royal prerogative did make its appearance in South Africa during the time of Sir John Cradock. If such a power is recognised, ownership of minerals is vested in the state and retained by the state upon unlawful extraction of minerals. This construction can be used as the starting point in the further debate about the expropriation of rights by s 3(2) the MPRDA to the extent that compensation is not provided by the transitional measures contained in the MPRDA. This debate is beyond the scope of the present article.

V CONCLUSION

Over time, the ownership of minerals and the right to prospect or mine and remove minerals have moved from private holding to public holding by the state in Australia and in South Africa. These developments took place over different periods of time and for different reasons. With a few exceptions, in
Australia, the development is complete in both systems and, in broad terms, the points of departure and the end results are the same. Unlike in South Africa, modern day reservations of ownership of minerals in situ in Australia were compensated. In South Africa, by virtue of the introduction of public ownership of minerals in situ, or their becoming res publicae, control of minerals in situ by the state has become possible. Uncertainty as to the ownership of minerals in situ in current South African law, and the failure of the legislature to vest the right to prospect or mine and remove minerals in the state, could be viewed against the background of the developments which have taken place in Australia where ownership of minerals in situ, and the right to prospect or mine and remove minerals, are vested in the state. Viewed comparatively, such a construction not only exists in Australia but is also theoretically possible in such systems. If such a legal position or end result was intended, the underlying principles of the Australian legislation could assist to make sense of the omissions to be found in the MPRDA. Resorting to Australian damming to mend the holes of the MPRDA, it is arguable that either ownership of minerals in situ or the power to preserve, regulate and control mineral resources in South Africa is vested in the state. After all, we know that omissions had been resorted to in South Africa to transform private ownership of minerals in situ to public ownership of such minerals.