Salus Populi Suprema Lex: Justifying Compulsory Mineral Leases in the *Mineral Resources Development Act 1995* (Tas)

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Abstract

This article examines the *Mineral Resources Development Act 1995* (Tas), which provides the framework for compulsory mineral tenement leases in Tasmania. It argues that the Act in substance provides a regime of compulsory acquisition over surface land. The sanctity of private ownership, and the presumption against proprietary interference without a valid cause, are balanced with welfare economic arguments. Once an economic basis is accepted for the Act, it then becomes expedient to examine the Act in more detail not only to see whether it produces injustice, but also whether it produces hidden inefficiencies. This article argues, using the concepts of moral hazard and external costs, that the Act in its present form facilitates inefficiencies that are almost co-extensive with some of the injustices typically associated with compulsory acquisition regimes. These relate to the environmental management and lease renewal regimes under the Act. The examination here is restricted to the relationship between the mining lessee, surface landowner and the state. Important public interest issues in the environmental management of the mining industry are left for a later examination.

I INTRODUCTION

Compulsory taking of private property for public purposes is a feature of all Anglo-American legal systems. Jurisdiction-specific technical definitions exist, under various names, but broadly understood 'compulsory acquisition' ranges from outright and permanent expropriation to partial and temporary dispossession. The *Mineral Resources Development Act 1995* (Tas) (the Act) is the statutory basis for

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the creation of mineral extraction leases in Tasmania. This article argues that when a lease is granted over private land under the Act, such a lease essentially involves an element of compulsory acquisition. A wide range of regulatory activities detract from a landowner's proprietary interests, and bodies of law exist to distinguish, according to the property and constitutional laws of each jurisdiction, lesser forms of expropriation such as 'sterilisation' from 'taking'. In Australia, it is the *acquisition* of an interest by the government that defines the concept of taking, rather than the coercive expropriation of the owner.[1] But this focus belies the fact that, from the perspective of the expropriated land owner, the result is very much the same. The Act empowers the Minister to grant a mining lease to a third person against the will of the freehold landowner, and to this extent it constitutes taking by the state from that landowner by executive action. A tranche of rights is taken from the landowner, and is bestowed by the state upon another. This coercive transfer of property rights between citizens can also serve public ends, and indeed must do if it is to be justified.[2]

These rights take the form of a leasehold estate for a given term and subject to given conditions. Even though they are not taken *to* the state, they are still taken *by* the state and *for* the state's public purposes. The common law does not have a system of allodial title, in which landowners are the full and absolute owners of their property. We are generally limited to a fee simple, a form of feudal tenancy granted from the Crown. It is shorn of its feudal trappings, but still relative and subject to certain limitations, including the Crown's 'eminent domain', land use regulation and taxing power. However, the common law system of land tenure has also coevolved with proprietarian liberalism for centuries, and demands justification for intrusion on property rights. Expropriation, including taxation as well as outright dispossession, must be with the consent of the proprietor: it may not be at the arbitrary will of the executive.[3]

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[1] See for example *Commonwealth v State of Tasmania* (1983) 158 CLR 1 at 145; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155; *ICM Agriculture Pty Ltd & Ors v Commonwealth & Ors* (2009) 240 CLR 140.

[2] See for example the infamous United States Supreme Court decision in *Kelo v City of New London* (2005) 545 US 469. Private land was condemned by the City of New London to enable a comprehensive redevelopment plan, which would provide employment and tax revenue. Although the land was condemned by the government to be given to another private owner, the Court held that the expected benefits to the community of the redevelopment qualified the plan as a public use for the purposes of the Fifth Amendment to the *United States Constitution*, which includes a takings clause the counterpart of s 52(xxxi) of the *Commonwealth Constitution*.

[3] John Locke, *Two Treatises of Civil Government* (Cambridge University Press, 1960) *Second Treatise* § 138, 378–9:

> The *Supream Power* [ie the Legislature] *cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes

In a parliamentary democracy, this means with the consent of the majority of representatives in Parliament.[4] But it must also be for a public purpose, as indeed any legislative or executive interference must be in pursuit of a recognised and legitimate public benefit. To do otherwise would offend some of the most fundamental axioms of our legal and constitutional tradition. The law may not derogate from the rights of a freehold owner for another individual's private benefit, without some deeper public objective in mind.

This article develops the only obvious modern justification available for the coercive dispossession of private property in Tasmania: the economic importance of extractive industry to the Tasmanian economy. If the justification for the creation of mining leases in Tasmania rests on welfare economic considerations of public benefit, then the maintenance and management of such leases should be subject to economic analysis, too. An economic analysis can be instructive as it provides useful analytical tools such as the concepts of externalities and moral hazard, which might allow us more accurately to estimate the public and private costs and benefits created by a mining lease, and whether it really is a rational pursuit of the public good.

A *The Scope of this Article*

This article aims to make a targeted and modest contribution to mineral law. First, it restricts itself to an analysis of the interests of surface landowners and mining entities, and to the role of public authorities. The interests of the public and the rights of public interest groups such as environmental organisations to be involved in the mineral lease regime are equally important. Often, large-scale mining operations will have an environmental impact, the importance of which transcends the purely private interests of surface landowners, because they affect environmental systems on a broader scale. Some of the arguments posited in this examination will apply with equal force to the public interest — especially discussion of the externalisation of costs, as costs are often externalised on public goods such as river systems, public land or the atmosphere. But the fundamental problem with a *compulsory* mining lease — as opposed to *any* mining lease that is poorly managed — is that it represents an intrusion on the proprietary interests of another individual. Various mining operations do exist that are likely to clash

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> and requires, that the People should *have Property*, without which they must be suppos'd to lose that by entring into Society, which as the end for which they entered into it, too gross an absurdity for any Man to own… [A] Man's *Property* is not at all secure, though there be good and equitable laws to set the bounds of it, between him and his Fellow Subjects, if he who commands those Subjects, have Power to take from any private Man, what part he pleases from his Property, and use and dispose of it as he thinks good.

[4] Ibid § 96, 349 and § 140, 380.

with landowners' normal, everyday activities such as farming and dwelling in rural areas, and they seem to be increasing.

Secondly, it is recognised that the coercive features of the Act are similar in substance to the mineral tenement leasing regimes in other Australian jurisdictions.[5] The application and appeal procedures differ significantly between Australian jurisdictions, especially in relation to the nature and role of public authorities such as the Director of Mines and the Mining Tribunal. While core features are broadly similar, some interstate statutes provide for a Mining Warden or similar, which may combine investigative and arbitral functions now separate in Tasmania. This examination remains focussed on the Tasmanian provisions. Rather than a detailed comparison of the existing legislation in each state and territory, this article aims to provide an insight into compulsory mineral tenement leasing from first principles which, it is hoped, may be relevant in some way to all states and territories.

B *Acquiring a Mining Lease*

A person applies for a mining lease to the appropriate government Minister under s 70 of the Act, specifying the minerals sought and detailing the land and proposed operation. Others with an interest in the application will include the freehold owner of private land over which a mining lease is sought, leasehold or other occupiers of that land; neighbouring owners or occupiers, and the public at large where public land is the subject of the application. Government agencies such as the Environmental Protection Authority also have a role to play in the application process, and by virtue of their statutory mandate have an institutional interest in the outcome of an application.

The land the subject of the application will have been explored and marked out under other provisions of the Act. Landowners are entitled to object to mineral exploration licenses, and the Director of Mines is obliged to attempt to resolve these objections.[6] If he or she cannot, then the Mining Tribunal will do so, which is a division of the Magistrates Court created under s 127. In practice this will involve the Director arranging for interested parties to meet and discuss their concerns, on the basis of which a number of conditions may be agreed for the exploration activities.

Applications for a mining lease go first to the Director of Mines. The Director is to consider each application, and then make a recommendation

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[5] These are the *Mineral Resources Act 1989* (Qld), the *Mining Act 1978* (WA), the *Mining Act 1992* (NSW), the *Mining Management Act 2008* (NT), the *Mining Act 1971* (SA) and the *Mineral Resources (Sustainable Development) Act 1990* (Vic).

[6] See s 75. The Director of Mines is appointed under s 8 of the Act.

about the application to the Minister.[7] The applicant can also make representations to the Minister at this stage, and is entitled to have them considered. Any person with an interest or estate in the land in respect of which a lease is sought is entitled under s 76 to object to the lease being granted. He or she must do this within 28 days of the marking out of the land. Objections are heard by the Mining Tribunal. Interestingly, this right to lodge an objection is not a right to have the decision to grant a lease reviewed. That decision has not yet been made. This much appears from the face of s 78(1), which reads:

> After considering an application for a lease and any recommendation of the Director and subject to any decision of the Mining Tribunal, the Minister may – a) grant the application; or b) refuse to grant the application.

The Minister may grant a lease if he or she is satisfied of a list of matters. These relate to the viability of the minerals to be extracted, the ability of the applicant to carry out the proposed operations, a sufficient environmental impact assessment, and adequate compensation arrangements with the landowner when the lease application relates to private land.[8] As the Minister is to be 'satisfied' that appropriate circumstances exist, he or she exercises a degree of discretion, which has consequences for the reviewability of his or her decision. The Minister may grant a lease subject to appropriate conditions relating to any of these matters pursuant to s 80. If the Minister makes a decision contrary to the recommendation of the Director of Mines, then under s 78 he or she must notify the Director and any person with an estate or interest in the land. That person is then entitled to object to the decision to grant the lease in accordance with s 76. The Act does not provide a clear avenue for landowners to seek review of the Minister's decision as a matter of course where it was made in accordance with the Director's recommendation. Some interstate statutes provide for clearer avenues to review ministerial decisions. However, it appears that in all states and territories, the balance between miners' and other landowners' rights makes mineral tenement leasing a contested area.[9]

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[7] The Director must also fulfil certain notice requirements. In particular, the Director is to notify the applicant and the parties required by s 29 of the *Native Title Act 1993* (Cth) that he or she intends to recommend that the application should be granted. The Director is further required to provide the applicant with a copy of the lease the Director proposes to recommend that the Minister grant. See s 75(2) and (2A).

[8] Compensation is paid to the surface landowner, for example on a per tonne basis for minerals removed. The amount and method of calculation of the compensation is to be determined by agreement between the parties under s 144 and s 145. If the parties fail to reach an agreement, either party can apply to the Mining Tribunal under s 150 to set a price for compensation. See s 75(3) for the full catalogue.

[9] The *Mining Management Act 2008* (NT) s 65 provides, for example, that 'a person may apply for review of a decision of the Minister or a delegate of the Minister' to the Chief

Once the Minister's decision is made and a lease is granted, the Environmental Protection Authority (EPA) will then have a role to play before mining can commence. In particular, mining is a scheduled Level 2 activity under the *Environmental Management and Pollution Control Act 1994* (Tas).[10] In order to carry out Level 2 activities, a person must undertake an environmental impact assessment according to terms of reference set by the Environmental Protection Authority.[11] The assessment is open to public comment, including from interested parties such as landowners, and this is perhaps the most important source of environmental management controls on mining activities.[12] Generally, an Environmental Protection Notice will be issued containing conditions to be observed in the management of the activity site.

II AN ENGLISHMAN'S HOME IS HIS CASTLE

The Act deprives a fee simple owner of the right to choose how to use his or her land, and above all the right to exclude others from its use without his or her personal consent and control, for example, subject to a lease agreement that is terminable for breach of certain conditions. From the full 'bundle' of property rights that a freehold owner has in his or her land,[13] any significant derogation from those rights can usefully be subjected to a taking analysis. Even land use planning laws such as zoning regulations sometimes constitute a form of taking in the sense of coercive expropriation that should attract juridical scrutiny, although this fact is recognised to different degrees in different jurisdictions, and not generally in Australia.[14]

Executive Officer (in the case of a decision of an officer) or to the Mining Board (in the case of a decision of the Minister). However it should be noted that the Mining Board consists of five persons nominated by the mining industry and appointed by the Minister. As such, the reviewability of ministerial decisions to such a tribunal might be cold comfort for affected parties; See for example Kirsty Ruddock, 'Justice in the Northern Territory?' (2008) 7(2) *Indigenous Law Bulletin* 21 on the political tension between mining industry, traditional land owners and environmentalists.

[10] See Schedule 2 for a list of Level 2 Activities. Extractive Industries are listed in s (5).

[11] These assessments are undertaken by private consultancies at the behest of the mine operator. The role of professional ethics should be kept in mind as consultancies may have ongoing relationships with the mining industry, if not with particular mine operators. Clear incentives exist for them to maintain commercial relationships at the expense of professional integrity, just as with any other profession or industry.

[12] The EPA also has the power in s 35 to require a bond to ensure compliance with the Act, but is only allowed to do so where the person has previously breached the Act and presents a risk of doing so again, rather than as a matter of course.

[13] The bundle of rights metaphor is usefully expounded by Kevin Gray, 'Property in Thin Air?' (1991) 50 *Cambridge Law Journal* 252.

[14] It has been recognised by the High Court (as it has traditionally been recognised in the United States under the doctrine of 'regulatory taking') that lesser forms of taking essentially amount to compulsory acquisition, albeit under limited circumstances. See *Newcrest Mining (WA) Ltd v The Commonwealth of Australia* (1997) 190 CLR 513; Cf

The presumption against the forced alienation of property is a fundamental principle of the common law.[15] This presumption remains even where it is constitutionally possible. Private property is prima facie inviolate from executive interference. As wrote William Pitt the Elder, First Earl of Chatham:

> The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter - the rain may enter — but the King of England cannot enter! All his force dare not cross the threshold of the ruined tenement![16]

In the Lockean framework that informs popular as well as legal understandings of our constitutional system, all interference with private property rights by the government must be by the *consent* of the proprietor, or rather, the majority of the population of the political community to which he or she belongs.[17] In a representative democracy, that means that interference must be authorised by an Act of Parliament. The fact that an expropriation occurs under an Act of Parliament, as opposed to the prerogative of the executive, provides the first limb of legitimation.

However, a second limb exists, though it is often forgotten.[18] English property law and the English constitutional tradition draw on a common

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Pennsylvania Coal Co v Mahon (1922) 260 US 393. Also see Donna R Christie, 'A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia and Canada' (2007) 32(2) *Brooklyn Journal of International Law* 343.

[15] Glen McLeod and Angus McLeod, 'The Importance and Nature of the Presumption in Favour of Private Property' (2009) 15 *Local Government Law Journal* 97, 100.

[16] This was famously declared by Pitt the Elder in the House of Lords in 1763. The idea was already well entrenched in English legal thought, however, and Sir Edward Coke had written over a century earlier that 'a man's home is his castle' – see Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown, and Criminall Causes* (London, 1644) 162. At the time of Pitt's writing, the average English subject enjoyed a far greater degree of liberty than many of his Continental counterparts. It should be remembered that in England, George II had to rule according to the evolving English constitution and powers of Parliament. In Hanover, the same George ruled as an absolute monarch who had direct and personal control over matters such as the appropriation of funds and the appointment of officials. There was at that time a personal union between the monarchs of the United Kingdom of Great Britain and Ireland and the Duchy of Brunswick-Lüneburg, much as a personal union exists in the monarchs of the United Kingdom, Australia, Canada and New Zealand today. See Basil Williams, *The Whig Supremacy* (Clarendon Press, 2nd ed, 1963) 13.

[17] 'For when any number of Men have, by the consent of every individual, made a *Community*, they have thereby made that *Community* one Body, with a Power to Act as one Body, which is only by the will and determination of the *majority*.' Locke, above n 3, § 96, 349.

[18] It is expressed in the United States Fifth Amendment, which employs language strongly reminiscent of Locke's politics: '[Nor shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' The reference to 'public use' is a restriction on the general

history and source, as reflected in documents such as *Magna Carta*, and in the writings of Locke and William Blackstone.[19] By the 18th century, the consensus had emerged that only *consent* rendered the King's entry legitimate, and an Act of Parliament evidenced that consent. But in Locke's political philosophy, governmental power is not regarded merely as a consensual relationship between individuals and their government. Rather, it is characterised as a trust under which the *enforcement* of natural rights — such as property rights — are delegated to the government, and this trust is subject to its fundamentally fiduciary, purpose-oriented nature.[20] Although this aspect of Locke's philosophy is not emphasised to the extent of his consent theory, it is absolutely central that an expropriation be not only consensual but also for the public good, which means conducive to the enforcement of community members' natural rights to life, liberty and property.[21]

For example, consent theory cannot realistically cure an expropriation under the *Mineral Resources Development Act* that enriches the Minister him or herself, or a third party to repay a political favour. While such breaches can be consented to between individuals of legal capacity, only through the use of elaborate fictions could it translate to the 'contract' between government and the many people over which it exercises power. The proscription of self-dealing is generally interpreted through criminal notions of corruption, but can be perhaps even better understood as incidents of the general fiduciary nature of public office.[22] To this end, it is important to recognise at the outset that Parliament, through the Act, has authorised the Executive to commit a great intrusion upon landowners' right to peaceful enjoyment of their land. Beyond the standard legitimation of democratic consent, there is still room to examine the Act and its use in practice against the requirement for public, rather than private, benefit. Politically, morally and philosophically —

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taking power: taking must not only be compensated, but for a legitimate public use. See *Kelo v City of New London* (2005) 545 US 469.

[19] Christie, above n 14, 344.

[20] See Locke, above n 3, §89, 343 and §149, 384.

[21] William Blackstone, *Commentaries on the Laws of England* (1765) *Book 1,* 120–1:

> [N]atural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature… But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obligation and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it… Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.

[22] See for example E Mabry Rogers and Stephen B Young, 'Public Office as Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanours Implies a Fiduciary Standard' (1975) 63 *Georgetown Law Journal* 1025.

even if not, always, legally — expropriation requires a coherent and compelling justification, and above all one that is articulated rather than tacit. The first aim of this article is to establish such a basis. The second aim is to examine whether the *Mineral Resources Development Act* can really be said rationally to serve the public good, and to suggest how it might be made to do so better.

A *Mineral Ownership in Australia*

Traditionally, all minerals except the royal precious metals were the property of the surface landowner, and he or she could leave them undisturbed, extract them him or herself, or authorise another to extract them against a fee by granting a *profit à prendre*. Even at the time Pitt the Elder wrote, precious metals in England had belonged to the Crown by virtue of royal prerogative since the *Case of Mines* in 1568,[23] which then included a right over surface land to access these minerals.[24] Property in these precious metals vested in the Crown, but the landowner retained robust and extensive property rights in everything else. As such, this fact did not prevent Blackstone from declaring in 1766 that *cuius est solum, eius est usque ad caelum et ad inferos*[25] as a principle of English law.

In Australia, Vice-Regents asserted the traditional prerogative over precious metals as part of the colonial legal system, and this allowed a mining licensing system through the Gold Rush.[26] The Australian jurisdictions have subsequently asserted state ownership in all or substantially all minerals, wherever found. This was achieved initially through reservations on the title of land alienated by Crown grant, required under statute, and later by blanket assertions of ownership in legislation. Legislative reservation of minerals in Tasmania dates from 1893. The *Mining (Amendment) Act 1911* (Tas) s 25 created a legislative reservation applicable to all lands alienated from the Crown, active

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[23] This was the result of a royal prerogative right recognised in the *R v Earl of Northumberland* (1567) 75 ER 472 (*'Case of Mines)*. This case involved the discovery of mixed copper and gold ore under lands owned by Thomas Percy, 7th Earl of Northumberland. Queen Elizabeth I claimed ownership in the gold by royal prerogative. It was held 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.

[24] As modern mining statutes generally bind the Crown, this right may be abrogated by statute in Australian jurisdictions.

[25] 'For whoever owns the soil, it is theirs up to Heaven and down to Hell' was a doctrine proclaimed in the seminal work of William Blackstone, *Commentaries on the Laws of England* (London, 1776) *Book 1,* 18.

[26] In Victoria, this system led to the famous Eureka Stockade rebellion.

retrospectively from 1893.[27] The *Crown Lands Act 1905* and a 1976 Act of the same name also applied to all grants since 1905, which reserved a number of specific minerals including metals, gems and oil.[28] The Act under examination contains a blanket provision applicable to all minerals wherever found, except those that were in private ownership at the time it was enacted. All non-privately owned minerals vested in the Crown upon enactment.

Mineral ownership is an important question, but will seldom be in issue today. The exception in this case tends to prove the rule. At the time of writing, the Full Court of the High Court of Australia had just delivered its judgment regarding the New South Wales government's ability to charge a royalty for admixed copper and gold ore as a 'publicly owned mineral' under s 282 of the *Mining Act 1992* (NSW), a fact scenario strangely reminiscent of the ancient precedent in the *Case of Mines.* In *Cadia Holdings Pty Ltd & Anor v State of NSW*,[29] Cadia Holdings Pty Ltd and Newcrest Operations Ltd[30] obtained a judgment that the copper in the Cadia mine is in fact in private ownership. This is because the land on which the mine is located was granted by the Crown between the years 1852 and 1881 (in 1878, in fact) without a reservation of ownership over copper — though such a reservation was made over sand, clay and indigenous timber for the building of public ways and canals. As such, the copper passed with the land to the grantee. The traditional prerogative Crown ownership of gold and silver, however, seem still to apply. The New South Wales government has been charging Newcrest Mining royalties for both metals since 1998. The result of the decision is that the State cannot charge royalties for the copper but only the gold.

B *Shylock's Quandary*

Shakespeare's comedy *The Merchant of Venice* provides an analogy for the Crown's problem with its ownership of subterranean minerals. In that play, the moneylender Shylock extends a line of credit to the merchant Antonio in return for a grisly bond: Antonio is to deliver to Shylock a pound of his flesh should he be unable to meet the terms of the agreement. Antonio defaults, and Shylock — who, in his defence, has not been and will not be treated well — seeks his repayment and through it

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[27] See Adrian Bradbrook, 'The Relevance of the *Cujum est Solum* Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land' (1988) 11 *Adelaide Law Review* 462, 467.
[28] *Crown Lands Act 1976* (Tas) s 54(1) provides that '[a]ll Crown land which is sold or in respect of which a lease or licence (other than a lease or licence under the *Mineral Resources Development Act 1995*) is issued, shall be deemed to have been sold or a lease or licence in respect thereof issued only as regards the surface, and to a depth of 15 metres below the surface unless the Minister, in any case, determines otherwise.'
[29] (2010) 240 CLR 537.
[30] The same Newcrest group in the litigation that established a doctrine akin to regulatory taking.

his revenge.[31] But Antonio is saved in the eleventh hour by the astute observation of a drafting technicality. Shylock is entitled to a pound of Antonio's flesh, but not a drop of his blood.

The surface of the land remains in private ownership, even if the minerals that lie beneath have long since vested in the Crown. The State, then, faces a similar problem. It must take some of the surface land, which it does not own, to get at the earth below, which it does. In some circumstances, subterranean lateral entry may be possible. But this is attended by its own problems. In the first case, lateral entry might interfere with the surface landowner's right to support from beneath.[32] Further, the intrusion into the earth below may still constitute an actionable trespass, despite its profound depth.[33] The *Mineral Resources*

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[31] Shylock is a fitting reference in the context of expropriation, although seised of personalty rather than realty as most Jews in medieval and early modern Europe. *The Merchant of Venice* written in the 1590s England, though it was set in the 14th century Venice. England was at that time officially devoid of Jews under the *Edict of Expulsion* of 1290. Under this edict Jews were not only expelled from the territory but also expropriated on their way out. The Jews of Venice, in turn, were expelled from the Ghetto in late 1572, shortly after the Holy League's victory over the Ottoman fleet at Lepanto. The catalyst for this was the surrender of Famagusta, a Venetian fort on Cyprus, some time earlier. Marc'Antonio Bragadin, commander of the fort, was flayed alive after surrendering on the orders of Lala Mustapha Pasha, the Ottoman general, over a matter of some Hajj pilgrims that had been killed under Venetian custody. The Ottoman butcher tasked with the grisly job was, incidentally, a Jew. In the comedy, Shylock's property is also forfeited for his attempted murder of Antonio. See Roger Crowley, *Empires of the Sea* (Random House, 2008) 241, 278.

[32] In *Pennsylvania Coal Co v Mahon* (1922) 260 US 393, a coal company that owned large tracts of land had conveyed surface rights to various homeowners. These conveyances had included an express reservation of the right to mine underneath, and a waiver of the landowner's rights to damages should the land subside due to mining. A law was passed, the *Kohler Act,* which prohibited mining in such a manner as to cause subsidence of any dwellings or certain types of public structures. The coal company challenged this statute as compulsory taking of its property in the subterranean coal, which requires compensation under the Fifth Amendment. The Supreme Court — Brandeis J dissenting — agreed. The Act made the property rights of the mining companies much less valuable and therefore required compensation. See Christie, above n 14, 345; also Richard A Posner, *Economic Analysis of Law* (Little, Brown & Co, 3rd ed, 1986) 52.

[33] The English Supreme Court (which replaced the House of Lords in October 2009) recently considered a case where subterranean oil was accessed beneath a landowner's property from a well drilled immediately outside its boundary. In *Bocardo SA v Star Energy UK Onshore Ltd & Anor* [2010] WLR (D) 204 (on appeal from the High Court, Chancery Division in *Bocardo SA v Star Energy UK Onshore Ltd & Anor* [2008] EWHC 1756 (24 July 2008) and the Court of Appeal in *Bocardo SA v Star Energy UK Onshore Ltd* [2009] 3 WLR 1010), oil was accessed from 1990 without the landowner's knowledge. It subsequently found out, asserted ownership in the oil under the *cuius est solum* doctrine, and sought a royalty on all oil extracted since that time. It was established at first instance that the landowner was in fact divested of property in the oil itself without compensation by statute. However, as it was still owner of the subterranean soil, it had a legitimate interest therein and the profound depth of extraction activities did not preclude an actionable trespass. The insertion of pipes under the land — even without causing any functional loss or visible change to the land — constituted a trespass. The rights of access

Development Act provides the mechanism to grant access to state-owned subterranean minerals. A leasehold estate, or the right to possess the land to the exclusion of others for a given period of time, is taken from the landowner and given to another who has a licence to take the Crown's minerals against a payment of royalties.[34] The ownership of the land is not extinguished. The landlord remains in the freehold owner and will get his or her entire bundle of fee simple rights back when the work is done. But the landlord loses his or her right to enter the land without the lessee's permission and most other rights of control, for the time the land is subject to the lease.

III Welfare Economics: Justifying Compulsory Mining Leases

A public benefit justification is required, and a coherent law and economics justification for compulsory mining leases is easy to develop. It is the crucial importance of extractive industry to the Tasmanian economy. Without stone to build, coal to burn, gold to trade and metals to work, the material economy as we know it would simply not exist. Unfortunately, we do not necessarily know today where the treasures are hidden. Finding them requires expertise and effort, and both of these things equate to the investment of capital. Our modern economy is based on a number of assumptions about capital, investment and production. One of them is that capital tends to be invested more efficiently where market forces such as competition are allowed to operate than where production is undertaken directly by the government itself. This justifies

were in fact compensable 'ancillary rights' under the *Mines (Working Facilities and Support) Act 1996*. That Act provides, similarly to the *Mineral Resources Development Act*, that an agreement is to be reached with regards to compensation for access, and that in the failure of an agreement being reached the Court is to order a compulsory acquisition and determine the quantum of compensation. Section s 8(2) provides that an amount be paid which is 'fair and reasonable as between a willing grantor and willing grantee.' The Court of Appeal reduced the damages payable from nine per cent of total royalties since 1990 (around £600 000) awarded at first instance to the nominal sum of £1000 as the landowner really had no valuable use for the soil at that depth before the oil extraction regime was created. This was affirmed on appeal to the Supreme Court. Interestingly, the Supreme Court discussed Parliament's intention in 1934 (the year of the original statutory acquisition of subterranean oil) in terms of maximising petroleum recovery in the 'national interest'. In Tasmania land alienated from the Crown is deemed to be only the surface and soil to a depth of 15 metres, and so this problem would not arise.

[34] The resource allocative function of compulsory acquisition should be remembered when we come to discuss the framework of welfare economics. Munch's comment that '[eminent domain] is effectively a reassignment of property rights: the seller is deprived of his right to refuse to sell and constrained in his right to bargain over price' applies equally to compulsory mining leases, except that the landlord is deprived of his right to refuse to lease, rather than to sell. The Act does provide some scope to bargain with the prospective lessee over price, but this bargaining process is far from unconstrained. See Patricia Munch, 'An Economic Analysis of Eminent Domain' (1976) 84(3) *The Journal of Political Economy* 473, 474.

the approach taken in the Act of granting exploration permission and extraction leases to private entities, rather than the state undertaking these activities itself.[35] Government's role is to ensure the most efficient allocation of resources, especially those over which is has direct control or indeed ownership. This might entail balancing conflicting claims to resources and, at times, derogating from the property rights of one interested party in favour of another.

This sort of law and economics analysis is not without its critics, and the case can certainly be overstated.[36] But it is a useful framework for examining the merit of governmental actions, especially those that are motivated by economic considerations. Welfare economics is the study of individual and group utility in an economy. The ultimate goal is to maximise group welfare, and this is done through allocating valuable resources efficiently to maximise the utility derived from them. An efficient system manages to produce more utility — in the sense of goods and services broadly defined — without using more resources. Clearly, using laws and regulation to create a more efficient system of resource allocation is an objective for any government. In the framework named after economist Ronald Coase, the premise is that resources should be allocated to the person that has the highest value use for them, as this person will use them most efficiently.[37]

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[35] The prevailing paradigm of the so-called New Resource Economics is that not only exploitation, but ownership of most resources should be in the private sector, governed by market principles, rather than in public ownership. In Tasmania, this can be seen with the recent introduction of regional water corporations and perhaps even the disaggregation of the electricity sector in the late 1990s. For an early 1990s examination of public industrial production in competitive markets with private goods characteristics, see Rainer Bartel and Friedrich Schneider, 'The "Mess" of the Public Industrial Production in Austria: A Typical Case of Public Sector Inefficiency?' (1991) 68(1) *Public Choice* 17.

[36] If economic arguments are used in law, it is also very important that they are good ones. For a critique in the natural resources context, see Ronald G Cummings, 'Legal and Administrative Uses of Economic Paradigms: A Critique' (1991) 31 *Natural Resources Journal* 463.

[37] See Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1. Coase makes reference to common law decisions to support his position that legal rules are or should be concerned with their ability to allocate rights to the most efficient rights-bearer. This is interesting in light of the Australian authority in *Turner v Minister for Public Instruction* (1956) 95 CLR 245. That case articulated the 'highest and best use' principle — the value of compensation for condemned land is to be assessed not by reference to the actual, current market value (for example a vacant lot used for storage in an urban renewal area), but by reference to the property's best and most advantageous use. This principle can be seen to increase the fairness of compensation values, as the best use is going to demand a higher value compensation. In a sense, it also serves to ensure in the Coasian framework that the rights are, indeed, given to the most efficient rights-bearer: by ensuring that the rights-acquirer is willing to pay the premium for the most advantageous current use of the land, it ensures that he or she indeed has a higher value use for it. On the contrary, a ceiling is imposed by the *Pointe Gourde* doctrine to prevent opportunistic rent-seeking.

The concept of efficiency is central to welfare economic theories. A useful way of thinking about efficiency comes from the work of Vilfredo Pareto. In the 1890s, this economist introduced the concept now known as Pareto Optimality. A Pareto Optimum transaction is one in which no party is worse off — at least a win–neutral situation, and preferably a win–win situation. The value people place on a resource is charted on a so-called 'indifference curve' and resources are, optimally, distributed on this curve so that they cannot be reshuffled without someone thinking they are worse off. Most trades between voluntary actors are, in fact, Pareto Optimum, because if they were not then the actors would not make the trade. In voluntary transactions, both parties can be said to be better off from transacting — the amount of utility has been increased in society just by property changing hands and, ideally, valuable resources are being used more efficiently to produce goods that would have remained outside the economy.

However, the requirement for at least one person to win and nobody to lose is, as described by Havemann and Keeler, a 'stringent criterion which could not be applied in many cases of interest, in which there are winners and losers.'[38] The next step came in the late 1930s from economists Nicholas Kaldor and John Hicks. These economists brought the 'potential compensation principle' into welfare economics, the principle that underlies enactments like the *Mineral Resources Development Act.* If the winners can compensate the losers in a non-Pareto Optimum transaction (for example a transaction coerced by the state), then overall utility will still have been maximised and, assuming compensation is made, no-one is worse off.[39]

For example, Farmer grazes cattle on Blackacre. Mining Co discovers that valuable minerals lie buried beneath Blackacre's pastures. Mining Co has, therefore, a higher value use for the surface land than growing grass, and under this model that resource should be allocated to the more efficient user. Absent government intervention, Mining Co would have to approach Farmer and offer to buy Blackacre or lease it from him to extract the minerals. As Farmer's property rights are protected from violation by the state, it would have to do so on Farmer's terms.[40] Farmer

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[38] Michael Hanemann and Andrew Keeler, 'Economic Analysis in Policy Evaluation, Damage Assessment and Compensation: A Comparison of Approaches' (Working Paper No. 766, Giannini Foundation of Agricultural Economics, May 1996) 6.

[39] See Nicholas Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49(195) *The Economic Journal* 549 and John R Hicks, 'The Foundations of Welfare Economics' (1939) 49(196) *The Economic Journal* 696.

[40] Conversely, under the Act, and given the relationship between mineral exploration licenses, marking out and mining lease applications, it is unlikely that Farmer will ever have a market for his compensation rights, and even if he had two miners bidding against each other, there is no mechanism in the Act to require the Minister to grant the licence to the miner who had agreed to give Farmer the highest compensation.

might agree and negotiate a reasonable price. But he might also refuse, as he likes Blackacre as a pasture more than as a mine. He might also ask a very high price, seeking to collect a rent from the profitability of Mining Co's proposed venture — he knows there are minerals under it now. Or, he could even try to extract the minerals himself.

None of these outcomes is likely to be desirable from a state perspective, assuming that the state is preoccupied with maximising the wealth in its economy. To do this, the state must ensure that as many buried treasures are unburied, as efficiently as possible. Starting from the last option, it is unlikely that Farmer can extract the minerals as efficiently as Mining Co. The second option is undesirable because, if taken to extremes, this sort of behaviour could threaten the commercial viability of mining operations generally.[41] Traditional economics approaches tend to break down when they encounter (economically) irrational behaviour: imagine, for example, that the millionaire Farmer actually bought Blackacre for the view, grazed cattle as a hobby and let his cows die old and happy.[42] Likewise, the first option is undesirable because it would lead to the underutilisation of a scarce resource. Assuming that the mineral underneath Blackacre — whether diamonds or coal — is more scarce than pasture, it is a more efficient use of Blackacre to extract the mineral than to graze Farmer's cattle. In the kind of world in which pasture was more scarce a resource than diamonds, the opposite would be true.[43]

In the case of Blackacre, it would appear that a free market could produce a sub-optimal allocation of surface land. If a free market fails in allocating resources in this manner, then the government holds a mandate to intervene and facilitate a more efficient allocation of the resources.[44] So it seems that government intervention is justified in the private affairs

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[41] Behavioural economists have observed that people place a higher price on things they own than on identical things owned by others — this is called the endowment effect and may affect people's willingness to accept compensation. See for example Richard Thaler, 'Toward a Positive Theory of Consumer Choice' (1980) 1 *Journal of Economic Behaviour and Organisation* 39.

[42] Uncurbed, absolute property rights can in fact lead to socially unacceptable outcomes. A quick thought experiment is sufficient to demonstrate why. Tasmania is a developing State that has a large peasant population. Farming Co, owned by an African sovereign wealth fund, buys up substantially all the arable land and water rights in Tasmania during a long period of economic decline, and then commences using it to grow tulips for export while the population suffers food shortages. The basic right of the *demos* to use the coercive apparatus of state to dispossess property owners of their rights is fundamental.

[43] Such a world is foretold in a Cree Indian proverb, now quoted and misquoted on countless inspirational posters, t-shirts and web-blogs: 'Only when the last tree has died, and the last river has been poisoned, and the last fish has been caught, will you realise that you can't eat money.'

[44] This summary draws on the transcript of a useful paper by Vanessa Ratten, Hamish Ratten and Rhys Lloyd-Morgan, 'An Economic Analysis of Australian Real Property Law' (Presented at *International Management Development Association Conference: Global Business – Coping with Uncertainty* Maastricht, 2004) 2.

of the market, including the market in property rights, where that intervention is calculated to render the allocation of resources more efficient. Under the Kaldor-Hicks paradigm, this justifies resource reallocation and compensation, just as we find under the *Mineral Resources Development Act*.

IV SOMETHING ROTTEN IN THE MINERAL RESOURCES DEVELOPMENT ACT

If the *Mineral Resources Development Act* is justified on the basis of welfare economics, then the regime created by the Act should also be subject to economic analysis, to see how well it reallocates mineral resources. Government intervention in the market may also be necessary to address market failures that arise subsequently to the creation of a mining lease. In particular, this might be warranted where the market fails to address situations of moral hazard, that is, where a person in control of resources has an incentive to manage them in an inefficient manner, or where costs are externalised from one resource user to another, meaning that the resources may not actually be allocated to the most efficient user.

Let us assume that Mining Co applied for a mining lease over part of Blackacre. Farmer objected to the lease and in a series of mediation sessions his relationship with the managers of Mining Co deteriorated. They were unable to negotiate a compensation agreement to which Farmer would agree, and Farmer felt that they were negotiating in bad faith because they knew he had no real choice anyway. The Mining Tribunal set a compensation price per tonne for minerals removed from the land by Mining Co, and the Minister for Infrastructure, Energy and Resources granted Mining Co a lease over Blackacre for 20 years. The EPA issued an Environmental Protection Notice on the basis of an expert consultant's report and representations from interested parties.

Mining Co now manages a piece of surface land it does not own. It has obligations to pay Farmer compensation, and obligations regarding management of the site. These obligations arise from the *Environmental Management and Pollution Control Act* and statutory documents made under it,[45] and from the terms of the lease. The measure of good environmental management should be at least the measure of compliance with these obligations.[46] Good site management may be a costly business,

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[45] While no specific provisions in the *Mineral Resources Development Act* relate to the rehabilitation of mineral tenements, leases are usually if not always granted subject to an environmental management and rehabilitation plan prepared by expert consultants retained by the lessee. Mining will also be subject to Environmental Protection Notices (EPN) issued under the *Environmental Management and Pollution Control Act 1994* (Tas).

[46] It should be remembered from the application process that the conditions were included not by Farmer, but by the Minister — while the landowner is entitled to have his opinion

and significant savings may be made through poor site management. For example, waste such as used oil, tyres or scrap metal from mining machinery could easily be buried in a quarry site. It costs money to transport waste from the site and many forms of waste attract disposal fees at municipal waste transfer stations. Likewise, settling ponds to ensure sediment is properly separated from effluent waste are costly to construct and maintain. Rehabilitation itself requires seedlings, soil retention measures and pest control. Gains made over years can be lost in one unfortunate event or one bad season, and the plan is back to square one. The cost of rehabilitation will accrue to Mining Co, but the benefit will accrue to Farmer when possession of the land reverts to him at the end of the lease. Conversely, the benefits of poor site management will accrue to Mining Co, but its cost will accrue to Farmer. Even a rough economic analysis of the situation, then, makes it apparent that the miner has a clear incentive to behave badly.

Such incentives for mismanagement are bad for efficiency for a very simple reason. Some people argue that it is the very reason why we have private property in the first place.[47] People tend to care less about other people's money than their own. When managing their own resources, people have a direct incentive to manage them well, which means efficiently, which means in the manner that derives most utility from their value. People lack such a clear incentive when they manage other people's resources, as they are buffered from the cost of their inefficient management. This is why corporations law is so preoccupied with imposing fiduciary duties on company managers, who are in control of shareholders' capital.[48]

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considered, he has no direct input into the terms of the lease. The landowner will likely have had his opinion considered regarding the terms of any EPN, but the final content of a Notice is determined by the EPA, not the landowner himself.

[47] Common and public resources are problematic precisely because no single owner has a reliable incentive to protect them. Where one individual's private property is being exploited, he or she can perform a cost-benefit analysis and decide whether to stop the exploitation or demand a rent. The benefit of asserting his or her rights, if able to do so, will likely outweigh the cost of doing so, unless the cost of enforcement is unreasonably high. The risk in other cases was described by Garrett Hardin in the late 1960s as a 'tragedy of the commons.' Each individual benefits directly from overexploiting the commons, but the cost is distributed over society. Because policing abuse is also costly, a collective action problem arises in that the cost of enforcement that falls on one individual will likely be greater than the cost imposed on him by the commons abuse. Mancur Olsen explained how collective action might be achieved, most reliably through coercion, for example by the state. See Garrett Hardin, 'The Tragedy of the Commons' (1968) 162(3859) *Science* 1243; see also Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965).

[48] For a good examination of corporations law (as compared with bondholder law) in this respect, see Jackson Taylor, *Bondholders' Rights* (Federation Press, 2005), especially Chapter 1.

The concept of external costs is also important to understanding these shortcomings of the *Mineral Resources Development Act.* All the costs of a production activity should appear in the cost–benefit analysis of that activity. When they are not, this is referred to as an externality. Pollution is in fact a perfect example. Quarry X may produce cheaper stone than Quarry Y because it pumps its effluent directly into the river instead of processing it in sediment settling ponds. Quarry X is in fact externalising the cost of effluent disposal by polluting the river, whereas Quarry Y is internalising the cost of its pollution into the unit price of Y Brand quarry stone. The cost of processing X's pollutants in the river may actually exceed the cost of processing Y's pollutants onsite, and so Y may be the more efficient producer.[49] To see this, however, the externalised costs have to be captured and incorporated into X's prices. To this extent, most economists would explain X's appearance as the more efficient of the two as a form of market failure, in the sense that uncaptured externalities are leading to an allocation of resources between the two producers that is less that optimally efficient.[50] If uncorrected, this might even lead X Co to acquire Y Co, or attract higher rates of investment on the capital markets, which would compound the sub-optimal allocation of resources even further.

There are two broad approaches in economics to internalise external costs. The traditional welfare economics approach, based on the early 20th century work of Arthur Cecil Pigou,[51] is to restore Pareto Optimality through government regulation and appropriate taxes and subsidies. An alternative approach was developed by Coase in the 1960s, which characterises the problem of externalities as a problem of ill-defined property rights. If property in the river were adequately defined, then Quarry X would not be permitted to exploit it without paying its owner some form of royalty. This would, in effect, internalise the cost of effluent pollution and correct the market failure that skewed X's prices relative to Y's.[52] Some economists dream of a Coasian paradise in which

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[49] The sediment may cause fish die-off, for example, and thus waste a significant biological resource. Unless a direct causal link is established between the two, this cost will have been successfully externalised onto the public. The rules of evidence and legal requirements of proof, combined with the cost of lawyers and technical experts, mean that establishing such a link gives rise to further costs still, and the success of any action to internalise the fish die-off into X's balance sheets presupposes an adequate environmental liability regime.

[50] In this context, costs imposed on public goods are perhaps more important than costs imposed on purely private interests because of their sheer scale. The pollution of river systems is a particularly apt example in this regard. For a discussion and conservative critique of the traditional welfare economics account of pollution, see Peter Lewin, 'Pollution Externalities: Social Cost and Strict Liability' (1982) 2(1) *Cato Journal* 205, 206.

[51] See Arthur Cecil Pigou, *The Economics of Welfare* (Macmillan, 1920).

[52] See Ronald Coase, 'The Problems of Social Cost' (1960) 3 *Journal of Law and Economics* 241.

no government regulation is necessary at all, and somewhere, sometime, some such place may well exist. However, it is unlikely to be Tasmania and certainly not at present. It is possible that externalities can be captured through a combination of these approaches where appropriate — defining property rights in resources as accurately and completely as possible, in addition to using taxation and regulation to control people such as emitters.

But under the *Mineral Resources Development Act*, a peculiar situation is created. The miner has an incentive to externalise costs and the means of doing so. Some of these costs may be imposed upon the public, but some are also imposed on individual landowners with well defined property rights.[53] The rights of the public might demand a Pigovian approach, but the well-defined rights of the landowner should be well accounted for under the Coasian model. But, even though that landowner might want to take action to protect his or her rights, his or her ability to do so is severely curtailed by the *Mineral Resources Development Act*. Parliament has socialised many of his or her rights of ownership, and a significant degree of control over the miner's environmental compliance is vested in the Minister, the Director of Mines and the EPA.[54] Optimally managed, this could well be an adequate regime to control the externalisation of costs. But the efficacy of this statutory scheme relies heavily on the efficacy of enforcement, primarily by the EPA and the Minister. By curtailing the enforcement of landowners' property rights, the Act denies one of the chief advantages of private property as an institution.

What makes this problematic is that these actors are now the managers of rights that they do not own. They too are in a position of moral hazard. The Minister, for example, is part of a government with a broad economic mandate that may pursue a mining-friendly policy to stimulate industrial activity. The EPA may be under political or other pressure to pursue an enforcement policy that does not scare off investment. With these considerations in mind, there is a definite incentive to overlook small

[53] This is true to a point. The landholder's rights are reasonably well defined, but subject to uncertainties, especially the unknown likelihood of a mining lease being extended on application. If the landholder could work with a fixed lease period, and could know when the land would revert to him absolutely, he could better perform the calculations required to decide whether to protect his rights. Likewise, when a lease has expired but subsists under s 98 because an application has been lodged, property rights in the land are not well defined. Neither miner nor surface landowner know whether they will be entitled to possession or for how long. This gives the miner even less incentive to rehabilitate the land and the surface landowner even less incentive to spend effort and money ensuring he does so.

[54] The *Environmental Management and Pollution Control Act 1994* (Tas), the conditions of the relevant mining license and lease, and instruments like EPNs issued by the EPA from time to time all seek to promote compliance from miners. Miners are also required to pay money into a security deposit account at the outset of a lease to ensure that sites can be rehabilitated.

market failures such as shoddy rehabilitation on private land, because the cost of this might be imposed upon an individual landowner only, or may materialise far in the future. The benefits, such as royalties and tax from mining revenues, or generating employment, are dispersed more widely among the electorate and are immediate. The Minister, for example, could potentially gain many votes for re-election by sacrificing only one.

Because of inherent features of administrative law and the wide discretions bestowed upon the Minister by Parliament, the landowner largely lacks effective means to control the Minister's moral hazard. In particular, discretionary decisions are only subject to judicial review for actual *mala fides* or serious, *'Wednesbury'* unreasonableness.[55] Though the Act creates an administrative moral hazard, it contains no special provisions to control it. For example, under s 98(3)(a), a mining lease subsists after its initial term where an application for renewal has been lodged until the Minister makes a decision to grant or refuse the application. This could allow leases to subsist despite a poor history of environmental compliance — a matter the Minister is bound to consider under s 96(2)(b) — simply through the Minister's failure to make a decision. Although the normal maximum period for renewal is 20 years under s 98(1), no time limit is expressly given to this grey period.

The Act contains no special provision for interested parties such as surface landowners to compel a determination of the fate of their land encumbered by such an indeterminate legal interest. Rather, such people are left with two options in administrative law — judicial review and mandamus — both of which are expensive, currently messy in Tasmania, and potentially time-consuming. This is inconsistent with the policy adopted in the Act to make mining disputes cheaper and easier to adjudicate. To this end, after all, the Act did establish the Mining Tribunal as a division of the Magistrates Court with simplified procedure and rules of evidence, and a special leave requirement to instruct legal counsel to appear on litigants' behalf.[56]

Such a landowner would likely have standing under s 19 of the *Judicial Review Act 2000,* which was intended to replace the prerogative writ of

[55] As with many such statutes, most of the powers given to the relevant public authorities are powers to make certain decisions if 'satisfied' of a number of criteria. Discretionary decisions are only subject to judicial review where they are unreasonable in the sense expounded in *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223, namely that the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[56] The Mining Tribunal is established in s 127. It has jurisdiction to determine proceedings concerning a list of matters in s 128, including 'any appeals or objections under this Act' in s 128(u). The rules of the Tribunal are the rules of the Magistrates Court (Civil Division) under s 131(1) but the rules of evidence do not apply under s 131(2)(a). Leave or consent is required for legal representation under s 131(4)(b).

mandamus in Tasmania.[57] It makes provision for the court to order that a public authority make a decision it is lawfully required to make, on the application of a 'person aggrieved' by the failure to make a decision. The test for a person aggrieved in that Act includes persons 'whose interests are, or would be, adversely affected' by the failure to make a decision.[58] While interstate authorities lend support to a broad interpretation for this provision,[59] there seems to be no Tasmanian authority directly on the question, and as the Minister has taken a narrow approach to s 7 in the recent past it is possible that the point would need arguing.[60] The other alternative is to apply for an order equivalent to the writ of *mandamus* under the *Supreme Court Rules 2000.* Such an action is also before the Supreme Court and the procedure is even more arcane than under the *Judicial Review Act.* Both causes of action attract considerable fees.[61]

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[57] It is seems that the jurisdiction of the Supreme Court to make an order equivalent to *mandamus* has survived the *Judicial Review Act,* contrary to the intention of Parliament and due primarily to expediency borne of incomplete contingency drafting. It is clear from the Hansard that Parliament did, indeed, intend to abolish the prerogative writs with s 43 'Abolition of Prerogative Writs.' However, Parliament forgot to make provision for people affected by decisions made before the Act came into force on 1 December 2001. One such person subsequently had issued a writ of *certiorari,* which was challenged by the authority in question. As such people would have been without any relief in the nature of *certioriari* — surely an unintended situation — the Supreme Court in *Tasman Quest Pty Ltd v Evans* (2003) 12 Tas R 16 held that the order available under r 627(2)(a) of the Tasmanian *Supreme Court Rules 2000* survived the *Judicial Review Act* and subsisted under the *Australian Courts Act 1828* (Imp) — see [8] per Blow J. This was followed by Evans J in *R v Resource Management and Planning Appeal Tribunal; Ex parte North West Rendering Pty Ltd* (2005) 138 LGERA 412. Rule 627(2)(b) provides much the same for *mandamus* as subrule (a) provides for *certiorari* and would appear to be similarly available despite the *Judicial Review Act.* Preferable would be that the *Mineral Resources Development Act* be amended to provide surface landowners some degree of involvement in the mining lease renewal process, starting with the right to be heard and have their positions considered. This would resolve the standing question under s 19 of the *Judicial Review Act* also.

[58] *Judicial Review Act 2000* (Tas) s 7(2)(b).

[59] The Queensland Supreme Court held in *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (14 June 2000) that a plaintiff with no private or proprietary right in a matter might still have standing under the *Judicial Review Act 1991* (Qld) s 7 (identical to the Tasmanian provision) unless their connection with the matter could be called an abuse of process. *BHP Coal Pty Ltd v Minister for Natural Resources and Mines* (2005) 139 LGERA 77 held that the words 'person aggrieved' should not be construed narrowly, and that they cover at least a person who can show a grievance beyond that which a person has as an ordinary member of the public.

[60] The Tasmanian Supreme Court case *Llewellyn v Clyde Group Inc* (2008) 17 Tas R 272 determined that the term 'person aggrieved' included persons incorporated after the time of the decision that caused the grievance. The relevant time is the time at which the application for review is made, not the time of the decision. This suggests that the Minister has taken an extraordinarily narrow view of s 7, and it is not unlikely that a similarly narrow approach could be submitted by the Minister in opposition to an application for review under s 19 in the future.

[61] Currently $410, and it is highly advisable to instruct legal counsel in the Supreme Court. It is not certain whether the two applications could be brought in one originating motion

V DE LEGE FERENDA

The situation is, then, that the *Mineral Resources Development Act* sits on fundamentally sound economic policy. However, because the Act contains an inadequate regime to ensure that leases are created, managed and renewed efficiently — especially with regards to their environmental management and their impact on private landowners — this justification has feet of clay. Miners and public authorities have inadequate incentives to manage leases properly, and costs may be thrown onto the public purse or private landowners instead of remaining internal to the lease owner's business. This represents in certain cases inefficient management by government itself. This section suggests some areas for legislative attention in the future.

The *Mineral Resources Development Act* reserves many control rights typically associated with freehold ownership to the Tasmanian Government, in particular to the Minister responsible for the Department of Infrastructure, Energy and Resources and his or her delegates such as the EPA. The diligence and effectiveness with which these public authorities exercise those powers directly affects the interests of the surface landowner.

When the state deprives an individual of the autonomy to promote his or her interests and wellbeing, the state assumes certain responsibilities towards that citizen. A prisoner, for example, would certainly not feel that the state is acting in his best interests when he is refused parole. But the state is obliged to act in his best interests, for example to care for his physical and mental wellbeing to a reasonable degree. In many meaningful ways, the state is obliged to administrate the powers it has assumed over his life for his benefit.[62] The nature and extent of these duties is open to debate, but that the state owes duties to such a person should form the starting point of that debate.

Under the Act, the landowner is constrained to enter a relationship against his or her will. He or she is then denied effective means to control that relationship, despite its ongoing character and its capacity to affect his or

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under the *Supreme Court Rules* as alternative orders for relief, and the author has received conflicting advice from the Court. Additionally, given the legal uncertainty, it is quite possible that both actions would be opposed. This makes optimising the exploitation of environmental resources in Tasmania less likely, due to raised transaction costs by virtue of bad lawmaking.

[62] As expressed by Paul Finn, 'where a fiduciary serves classes of beneficiaries possessing different rights, though obliged to act in the best interests of the beneficiaries as a whole, the fiduciary is nonetheless required to act fairly as between different classes of beneficiary in taking decisions which affect the rights and interests of the classes inter se.' Paul Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed), *Equity Issues and Trends* (Federation Press, 1995) 138.

her daily life, perhaps even in the innermost sanctum of his or her existence — his or her private home.[63] The *Mineral Resources Development Act* could have given the state the power of compulsory acquisition of the surface land, which the state could then lease to mining entities. Or it could have given mining entities the power compulsorily to acquire a freehold rather than leasehold interest.[64] This would cause ownership and control to coalesce, be it the state or the mine operator, removing the problem of moral hazard to a large extent and restricting the externalisation of costs to the public, rather than private third parties.[65] Both of these options were open to Parliament and neither was chosen. What remains is the voluntary assumption of control over the interests of surface landowners, and it is submitted that this should give rise to clearer duties — ethical, moral and legal.[66]

The Minister and his delegates in the public service must take cognisance of the role they play in the lives of surface landowners under the Act. The role of public service ethics is not always addressed in public law literature. But the professional attitude of public servants directly informs the quality of government decisions. They must use their powers and abilities to advance extractive industry in Tasmania for the welfare of the

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[63] Although mining leases may not be granted within 100m of dwelling-houses, water bodies such as lakes and dams and so on, mining activities may in fact impact on rural domestic life by intersecting fields with roads and fences, creating dust problems, destroying visual amenity, creating noise irritants and traffic dangers in the inescapable vicinity of rural dwelling houses.

[64] This also seems to be an approach favoured by some landowners in other contexts, such as land affected by wind turbine leases. See Lauren Wilson, 'No relief for land owners affected by wind farms,' *The Australian* (Sydney) 24 August 2009, <http://www.theaustralian.com.au/business/mining-energy/no-relief-for-land-owners-affected-by-wind-farms/story-e6frg9df-1225765400543>.

[65] To a large extent if the state retained ownership of the land, because the miner would still have the daily operational control of the site but the state has direct supervision and control of the miner. Moral hazard would be completely removed if the miner were required to purchase the land freehold, because there would be no separation of ownership and control. The desire to recoup any value at all from the mine site after operations cease would create an incentive on the miner to rehabilitate the site and avoid environmental contamination.

[66] See generally Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259. In the United States and Canada the deprivation of land and assumption of control has given rise to duties, recognised by the courts to be fiduciary in nature, owed by the State to the regions' Indigenous inhabitants (and erstwhile owners). Such developments are interesting because they proceeded by way of analogy from the relationship between guardian and ward. Australian courts have been less receptive to the notion of extending the state's fiduciary duties, even *sui generis*, despite some encouraging minority opinions. See *Guerin v The Queen* [1984] 2 SCR 335. For a discussion of a counterpart duty owed to Indigenous Australians (especially those affected by the Stolen Generations policies), see Paul Batley, 'The State's Fiduciary Duty to the Stolen Children' (1996) 2(2) *Australian Journal of Human Rights* 177; Tim Hammond, 'The "Stolen Generation" – Finding a Fiduciary Duty' (1998) 5(2) *Murdoch University Electronic Journal of Law;* see also the judgments of Toohey and Brennan JJ in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

state, but do so in a manner that is reconcilable with the fundamental interests of those people particularly affected by mining activities. And it has been suggested here that to do so might even increase the economic efficiency of the mining lease regime, in particular as far as environmental management is concerned.

This notion might be said to push the concept of public trust well beyond its orthodox boundaries. However, it is based soundly on the politics of Locke's *Second Treatise*, a cornerstone document of modern liberal political theory, which is in turn based on a long tradition of thinking about political authority.[67] The notion not only seems unthreatening, but our actually-held expectations of government make little sense without it: not only must governmental power be with the consent of the governed, but it must always be in their interests and serve no other purpose. As Frederic Maitland explained to his Continental counterparts in the opening years of the last century:

> Open an English newspaper, and you will be unlucky if you do not see the word 'trustee' applied to 'the Crown' or to some high and mighty body… There is metaphor here. Those who speak thus would admit that the trust was not one which any court could enforce, and might say that it was only a 'moral' trust. But I fancy that to a student of *Staatswissenschaft* [political science], legal metaphors should be of great interest, especially when they become the commonplaces of political debate.[68]

The notion of Crown trusteeship is, unfortunately, no longer a commonplace of political debate in Australia; in Paul Finn's words, it is the 'forgotten trust'.[69] It may have no legal consequences to think about government in this way.[70] But it does have implications, which may change the way we assess statutes and executive action both politically and legally. In the case of the *Mineral Resources Development Act*, it is suggested that Parliament must either provide adequate and robust administrative solutions to the management problem, or open up clearer pathways for private control by landowners to protect their own interests under mining leases. Ideally, it should do both, and do so in a manner that adequately balances landowners' interest with the public interest in promoting the mining industry.

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[67] For an excellent historical overview, especially from the English Civil War period, see J W Gough, *John Locke's Political Philosophy: Eight Studies* (Oxford University Press, 1964) ch 8.

[68] Frederic Maitland, *State, Trust and Corporation* (Cambridge University Press, 2003) 127.

[69] Finn, 'The Forgotten 'Trust': The People and the State" in Malcolm Cope, above n 63.

[70] Paul Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 *Federal Law Review* 335.

A *Administrative Law*

First, it is suggested that a clear avenue be provided for affected parties to seek internal and external review of the Minister's approval and rejection of mineral tenement leases, and the imposition of conditions on them. It appears that s 76 is designed to make the Minister's decisions particularly difficult to review. This is partially defensible. Judicial review is generally regarded as a blunt instrument of governmental accountability, given its expense and procedural complexity, and given the limited scope for judges to second-guess administrators' professional decisions. The decision to grant a mining lease, based upon welfare economical considerations as much as a legal rights analysis, is likely to be a nuanced and a technical one. It may be that the Minister is a more appropriate figure to perform the complex interest-analysis involved than some tribunal. However some additional scrutiny and review, particularly within sensible time frames, is probably warranted by the existence of moral hazard in the Minister's role. He or she has motives to grant leases — economic development and employment for the state as well as less acceptable political motives — and if he or she makes the wrong political decision, it is the surface landowner (or a future generation of the public) that pays the price.

As under the present Act the Minister grants a lease subsequently and 'subject to' any objection heard before the Mining Tribunal, it is in theory possible for the Minister to grant a lease inconsistent with the determination of the Mining Tribunal. The wording of s 78(1) indicates that a Minister could grant a lease inconsistent with a decision of the Mining Tribunal, and then the administrative law mechanism of judicial review would become very relevant. It would appear logical that a decision to grant a lease contrary to a decision of the Tribunal would be a reviewable error, but short of actual contradiction the landowner may find him or herself in the quagmire of seeking review of a discretionary decision.

Furthermore, the procedure by which an environmental impact assessment is made subsequent to the grant of a mining lease seems counter-intuitive. All actors involved, from the consultancy undertaking the assessment to the EPA making the decision to issue an Environmental Protection Notice might well consider the operation a foregone conclusion. As such, they will direct their minds not to whether the Level 2 activity should be undertaken, but how the environmental impact of that activity can be mitigated. Perhaps it would be better to require the EPA's involvement prior to grant, and to give the landholder a clear right to object on the basis of inconsistency with an environmental assessment just as the case is for inconsistency with a recommendation of the Director. This would provide an additional check against a ministerial decision based solely on political, rather than on factual, premises.

It might also bear to explore, in practice, whether administrative law mechanisms such as the Tasmanian Ombudsman can play a more meaningful role in investigating the procedural fairness of lease granting, supervision and renewal. Often transparency is just as powerful an instrument as review to ensure that public powers are exercised competently and rationally. It may even bear thinking of to create a mining industry Ombudsman with investigative powers and the power to make determinations and small monetary awards. Such an Ombudsman was created for the energy sector in the *Energy Ombudsman Act 2000* (Tas). This would certainly be desirable for its independence from the State departments, which were involved in the creation of the lease and its conditions. To maximise the efficacy of the Ombudsman's role, it would also appear necessary to expand landholders' involvement rights in the lease creation, supervision and renewal process. The Ombudsman would have no scope to investigate into the lease renewal process, for example, where the landowner has no right of involvement anyway.

B *Influencing Corporate Behaviour*

Economists have traditionally worked with a model of human behaviour based on the so-called *homo economicus,* or 'economic man.'[71] In this classical view, humans behave rationally, that is, in their economic best interests.[72] A newer school of behavioural economists has adjusted the classical view with important literature on the concept of 'bounded rationality'[73] due to imperfect information-processing capacity and various non-rational motivations that actually motivate people's behaviour. Nonetheless it is still fair to say that humans will usually act in the manner that most advances their economic interests. This is especially true in the context of corporations, which are legal persons generally created with a financial profit motive.[74] Even if the people managing a corporation hold non-economic considerations dear, their capacity to promote non-economic interests may be limited by their duties of loyalty to the corporation under corporations law. Recent developments in the concept of corporate citizenship are heartening, as is the adoption by many mid-sized and large companies of environmental values in their

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[71] For a discussion of the role of *homo economicus* and non-economical considerations that may in fact motivate him, see Thomas Petersen and Johannes Schiller, 'Homo Oeconomicus and Homo Politicus in Ecological Economics' (2002) 40(3) *Ecological Economics* 323.

[72] More recently economists have pointed out the importance of the fact that they do so on the basis of the imperfect information they have. See Joseph Stiglitz, 'Information and the Change in the Paradigm in Economics' (2002) 93(3) *American Economic Review* 460.

[73] This term was coined by Herbert Simon in the mid 1950s. For an overview of the concepts history and development, see Gerd Gigerenzer and Reinhard Selten, 'Rethinking Rationality' in Gerd Gigerenzer and Reinhard Selten, *Bounded Rationality: The Adaptive Toolbox* (MIT Press, 2002) 3.

[74] This is not true of all corporate forms, such as the company limited by guarantee. However most companies or corporate groups will, at their core, have a profit motive.

company charter.[75] This notwithstanding, it is not a contentious proposition to say that companies are, generally, concerned primarily with generating profit for shareholders, and corporations law imposes duties on company directors to promote that concern above most other values in normal circumstances.

To exert any significant normative influence on miners' decision-making processes, bad environmental management and other conduct prejudicial to the interests of the surface landowner must attract financial sanctions.[76] These must be both significant and certain to influence miners' decision-making. Inadequate fines would encourage miners to commit what is called in contract law 'economic breach',[77] as it may be in the financial best interests of a company to breach a condition of their lease or Environmental Protection Notice and pay the fine or compensation rather than to comply with a costly environmental management regime. While the maximum penalty available under the *Environmental Management and Pollution Control Act* are $60 000 for natural persons and $120 000 for corporations,[78] fines actually imposed in the author's experience are more likely to place in the hundreds or low thousands of dollars.

Small fines and lax enforcement give an equivocal impression and do not convey the message that the license will be cancelled for breach of conditions. This in turn encourages sloppy management and is likely to result in harm to the site environment. This is not only unfair, but inefficient. The efficient breach theory is based on the Coasian premise that a resource should go to the highest bidder, as the highest value user is going to use the resource most efficiently.[79] However, it is necessary to

[75] For corporate motivations to meet and exceed environmental obligations, see the extensive literature by Neil Gunningham, for example Neil Gunningham and Joseph Rees, 'Industry Self-Regulation: An Institutional Perspective' (2002) 19 *Law & Policy* 363; Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social Licence and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29(2) *Law & Social Enquiry* 307.

[76] Other normative influences do exist and should not be discounted, even though the focus here is on financial sanctions. For a good study that compares pulp-mill environmental performance over a long period in Australia, New Zealand, Canada and the United States with reference to state regulatory and other forms of control, see Robert Kagan, Neil Gunningham and Dororthy Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (2003) 37(1) *Law and Society Review* 51.

[77] See Robert Birmingham, 'Breach of Contract, Damage Measures and Economic Efficiency' (1970) 24 *Rutgers Law Review* 273; Charles Goetz and Robert Scott, 'Liquidated Damages, Penalties and the Just Compensation Principle: A Theory of Efficient Breach' (1977) 77 *Columbia Law Review* 554; for an illustration, see Posner, above n 33, 107.

[78] See s 32(5)(a) and (b).

[79] This is known as a liability rule, where actors are allowed to use a resource if they are prepared to pay the price. Some economists argue that liability rules are more efficient than property-right assignment in some circumstances. See Siobhan McKenna, 'Negotiating

know how much each bidder is willing to pay. For this model to work accurately, penalties for breach must be certain and must be based on a model that adequately accounts for the value of all potential users. Both of these pre-conditions are difficult to satisfy in reality. As a result, the Act should not only contain provision for swifter and steeper penalties, but impose mandatory consequences for breach of lease conditions. At present, past compliance is one consideration for the Minister considering an application to renew under s 96. But ultimately the Minister retains discretion to grant a license even where compliance has been poor. Given the preceding discussion on the Minister's position of moral hazard, more mandatory rules and less discretion would be preferable. Mining leaseholders must know as a matter of certainty that if they breach environmental management and rehabilitation conditions, their lease may be terminated and will certainly not be renewed.

Another powerful mechanism to influence behaviour is the 'name and shame' approach. This has been used in capital markets law in Australia and overseas to very good effect.[80] It is suggested that the EPA clearly publish the names and details of persons and companies that have infringed the terms of an Environmental Protection Notice. This could be done cheaply and quickly on the Authority's website. This has the advantage of harnessing market mechanisms — such as increasingly 'green' consumer trends in Australia — with minimal regulatory expense for the State.

C *Private Suit or Public Enforcement?*

In most other situations where an incentive for mismanagement is created, the law imposes obligations on the manager to protect the interests of the owner that are directly enforceable by the owner against the manager.[81] The *Mineral Resources Development Act*, on the other

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Mining Agreements under the *Native Title Act 1993*' (1995) 2(3) *Agenda* 301 at 302; Posner, above n 33.

[80] The name and shame approach has its origins, as most institutions of capital markets regulation, in the United States. It has been adopted — despite the absence of a historical European precedent — by the Committee of European Securities Regulators as a response to the problem of credit rating agencies. See Committee of European Securities Regulators, *Second Report to the European Commission on the Compliance of Credit Rating Agencies with the IOSCO Code and the Role of Credit Rating Agencies in Structured Finance* (CESR/08-277, May 2008). On a lighter note, the Australian Securities and Investments Commission has instituted the 'Pie in the Sky' awards for financial scams: see Delia Rickard, 'Pie in the Sky' (2010) 24(4) *Equity* 13.

[81] For example the *Corporations Act 2001* (Cth) Part 2D.1 imposes fiduciary obligations on company Directors toward the company as a whole. It creates several causes of action for shareholders to address mismanagement directly before the courts (see the statutory derivative action in s 236), and complements this with an active and far-reaching role for a supervisory authority, the Australian Securities and Investments Commission. Similarly, trustees are subject to a particularly stringent regime of equitable doctrines to ensure that they exercise whatever powers they have for the purposes those powers were given.

hand, utilises the normative instrument of private enforcement half-heartedly at best. Although the Act intrudes upon the private property interests of landowners, it provides no special causes of action for them to seek redress for grievances of mismanagement. Landowners' input is substantially limited to objecting to lease applications at the outset (hoping thereby to have some influence over the conditions of the lease) and bringing a dispute about the lease so obtained to the Mining Tribunal. Landowners are powerless to terminate a lease for breach of its conditions, and cannot realistically compel the Minister to do so. Much of the evidence that would be needed to prove a breach of the license or lease terms would likewise depend on the public authorities, who will be informed by expert consultants engaged by miners. The Act relies, as such, more or less completely on the supervision of public authorities. Landowners have greater scope to bring a civil enforcement action under the *Environmental Management and Pollution Control Act* before the Resource Management and Appeals Tribunal for breach of an Environmental Protection Notice. This should be expanded and some provision included for consistently poor compliance to entitle landowners to sue to have a lease revoked.

David Mossop has discussed the reluctance of Australian parliaments to utilise private causes of action as a mechanism for increasing compliance with environmental regulation.[82] This trend stands in contrast to the United States, where private citizen suits feature in every major piece of environmental policy, as they do in securities, competition, consumer protection and civil rights law.[83] Private citizen suits are an important mechanism for ensuring accountability from the state and also from entities into whose hands the state places management of resources, both publicly and privately owned. They ease the regulatory burden on public authorities as well as applying pressure on the same, providing a check against complacency and corruption. What, exactly, would constitute 'appropriate' avenues for private enforcement is the topic for another discussion, but the existence of more extensive private controls on leaseholders' mining activities would greatly reduce the intrusion upon landowners' property interests and help to improve efficient resource use.

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[82] David Mossop, 'Citizen Suits – Tools for Improving Compliance with Environmental Laws' in Neil Gunningham, Jennifer Norberry, and Sandra McKillop (eds), *Environmental Crime* (Australian Institute of Criminology, 1995) 1.

[83] See Christian Langpap and Jay P Shimshack, 'Private Citizen Suits and Public Enforcement: Substitutes or Complements?' (2010) 59 *Journal of Environmental Economics and Management* 235, 235. It is regularly assumed that enhanced private enforcement enhances public enforcement also, which these authors challenge with one of the first empirical examinations on the issue. Their findings suggest that private citizen suits 'crowd in' public monitoring but 'crowd out' public enforcement. The point remains that both private and public enforcement have a valuable role to play in environmental management.

D *Clarifying Fuzzy Property Rights*

Fuzzy property rights are bad for efficiency in the Coasian framework. They lead to unpredictability, which is discouraging of investment. Property rights under the Act are fuzziest when a lease has expired but subsists under s 98. Miners, unsure whether they will be able to continue operations in the medium to long term, have even less incentive than normal to discharge their rehabilitation obligations. Landowners, conversely, have less incentive than normal to police miners, as they may not be getting the land back for another 20 years. And it allows the Minister to languish in unconscientious delays with no effective compulsion from any quarter to change the status quo. A simple and effective amendment could remedy this problem: the imposition of a reasonable time limit in a new subsection to s 98. If the Minister fails to make a decision on an application to renew within, say, three or six months, then the application is deemed to be refused. This puts the onus of compelling the Minister to act upon the mining lessee, who presumably is better resourced, more sophisticated and more interested than the surface landowner in the granting of the application.

Such a default position would be in keeping with the proprietary presumption that informs so much of the law. Interestingly, it would also be in keeping with the provisions that relate to initial applications for a mining lease. Under s 73, an application is pending from the marking out of land to the granting or refusal of the lease. An application that has not been granted, refused or withdrawn lapses automatically after 12 months. The Director may — but need not — extend the period, but only if he is satisfied that the failure to determine the application is not the fault of the applicant, or that there is some other reason to do so. Surely a lease renewal can be decided, in ordinary cases, more quickly than an initial application. It is suggested that the Act be amended so that s 98 adopts the approach taken by s 73.

VI CONCLUSION

This article has sought to do two things. First, it has sought to articulate clearly the hitherto tacit policy basis of compulsory mining leases in Tasmania. Essentially there are three alternatives. The first is that State ownership of minerals in Tasmania and the compulsory access regime are simply modern specimens of the traditional Crown prerogative. This is an adequate justification, but harks back to an age when the Crown could still use its prerogatives in its own interests. Now it is universally accepted that even the Crown prerogatives are to be used for the good of the people. The law as it stands should be expressly linked with a defensible policy basis, or amended. The second alternative is that State ownership of minerals is for the private benefit of mining entities. This is, in contrast, an entirely unsatisfactory justification, as it runs counter to

centuries of common law legal principle. The final justification is that the regime is based on welfare economical considerations for the benefit of Tasmanian society. It has been suggested that this final justification is to be preferred.

The second limb of this article flows from the nature of the justification established in the first. If the justification for mining leases is economic, based on considerations of social welfare achieved through allocative efficiency, then the mining lease regime must be managed efficiently if that justification is to stand. The raison d'être of mining leases may be partially or even fully undermined whenever a mine site is managed inefficiently, through the imposition of costs on surface landowners or the externalisation of costs onto public goods such as publically owned river systems or the atmosphere. If the allocative efficiency justification of mining leases is nullified in this manner, then all that remains is an unjustified — and therefore unjust — derogation by the state from the property rights of private citizens. This may not currently be illegal or actionable, but it should be recognised politically and philosophically as unacceptable.

On this basis, the article has suggested several improvements that must be made to the *Mineral Resources Development Act* and its legislative and regulatory context to ensure that the justification and operational reality of mining leases remain coextensive. Changes should be made at the stage of the initial lease grant, lease supervision and management, and at the stage of lease renewal. These include reducing political discretion, fine-tuning administrative law mechanisms, ensuring that sanctions are sufficient, harnessing the power of private causes of action as a regulatory instrument, and clarifying property rights. It is suggested that minimal and nuanced legislative changes would be sufficient to improve both the efficiency and the fairness of the mining lease regime in Tasmania.