

Royal Mines

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Cadia Holdings Pty Ltd v New South Wales [2010] HCA 27, 25 August 2010, comes hard on the heels of *Star Energy Weald Basin Ltd v Bocardo SA* [2010] UKSC 35 as another reconsideration of deeply-embedded law about mining and the use of the subsurface. The Cadia mines, near Orange, are on land owned by Cadia and its parent Newcrest. Neither the Crown grants nor the lands legislation of the time had reserved minerals to the Crown. But under the prerogative, as laid down in the *Case of Mines* (1568) 1 Plowden 310, 75 ER 472, mines of gold and silver belong to the Crown; and so do all ores or mines of copper, or other base metal, containing or bearing gold and silver.

Cadia held mining leases under the Mining Act 1992 of New South Wales, which allows the Minister to grant mining leases over privately-owned minerals as well as public. But where in such cases the Minister receives royalties for privately owned minerals, he or she must pay seven-eighths to the owner.

The problem is that many mineral deposits contain mixtures; silver-lead-zinc deposits are common, and so are copper-gold deposits. The Cadia mines are a copper-gold deposit. The two elements could not be mined separately, and could be separated only during processing. The State refused to pay the seven-eighths royalty collected on the copper, because the mines could not fairly be described as a copper mine. The Court of Appeal agreed.

The High Court of Australia came to a different result relying on the Royal Mines Act 1688 section 3: "That no mine of copper, tin, iron, or lead, shall hereafter be adjudged, reputed, or taken to be a royal mine, although gold or silver may be extracted out of the same." The mischief that this was intended to remedy was doubt about what mixed deposits would engage the prerogative. Land owners were inclined to conceal valuable mines from the oppressive intrusions of the royal refiners and assayers. The constitutional context of the Act was an extraordinary one; this was the first session of the Convention Parliament of the revolution of 1688. James II had barely left London, throwing the Great Seal into the Thames, and William and Mary were taking hold of the monarchy. The Bill of Rights was passed in the second session. The Royal Mines Act was aimed at limiting the prerogative and a non-Parliamentary source of royal revenue. Parliament saw the fiscal pretensions of the executive as a mischief to be remedied, so the High Court did not accept the argument that the prerogative is not displaced except by express words or necessary implication. The Act was effective in New South Wales. The consequence therefore was that the copper was a privately owned mineral, whose owner was entitled to the seven-eighths royalty. (So held Gummow, Hayne, Heydon and Crennan JJ in a joint judgment; French CJ concurred with substantially similar reasons.)

The Court of Appeal majority (Basten JA and Handley AJA) had placed more emphasis on the Royal Mines Act of 1693 which sought to clarify that of 1688, and called for a restrictive interpretation of both Acts. For them to apply, the mine had fairly to be able to be described as a copper mine, rather than a gold mine, and the Cadia mines could not be so described.

The High Court of Australia decision gives effect to plain if antique words in the 1688 Act. It seems a little odd to say that reliance on a seventeenth-century statute gives a more modern result than would have otherwise been obtained, but that is the case. When mineral operations

can target multiple substances, and when we can find traces of an element like gold in parts per billion, a modern approach to the prerogative minerals is one that is directed to mineral products rather than categories of mineral operation. The result can also be said to be compatible with *Star Energy v Bocardo* in maintaining a focus on the proprietary rights of the owner of the land, and keeping an exception or reservation relatively specific.

The same issue of mixed mineral ownership is likely to occur in New Zealand in areas where Crown grants of land were made in the nineteenth century, before reservations of all mines and minerals to the Crown became common. The solution in New South Wales is to authorize the Minister to grant a mining lease in respect of any minerals whether or not they are vested in the Crown. Certainly this displaces the proprietary rights of mineral owners but it is a solution used in several Australian states. There is no equivalent in New Zealand. The closest is section 79 of the Crown Minerals Act, giving the High Court the power, where the owner of the mineral estate is unknown or of unknown whereabouts, to make an order authorizing the Public Trust to act as if it were the agent of the owner, to sell the minerals at fair market value. That procedure may suit some large operations, but it does not suit exploration activity where a company has only moderate hopes that the property can become a mine. From a policy point of view, it is not desirable that patterns of ownership are intrinsically a barrier to mineral exploration.

Does the Royal Mines 1688 Act apply in New Zealand? It is not listed in the Imperial Laws Application Act 1988 but that may not matter. *Cadia* held that the common law of England about the prerogative had been abridged before its reception in Australia. That seems a logical reading of common law and statute together, and may well apply in New Zealand.