# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Glencore Coal Queensland Pty Limited v State of Queensland & Anor* [2022] QSC 240 |
| PARTIES: | **GLENCORE COAL QUEENSLAND PTY LIMITED**<br>(plaintiff)<br><br>**v**<br><br>**THE STATE OF QUEENSLAND**<br>(defendant)<br><br>**AND**<br><br>**ASSOCIATED PRODUCTS & DISTRIBUTION PROPRIETARY**<br>(third party and first defendant by counterclaim) |
| FILE NO/S: | 4435 of 2019 |
| DIVISION: | Trial Division |
| PROCEEDING: | Claim |
| ORIGINATING COURT: | Supreme Court |
| DELIVERED ON: | 7 November 2022 |
| DELIVERED AT: | Brisbane |
| HEARING DATES: | 28-29 April 2022 |
| JUDGE: | Bradley J |
| ORDER: | **THE ORDER OF THE COURT IS THAT:** |

**1. The separate questions are answered as follows:**

**Question 1:**

**From the time of:**

**(a) the surrender of Deed of Grant 30060155 on 10 January 1934 and/or the subsequent grant by Deed of Grant 30169230 on 12 April 1935, or**

**(b) the surrender of Deeds of Grant 30062250 and 30079240 on or about 9 May 1984 and/or the subsequent grant by Deed of Grant 30535231 on 1 February 1985,**

**was the coal on or below the surface of the land the**

**subject of the aforementioned deeds, the property of the defendant?**

**Answer**: **No.**

**Question 2:**

**Is the restitutionary claim by the plaintiff (see paragraph 27(a) of the further amended statement of claim) precluded by reason of chapter 11 of the *Mineral Resources Act 1989* (Qld) and or s 36 of the *Taxation Administration Act* (Qld)?**

**Answer: No.**

2. **The defendant pay the plaintiff's costs of the hearing and determination of the separate questions.**
3. **The defendant pay the third party and first defendant by counterclaim's costs of the hearing and determination of the separate questions.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR QUESTION –where the plaintiff operates the Rolleston Coal Mine under mining leases granted by the Minister on behalf of the defendant – where one of the mining leases authorises the plaintiff to mine coal within Lot 1 on SP174071 and Lot 18 on RP61769 – where the parties have agreed on separate questions to determine issues of mixed fact and law and of law arising in the proceeding – where the court has ordered separate question be heard and determined separate questions arising about ownership of coal within each Lot and the availability of a restitutionary remedy

REAL PROPERTY – GENERAL PRINCIPLES – where land was the subject of a deed of grant issued in 1892 – where the original deed did not reserve to the Crown any coal on or under the surface of the land – where the plaintiff opened a road across the land – where, following the opening of the road, the owner of the fee simple surrendered the original deed in 1934, and a fresh deed of grant was issued in 1935 – whether the defendant has property in the coal within the land from the time of the surrender of the original deed or from the grant of the fresh deed

REAL PROPERTY – GENERAL PRINCIPLES –where land was the subject of deeds of grant issued in 1893 and 1899 – where the original deeds did not reserve to the Crown any coal on or under the surface of the land – where a road reserve through part of the land was permanently closed and the owner of the fee simple purchased it from the defendant –

where, following the road closure and purchase, in 1984 the owner surrendered the original deeds, and in 1985 a fresh deed of grant was issued – whether the coal within the land has been the property of the defendant from the time of the surrender of the original deeds or from the grant of the fresh deed

RESTITUTION – INVOLVING CROWN OR PUBLIC AUTHORITIES – CLAIMS AGAINST CROWN OR PUBLIC AUTHORITIES – MISTAKE - where the plaintiff has paid more than $54 million to the defendant as royalties in respect of coal mined from the land – where the plaintiff says it paid these royalties to the defendant in the mistaken belief that the defendant held the property in the coal – where the plaintiff says it owned the coal and the defendant received the royalties in circumstances where the defendant had no legitimate basis for retaining them

MINING ROYALTIES – STATUTORY PROVISION FOR REFUND - whether the restitutionary claim by the plaintiff is available - *Mineral Resources Act 1989* (Qld), chapter 11 - *Taxation Administration Act* (Qld), s 36

*Agricultural Lands Special Purchase Act 1901 (Qld)*
*Corrected Title to Lands Act 1882* (Qld), s 1
*Crown Lands Act 1884* (Qld), s 8, s 110.
*Land Act 1910 (Qld),* s 6, s 8
*Land Act 1962* (Qld), s 4, s 9, s 14(1), s 362(1), s 363, 365
*Mineral Resources Act 1989* (Qld), s 319, s 331B, s 333, s 886, s 887, s 888, s 891
*Mining Act 1968* (Qld), s 110(3)
*Mining on Private Land Act 1909* (Qld), s 6, s 21A
*Taxation Administration Act 2001* (Qld), s 3, s 6, s 6A, s 36, s 37
*Uniform Civil Procedure Rules 1999* (Qld), r 483(1)

*Allen v Gulf Oil Refining Ltd* [1981] AC 1001, followed
*Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, followed
*Bropho v Western Australia* (1990) 171 CLR 1, followed
*Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509, distinguished
*Harry v Valuer General* (1975) 12 SASR 446, cited
*Higgins v Berry* (1908) 6 CLR 618, cited
*Nolan v Clifford* (1904) 1 CLR 429, cited
*Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635, followed
*Perilya Broken Hill Pty Ltd v Valuer General* [2015] NSWCA 400, cited
*Potter v Minahan* (1908) 7 CLR 277, cited

*R v Earl of Northumberland* (1568) 1 Plowden 310; 75 ER 472
*Tasker v Small* (1837) 3 MY&C 63, cited
*Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, followed
*Walsingham's Case* (1573) 2 Plowden 547; 75 ER 805, cited
*Wik Peoples v State of Queensland* (1996) 63 FCR 450, cited

COUNSEL: M Izzo SC and E Goodwin for the plaintiff
M Hindman QC and D Keane for the defendant
S Couper QC and J Sweeney for the third party and first defendant by counterclaim

SOLICITORS: Allens for the plaintiff
G R Cooper Crown Solicitor for the defendant
Gilbert + Tobin for the third party and first defendant by counterclaim

[1] The plaintiff (**Glencore**) operates the Rolleston Coal Mine under mining leases granted by the Minister on behalf of the defendant (the **State**). The mine is in the Bowen Basin, about 16 kilometres west of Rolleston township, and about 275 kilometres west of Gladstone. By tradition, the Gayiri people are the custodians of this country.

[2] One of the mining leases authorises Glencore to mine coal within Lot 1 on SP174071 (**Lot 1**) and within Lot 18 on RP617697 (**Lot 18**).[1] Glencore owns Lot 1.[2] The third party and first defendant by counterclaim (**APD**) owns Lot 18.

[3] Since about January 2009, Glencore has mined coal from Lot 1 and Lot 18.[3]

**The claims and counterclaims of the parties**

[4] Glencore has paid about $54 million to the State as royalties in respect of coal mined from Lot 1. Glencore says it paid these royalties to the State in the mistaken belief that the State owned the coal within Lot 1 and that, as holder of the mining lease, Glencore was obliged to pay the royalties to the State for the coal it mined from that land.[4] Glencore says the State had no legitimate basis for receiving or retaining these royalties, because the State had no property in the coal within Lot 1.

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1 The relevant mining lease (ML 70307) also authorises mining of coal from land that is now Lot 1 on SP293499. This third lot is not relevant to the separate questions before the court.

2 Until about September 2021, Glencore, Rolleston Pty Ltd (In liquidation) (**ICRA**) and Sumisho Coal Australia Pty Limited (**Sumisho**) owned Lot 1 in shares of 74%, 12.5% and 12.5% respectively. In about September 2021, Glencore acquired a 12.5% interest in Lot 1 from ICRA. In November 2021, Glencore acquired another 12.5% interest in Lot 1 from Sumisho. ICRA and Sumisho were formerly the second and third defendants by counterclaim in this proceeding. Before the April 2022 hearing, the State discontinued the proceeding against them.

3 Initially, Glencore mined coal in a joint venture with ICRA and Sumisho. Glencore's initial interest in the joint venture was 75%. In about September 2021, Glencore acquired a further 12.5% interest in the joint venture from ICRA; and in about November 2021, Glencore acquired the remaining 12.5% interest in the joint venture from Sumisho.

4 *Mineral Resources Act 1989* (Qld) (**MRA**), s 320(3).

Glencore claims the State is obliged to make restitution for the royalties Glencore paid by mistake and that Glencore has a right to restitution against the State for the royalties which the State had no legal entitlement to receive (the **restitutionary claim)**.

[5] The State says it regained ownership of the coal in part of Lot 1 in 1934, when the then owner of the land surrendered the original deed of grant for that part. The State says in 1935, when it issued a fresh deed of grant for the land to the owner, the State did not grant or covey to the owner any property in the coal.

[6] If the State is wrong about the effect of the surrender and the fresh deed, and so does not own the coal in Lot 1, the State says it still may retain the royalties paid by Glencore for coal taken from that land. The State says this is because chapter 11 of the MRA or section 36 of the *Taxation Administration Act 2001* (Qld) (**TAA**) precludes a restitutionary claim by Glencore to recover those moneys.

[7] From 2014 until July 2020, Glencore paid more than $80 million in royalties to APD for coal mined from Lot 18.

[8] The State says it regained ownership of the coal in Lot 18 in 1984, when the owner surrendered the original deeds of grant. The State says in 1985, when it issued a fresh deed of grant for the land to the owner, the State did not grant or convey to the owner any property in the coal. The State seeks a declaration that it has been the owner of the coal within Lot 18 since 1 February 1985. The State says Glencore owes it at least $80,586,336 for royalties for coal mined from Lot 18. It counterclaims for that amount, as a debt, and for interest. Glencore disputes the declaration and counterclaim, contending the coal is the property of APD, as owner of the fee simple in Lot 18.

[9] Since July 2020, Glencore has paid into court amounts for royalties on coal mined in Lot 18. ADP says it owns the coal within Lot 18 and is entitled to the royalties paid into court by Glencore. The State says the money in court should be paid to it for outstanding royalties on that coal.

**Separate questions**

[10] On 10 November 2021, the court ordered a separate hearing and determination of questions pursuant to r 483(1) of the *Uniform Civil Procedure Rules 1999* (Qld). On 29 April 2022, by consent, the court revised the questions. There now are two separate questions:

> "1 From the time of:
>
> (a) the surrender of Deed of Grant 30060155 on 10 January 1934 and/or the subsequent grant by Deed of Grant 30169230 on 12 April 1935, or
>
> (b) the surrender of Deeds of Grant 30062250 and 30079240 on or about 9 May 1984 and/or the subsequent grant by Deed of Grant 30535231 on 1 February 1985,

was the coal on or below the surface of the land the subject of the aforementioned deeds, the property of the State?

2 Is the restitutionary claim by the plaintiff (see paragraph 27(a) of the further amended statement of claim) precluded by reason of chapter 11 of the *Mineral Resources Act 1989* (Qld) and or s 36 of the *Taxation Administration Act* (Qld)?"

[11] Before dealing with the separate questions, it is convenient to identify some matters that are not in dispute.

**Matters that are not in dispute or cannot be disputed**

[12] On 22 August 1892, the State[5] granted land including the land now in Lot 1 (the **Lot 1 land**) to James Tyson, by Deed of Grant 30060155 (the **1892 deed**) and Deed of Grant 30060156 (the **second 1892 deed**).

[13] On 11 May 1893, the State granted part of the land that is now Lot 18 (the **Lot 18 land**) to Tyson by Deed of Grant 30062250 (the **1893 deed**). On 21 June 1894, Tyson was the purchaser of the balance of the Lot 18 land at an auction of Crown land by the State.

[14] Tyson was a pastoralist based at Felton, near Cambooya, with extensive land holdings in Queensland, New South Wales, and Victoria. In December 1898, he died, unmarried and intestate, leaving an estate valued at over £2 million.[6] On his death, the Lot 1 land and the part of the Lot 18 land within the 1893 deed were transmitted to Queensland Trustees Limited (**QTL**) as administrator of his deceased estate. Tyson had not taken up the grant of the balance of the Lot 18 land he had purchased at auction before he died. In 1899, the State granted the balance of the Lot 18 land to QTL, as administrator, by Deed of Grant 30079240 (the **1899 deed**).

[15] By the 1892 deeds, the State alienated the Lot 1 land from the Crown. By the 1893 deed and the 1899 deed, the State alienated the Lot 18 land from the Crown.

[16] The language of the grant in each of the four deeds was effective to convey the fee simple in the land. Fee simple in land is the amplest proprietary rights recognised by the law protecting along the plane of time.[7] As a matter of formality, a freehold estate in land is held as tenant from the Crown. For all practical purposes, the State conveyed to Tyson and his administrator the equivalent of full ownership of the land, approximating absolute ownership, inheritable and able to inure in perpetuity,

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5 In these reasons references is made to grants made by deeds executed by the Governor of the Colony of Queensland on behalf of the Crown. It is convenient to refer to the Crown (now the Crown in Right of the State of Queensland) as the "State", regardless of whether the reference is to a time before or after the commencement of the *Commonwealth of Australia Constitution* on 1 January 1901.

6 This led to much litigation: *Mulholland v Doneley* (1899) 9 QLJ 260; *Re Tyson; ex parte Queensland Trustees Ltd* (1900) 10 QLJ 34; *Re Tyson* (1900) 10 QLJ 151; *Re Tyson (Deceased)* (1900) 9 QLJ 339;

7 *Harry v Valuer General* (1975) 12 SASR 446, 454 (Wella J), citing *Polycon Maitland History of English Law,* 2nd ed, vol 2, p 10.

distinct from and subject to the radical title of the Crown.[8] When the deeds were entered in the register kept by the registrar of titles, Tyson and QTL obtained legal title to the land.[9]

[17] In each of the deeds, the State conveyed an estate relevantly subject to the reservations contained in the *Crown Lands Act 1884* (Qld). Those reservations were limited to gold,[10] and included no other reservation of property in minerals.[11] They followed the common law, which recognised the person with a fee simple as owning the surface and the subterranean soil and everything in it, save for deposits of the royal metals, which were the property of the sovereign as part of the royal prerogative with respect to coinage.[12] So, the State granted and conveyed to Tyson ownership of any coal on or under the surface of the Lot 1 land, and to Tyson and QTL any coal in the Lot 18 land.

[18] In 1902, as administrator of Tyson's estate, QTL sold the Lot 1 land and the Lot 18 land to Frederick William Donkin. In 1925, Douglas Hamilton Robertson acquired the Lot 1 land. He became the owner of any coal in the Lot 1 land.

[19] In 1968, Naroo Pastoral Co Pty Ltd (**Naroo**) acquired the Lot 18 land. As such, Naroo became the owner of any coal within the Lot 18 land at this time.

**Question 1**

[20] There are two parts to Question 1. It is convenient to consider the events in 1934 and 1935, which concern the Lot 1 land, and then consider the events of 1984 and 1985, which concern the Lot 18 land.

***Was the coal within Lot 1 the property of the State from the time of the surrender of the 1892 deed on 10 January 1934 or from the time of the subsequent deed of grant on 12 April 1935?***

[21] In 1933, the State sought to create the Springsure-Bauhinia-Duaringa Highway as a main road, which would run through the Lot 1 land. The State asked the then owner Robertson to surrender the 1892 deed "with a view to the issue of a new deed excluding the area resumed" for the road.

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8 *Walsingham's Case* (1573) 2 Plowd 547, 555; 75 ER 805, 817; *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635, 656 (Deane, Dawson and Gaudron JJ); *Perilya Broken Hill Pty Ltd v Valuer General* [2015] NSWCA 400, [31]-[32] (Leeming JA).

9 The 1892 deeds were entered in the register book on 22 August 1892. The copy of the 1893 deed produced to the court does not include a record of the deed being entered in the register book. However, the hearing proceeded on the basis that the deed was registered within a short time after it was made. The 1899 deed was entered in the register book on 29 August 1899.

10 *Crown Lands Act 1884,* s 110.

11 Ibid, s 8 proviso, "subject to no other reservations".

12 In *R v Earl of Northumberland* (1568) 1 Plowden 310 (*Case of Mines*), twelve judges decided authoritatively "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". See also: *Attorney-General v Morgan* [1891] 1 Ch 432 CA, 455-456 (Lindley LJ).

[22] On 10 January 1934, Robertson signed the documents prepared by the State and, as the State requested, surrendered the 1892 deed.[13] On 12 April 1935, after delay in obtaining a survey of the new road, the State issued Deed of Grant 30169230 (the **1935 deed**) to Robertson. The 1935 deed was a grant of the whole of the land contained in the 1892 Deed, with the exclusion of 41 acres and 34 perches for a surveyed road. It was subject to the conditions and reservations contained in and declared by Queensland laws, and to the reservations and conditions in the 1892 deed.

[23] It is clear from their contemporaneous documents that the representatives of the State and of Robertson understood this surrender and fresh deed process to be one pursuant to s 8 of the *Land Act 1910* (Qld).

[24] At that time, s 8 relevantly provided:

> "8. (1) Whenever, by reason of the opening or closing of a road through or adjoining any land held in fee-simple, the description of the land as comprised in the existing instruments of title has ceased to be a convenient description of the land to which, after such opening and closing and the consequent alterations of boundary, any owner is entitled, such owner may surrender to the Crown his title to the land; and upon such surrender a fresh deed or fresh deeds of grant shall be issued comprising the land to which, after such opening or closing, such owner is entitled.
>
> In the fresh deeds of grant the Governor in Council may reserve the right to resume for public purposes an area equal to that comprised in all roads so closed on payment of a sum per acre for the land resumed equal to that paid per acre on the closure of the roads.
>
> …
>
> (4) When land under that Act upon which there is any mortgage or other encumbrance is surrendered under this section, the Registrar of Titles shall endorse the mortgage or other encumbrance on the fresh deed of grant without fee, anything in any Act to the contrary notwithstanding."

[25] Section 8(1) was based on s 1 of the *Corrected Title to Lands Act 1882* (Qld),[14] which was repealed by s 5 of the *Land Act 1910*.

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[13] This separate question concerns only the land within Lot 1 that was originally granted by the 1892 deed. It is common ground that the coal within the part of Lot 1 that was alienated by the second 1892 deed is the property of Glencore as the owner of the fee simple in Lot 1.

[14] (46 Vic No. 4) "1. Whenever, by reason of the opening or closing of a road for public use through or adjoining any land held in fee from the Crown, the description of the land as contained in the existing instruments of title has ceased to be a, convenient description of the land to which, after such opening or closing and the necessary alterations of boundary consequent thereon, the owner is entitled, it shall be lawful for such owner to surrender to the Crown his title to the land ; and upon such surrender a new Deed or new Deeds of Grant shall issue, comprising the land to which after such opening or closing such owner is entitled."

[26] The State says it acquired title to the whole of the estate in fee simple in the part of the Lot 1 land the subject of the 1892 deed, including the coal on or below the surface, by the surrender of the 1892 deed. The State also says that, by the 1935 deed, it granted and conveyed to Robertson an estate in fee simple that *excluded* the coal on or under the surface of that part of the Lot 1 land.

[27] The State says the surrender of the 1892 deed had the effect of merging Robertson's estate in that part of the Lot 1 land with that of the State. On surrender, the State says, Robertson no longer had an estate or interest in the land. According to the State, it could not issue a fresh deed unless Robertson's estate and interest in the land had been "submerged" or "drowned" in this way. The State based these submissions on the word "surrender" in s 8, and to a lesser extent on the terms "release", "surrender" and "transfer" in the documents prepared by the State for Robertson to execute. For example, the memorandum of transfer prepared by the State and executed by Robertson on 4 November 1933 as a "Surrender and Transfer" of his estate or interest in the land contained in the 1892 deed to the State is expressed to be "under and in pursuance of the provisions of Section 8" of the *Land Act 1910*. The State says the process was the equivalent of a surrender of old system land.

[28] The State's submissions are not consistent with s 8 of the *Land Act 1910*. Nor are they consistent with the relationship between the State and Robertson as the owner of the fee simple in the Lot 1 land.

[29] The statutory process under s 8 gave a landowner an entitlement to a fresh deed of grant that described the land more correctly or accurately than an existing deed. An owner could obtain a fresh deed by surrendering the existing deed. The section was directed to providing for the title instrument to contain a convenient description of the land to which the owner was entitled, after the opening or closing of a road or any consequent alterations of a boundary. It reveals no legislative intention that the State would acquire any property in the land from a surrendering landowner, save for any road they had agreed would be acquired before the surrender of the deed.

[30] By s 8(1), the State was required to issue a fresh deed of grant "comprising the land to which, after such opening and closing and the consequent alterations of boundary, any owner is entitled". In this instance, Robertson was entitled to the fee simple in the Lot 1 land, despite surrendering the 1892 deed. The statute did not authorise the State to grant a lesser or more limited estate or interest to the owner by issuing a fresh deed of grant.[15]

[31] The expression "release and surrender" used by the State in the documents it drafted also indicates it was not the parties' intention to carry out a conveyance of the nature known by either of those terms in respect of old system land.[16]

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15 In the case of a road closure, the State was permitted to reserve "the right to resume for public purposes an area equal to that comprised in all roads so closed on the payment of a sum per acre for the land resumed equal to that paid per acre on the closure of the roads."

16 An old system "release" is a conveyance of a remainder or reversionary interest to a person in possession of the land or a conveyance from one joint tenant to another. A "surrender" of old system land is the conveyance by a person in possession of their estate to the holder of the reversionary interest.

[32] A "surrender" pursuant to s 8 of the *Land Act 1910* was not a "surrender" in the sense of a conveyance of old system land. Unlike an old system conveyance, a party surrendering a deed under s 8 remained "entitled" to the estate and interest in the land, after the adjustment caused by the opening or closure of a road. On surrendering a deed under s 8, the owner had an entitlement to the land. It was binding on the State. The relationship between the owner, with a freehold estate in the land, and the State, as lord paramount of whom all land was held either mediately or immediately,[17] endured through the process under s 8. The nature of the owner's estate in the land, the subject of a surrendered deed and a fresh deed, also endured.

[33] This is consistent with s 8(4), which required the registrar to endorse on the fresh deed of grant any mortgage or other encumbrance registered over the title to the land the subject of the surrendered deed.

[34] There is nothing in the *Land Act 1910* to indicate Parliament intended to take away vested property rights in the s 8 process. It is improbable that Parliament would infringe vested property rights without expressing its intention in very clear language.[18] The State says the process under s 8 did not have "the effect of confiscating property other than on clear terms" because it "was not imposed by the legislature but was effected voluntarily by the holders of the fee-simple at the relevant times." This submission misses the central point: a process for creating a more accurate description of land held after, in this instance, a road opening, is unlikely to involve a derogation of the original grant by the surreptitious taking of property from the landowner.

[35] The absence of compensation for the surrender of an existing deed and the issue of a fresh deed also indicates s 8 was not intended to authorise interference with private rights.[19] This reinforces the conclusion, drawn from an ordinary reading of the provision, that the surrender of the original deed and the issue of the fresh deed did not involve any change to the relevant estates and interests in the land, other than that already effected before the surrender by the opening or closing of a road. The words in s 8 bear their ordinary meaning in the context of the provision and the balance of the Act. They do not have the technical meaning, for which the State contends.

[36] The State says it could not grant Robertson the property in or right to any coal in the part of the Lot 1 land because the power in s 6 of the *Land Act 1910* did not authorise such a grant.

[37] Section 6 was in these terms:

> "6. (1) Subject to this Act, the Governor in Council may, in the name of His Majesty, grant in fee-simple, or demise for a term of years, any Crown land within Queensland.

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17 *The Reception of English Law Abroad*, B H McPherson CBE, SCLQ, 2007, ch 2, p 58.

18 *Bropho v Western Australia* (1990) 171 CLR 1, [13] (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting *Maxwell on Statutes*, 4th ed, 121.

19 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1016 (Lord Edmund-Davies).

(2) The grant or lease shall be made subject to such reservations and conditions as are authorised or prescribed by this Act or any other Act, and shall be made in the prescribed form, and being so made shall be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated.

(3) The rights of the Crown in gold and other minerals, and the reservations with respect to the same which are to be contained in all Crown grants and leases, are declared and prescribed in *The Mining on Private Land Act of 1909*."

[38] The term "Crown land" was defined in s 4 of the *Land Act 1910* as:

"All land in Queensland, except land which is, for the time being-

(a) Lawfully granted or contracted to be granted in fee-simple by the Crown; or

(b) Reserved for or dedicated to public purposes; or

(c) Subject to any lease or licence lawfully granted by the Crown: Provided that land held under an occupation licence shall be deemed to be Crown land;"

[39] The Lot 1 land had been lawfully granted in fee simple by the State to Tyson in 1892, bringing it within paragraph (a) of the exclusions from "Crown Land" in the definition. Tyson had become the owner in equity, as between the State and himself,[20] and the land had been alienated from the Crown. [21] The road corridor was not Crown Land, because it was land "reserved or dedicated to public purposes" and so within paragraph (b) of the same exclusions. This is consistent with the scheme of the general provisions in division 1, part 2 of the *Land Act 1910*, and with the balance of the Act.

[40] By s 6 of the *Land Act 1910*, Parliament authorised the voluntary alienation of Crown land by deed of grant. By s 8, Parliament authorised a different thing: the surrender of an existing deed and the issue of a fresh deed to provide a more convenient description of land. The issue of a fresh deed of grant under s 8 was not an alienation of Crown land within the meaning of s 6. It was the issue of an instrument with a more convenient description of land that had already been alienated from the Crown.

[41] The State may be correct in its contention that, in 1935, the creation of an interest in unallocated Crown land by a deed of grant under s 6 could not include an interest in any coal on or under the surface of the land. This contention is not relevant to whether Robertson, as the owner of the Lot 1 land, continued to own any coal on or under that land following the surrender of the 1892 Deed and the issue of the 1935 Deed. The delivery of the 1935 deed did not create an interest in unallocated Crown land.

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20 *Tasker v Small* (1837) 3 MY&C 63 (Lord Cottonham LC).

21 *Higgins v Berry* (1908) 6 CLR 618, 642-643 (Higgins J).

[42] If the surrender of the 1892 deed and the issue of the 1935 deed had been pursuant to s 6 of the *Land Act 1910* (which it was not), the State's contentions would still be wrong.

[43] The State says the exclusion of coal from the 1935 deed arose from s 6(3) of the *Land Act 1910*, which provided that the State's rights to gold and other minerals were those "declared and prescribed" in the *Mining on Private Land Act 1909* (Qld) (**MPLA**). In 1935, those rights and reservations were contained in s 6(1) and (2) of the MPLA, in these terms:

> "6. (1) Subject to this Act-
>
> (i) **Gold is the property of Crown.** Gold on or below the surface of all land in Queensland, whether alienated in fee-simple or not so alienated from the Crown, and if so alienated whensoever alienated, is the property of the Crown;
>
> (ii) **Silver when the property of the Crown.** Silver on or below the surface of all land in Queensland whether alienated in fee-simple or not so alienated from the Crown, and if so alienated whensoever alienated, other than land alienated in pursuance of section twenty-two of *The Crown Lands Alienation Act of 1860*, or section thirty-two of *The Crown Lands Alienation Act of 1868*, or section twenty-one of *The Mineral Lands Act of 1872*, is the property of the Crown;
>
> (iii) **Copper, etc., since 1st March, 1899.** Copper, tin, opal, and antimony on or below the surface of all land which is situated within the limits of a gold field or mineral field, and has been alienated in fee-simple from the Crown or lawfully contracted to be so alienated since the first day of March, one thousand eight hundred and ninety-nine, and also on or below the surface of all land wheresoever situated which is not alienated in fee-simple from the Crown at the commencement of this Act, are the property of the Crown;
>
> (iv) **Coal on certain lands.** Coal on or below the surface of land subject to *The Agricultural Lands Special Purchase Act of 1901*, whether alienated in fee-simple from the Crown at the commencement of this Act or not, is the property of the Crown;
>
> (v) **Other minerals on lands not yet alienated.** All other minerals on or below the surface of all land which is not alienated in fee-simple from the Crown at the commencement of this Act are the property of the Crown.

> (2) **Reservations in Crown grants.** All Crown grants and leases under any Act relating to Crown land issued after the commencement of this Act shall contain a reservation of all gold and minerals on and below the surface of the land comprised therein, and also a reservation of the right of access for the purpose of searching for or working any mines of gold or minerals in any part of the land."

[44] The relevant reservation in s 6(1)(iv) of the MPLA was limited to coal on or below the surface of land subject to the *Agricultural Lands Special Purchase Act 1901* (Qld) (**ALSPA**). The ALSPA provided for the Crown to acquire the fee simple in alienated land from an owner by agreement, and to make that land available for selection for closer settlement. The Crown acquired – with the fee simple in such land – the right to the minerals on and under the surface of the land which had been granted by the original deeds of grant. Land acquired by the State in this way did not become Crown land. On the sale of the smaller holdings to selectors, the Crown was to reserve all coal in or under the land.[22] The Lot 1 land was not land subject to ALSPA.[23]

[45] The Lot 1 land the subject of the 1935 deed was not Crown land, but land alienated from the Crown in 1892. Section 6(2) of the MPLA did not require the 1935 deed to contain a reservation of minerals, including coal.

[46] If there were any doubt, the second proviso in s 21A(3) of the MPLA made the position clear. Inserted by an amendment with effect from October 1925, nearly ten years before the 1935 deed, it provided that:

> "coal on or below the surface of the land (except land subject to [the ALSPA]) which was alienated in fee simple from the Crown on or before the first day of March, one thousand nine hundred and ten, is the property of the grantee of the land or of his successor in interest to the land or to the coal, except where such coal is reserved or included in a reservation to the Crown in the instrument whereby the land was alienated in fee-simple from the Crown when in such case the coal is, and it is hereby declared always was, the property of the Crown."

[47] The effect of this proviso was preserved in s 110(3) of the *Mining Act 1968* (Qld), which commenced in 1971 when the MPLA was repealed. It remains in s 8(2) of the MRA, which was enacted when the 1968 Act was repealed. As these provisions indicate, Parliament did not authorise or require the appropriation to the State of property in any coal that had been granted and conveyed to landowners prior to 1 March 1910, save for coal in land subject to the ALSPA.

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22 ALSPA, s 5. See also the explanation of s 6(1)(iv) and the ALSPA in *Wik Peoples v State of Queensland* (1996) 63 FCR 450, 496D-F (Drummond J).

23 In passing, I note that the Mount Russell Estate between Jondaryan and Pittsworth, acquired by the State from Tyson's administrator QTL, was land subject to ALSPA, by s 3. The other land under ALSPA was, by s 2, the Gowrie Estate 20km north-west of Toowoomba, acquired from the trustees of the will of George King, and, by s 4, the Durandur Estate near Woodford, acquired from the Bank of Australasia.

[48] The State says the 1935 deed drew a distinction between the reservations contained in and declared by the laws of Queensland and the reservations set forth in the original 1892 deeds. It says this indicates that the 1935 Deed was "not merely intended to be subject to the reservations that applied under the relevant original deeds." The State was acting pursuant to s 8 of the *Land Act 1910*. I would not infer from the general expression in the 1935 deed that the State was acting otherwise.

[49] In 1934, the registrar's endorsement on the title to the Lot 1 land of a transfer to the Crown under s 8 of the *Land Act 1910* may have created a legal interest in the fee simple for the Lot 1 land under the *Real Property Act 1861* (Qld). It did not alter the respective equitable estates and interests of the State and Robertson, including concerning any coal on or under the surface of the Lot 1 land.

[50] The State had knowledge of Robertson's statutory entitlement to the land. The State could not have acquired the coal in reliance on the register. I reject the State's contrary submission, based on *Breskvar v Wall*,[24] that:

> "In accordance with the principle that title under the *Land Title Act* is a system of registration of title, not title by registration, even if it were the case that the [State] had wrongfully acquired the interest in the coal, it is valid in any event."

[51] I also reject the State's submission that the presumption of regularity[25] applies to make the 1935 deed a grant subject to the reservation of minerals to the State as if it were a grant of Crown land.

[52] From the delivery of the 1892 deed, the State conveyed ownership of any coal on or below the surface of the Lot 1 land to Tyson and his assigns. From that time, the coal ceased to be the property of the State. This ownership was unaffected by Robertson's surrender of the 1892 deed on 10 January 1934 and the State's subsequent issue of the 1935 deed on 12 April 1935.

[53] The Lot 1 land is now the subject of a certificate of title created in November 2005. It is subject to the rights and interests reserved to the State by the original deeds of grant, including the 1892 deed. Glencore is the successor in title to Tyson to the Lot 1 land. As such, it is the owner of any coal on or below the surface of the land.

[54] From the time of the surrender of the 1892 deed on 10 January 1934 and from the time of the subsequent grant by the 1935 deed on 12 April 1935, the coal on or below the surface of the land the subject of those deeds was not the property of the State.

***Was the coal within Lot 18 the property of the State from the time of the surrender of the 1893 deed and the 1899 deed on or about 9 May 1984 or the subsequent deed of grant on 1 February 1985?***

[55] The 1893 deed granting the part of the Lot 18 land to Tyson contained a clause excluding 110 acres and two roods "reserved for road purposes".

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24 (1967) 126 CLR 376, 385 (Barwick CJ). The State also cited *Assets Co Limited v Mere Roihi* [1905] AC 176 PC.

25 *Neowarra v Western Australia* [2003] FCA 1402, [562]-[570] (Sundberg J).

[56] In 1968, when Naroo became the owner of the fee simple in the Lot 18 land, reservations in deeds of grant were the subject of division 5 of the *Land Act 1962* (Qld). By s 358(1), Parliament had provided:

> "358. (1) Notwithstanding anything in any other Act, in every case in which a deed of grant, whether issued before, on or after the commencement of this Act, contains a reservation of part of the land comprised therein for public purposes, and specifies the area of the land reserved, whether or not the land reserved is described so as to identify it, the Governor in Council may, for any of the public purposes mentioned in the reservation, at any time and from time to time resume possession from the person for the time being entitled thereto—
>
> (a) where the land comprised in the reservation is identified by description, of any part of the land comprised in the reservation; or
>
> (b) where the land comprised in the reservation is not identified by description, of any part of the land comprised in the grant provided that the area or aggregate of the areas possession whereof is so resumed shall not exceed the area specified in the reservation."

[57] The sale by the State of reserved land was the subject of s 359 of the *Land Act 1962*. It relevantly provided:

> "359. (1) In any case of a grant of land in fee-simple, whether made before, on or after the commencement of this Act, where by the deed of grant either-
>
> (a) a part of the land identified by area and description has been reserved for public purposes; or
>
> (b) a part of the land has been reserved for public purposes, specifying the area of the land reserved, but not describing the part reserved so as to identify it,
>
> the Governor in Council may, if the land reserved, or any part thereof, is not required for public purposes, sell to the owner of the land, the whole or any part of the reserved land.
>
> …
>
> (6) Upon payment of the price agreed upon …, the owner of the land shall surrender to the Crown his title to the land, whereupon a fresh deed of grant shall be issued to him pursuant to section nine of this Act.
>
> Such fresh deed of grant shall be for the whole of the land described in the surrendered title freed and discharged, so far as relates to the land sold to and purchased by him, from the

> reservation to which the surrendered title was subject, but subject otherwise to such reservation, and to any mortgage or other encumbrance, estate or interest subject to which the surrender was made."

[58] The declaration or dedication of land open as a road for public use was the subject of s 362(1) and (2) of the *Land Act 1962*:

> "362. (1) The Minister, with the approval of the Governor in Council, may by notification published in the *Gazette*, declare any Crown land open as a road for public use and such land shall thereby be dedicated as a road accordingly.
>
> (2) Crown land may also be dedicated as a road for public use upon and by the registration and deposit in the Office of the Surveyor-General of a plan of survey which exhibits distinctly delineated thereon the land thereby dedicated as such road."

[59] There is no evidence before the court that the State resumed for road purposes any part of the land the subject of the exclusion in the 1893 deed. The land seems to have remained reserved land. There is no evidence before the court that the State declared any part of the land open as a road for public use or dedicated it as a road for public use by registration of a plan of survey, pursuant to s 362(1) or (2).

[60] In 1983, Naroo asked the State to delete the clause excepting the road reserve from the title deed including the Lot 18 land. The State told Naroo to apply for the permanent closure of "the road" pursuant to s 363 of the *Land Act 1962* and that the State would make an offer to Naroo to purchase "the road" under s 365 of that Act.

[61] The relevant parts of those provisions were in this form:

> "363. The owner of any land held in fee-simple, or the lessee of any land held from the Crown under this Act or any other Act, which land adjoins a road which is not required for public use may apply in writing to the Minister that the road may be closed either permanently or temporarily. The Minister shall cause notice of such application to be published once at least in the Gazette and in a newspaper circulating in the locality of the road and also for such period as the Minister directs (being not less than one month or more than two months) to be conspicuously posted on the road proposed to be closed and at the nearest District Land Office and police station. At the expiration of such period, the Governor in Council may approve of such application with or without modification.
>
> …
>
> 365. (1) When the permanent closure of any road is approved the Governor in Council shall, by notification published in the *Gazette*, close such road permanently and may—

> (a) if the applicant is the owner of land held in fee-simple—
>
> > (i) sell to such owner or to the several owners of adjoining lands held in fee-simple the land, or parts respectively as determined by him of the land, comprised in the closed road at such price as the Minister thinks reasonable; and
> >
> > (ii) issue to such owner or owners a fresh deed of grant or fresh deeds of grant under and in accordance with the provisions of section nine of this Act or, if it appears appropriate so to do, a deed of grant or deeds of grant for the land comprised in the closed road;"

[62] The local Land Commissioner's report described the road reserve as "an extension of an old stock route which runs through the adjoining Aldebaran Holding." The Land Commissioner stated the road was unformed with no public usage and no sighted survey pegs. At this time, the State seems to have assumed that the road reserve had become a road.

[63] Naroo complied with the State's requirements for the permanent closure of the road reserve. After advertising and consultations with authorities, the State agreed and offered to sell the land within the road reserve to Naroo at a nominated price. In 1984, the State asked Naroo to complete the forms it provided and pay the purchase price. These forms included a form for a surrender of the 1893 deed and the 1899 deed under s 9 of the *Land Act 1962*, a form to accept an offer to purchase road reserve under s 365, and a form to apply for a fresh deed. The latter form, dated 1 March 1984, requested the fresh deed "being for land granted under Section 9 of the [*Land Act 1962*], in consideration of the surrender under that Act" of the former certificate of title. Naroo did as the State requested.

[64] The communications between the State and Naroo proceeded on the basis that the surrender of the 1893 deed and the 1899 deed, the purchase of the road reserve, and issue of a fresh deed were pursuant to those statutory provisions.

[65] On 23 January 1985, the State issued Deed of Grant 30535231 (the **1985 deed**) to Naroo including the Lot 18 land and without the exclusion of the former road reserve. By the 1985 deed, the State granted Naroo the fee simple in that land "subject to the reservations and conditions set forth on the original deed of grant". It was also "subject to the reservations and conditions contained and declared by the laws" of Queensland. At that time, those laws included s 21A(3) of the MPLA, 110(3) of the *Mining Act 1968*, and s 9 of the *Land Act 1962*.

[66] Section 9 was relevantly in these terms:

> "9. (1) Whenever by reason of—
>
> > (a) the opening or closing of a road through or adjoining any land held in fee-simple;
> >
> > (b) a sale, pursuant to Division III of Part VIII; or

(c) a sale, pursuant to section three hundred and fifty-nine of this Act, of the whole or part of a reservation,

the description of the land as comprised in the subsisting instrument of title has ceased to be the appropriate description of the land to which, after such opening and closing or sale and any consequent alterations of boundary, the owner is entitled, the owner may surrender to the Crown his title to the land; and upon such surrender a fresh deed or fresh deeds of grant shall be issued comprising the land to which, after such opening or closing or sale the owner is entitled.

In any fresh deed of grant issued by reason of the closure of a road, the Governor in Council may reserve the right to resume for public purposes an area equal to that comprised in the road so closed on payment of a sum per acre for the land resumed equal to that paid per acre for the land comprised in the closed road.

…

(3) When issuing any fresh deed of grant pursuant to this section, the Governor in Council may, if it appears appropriate so to do, amend or alter the description of the land contained therein. The Registrar of Titles shall thereupon cause to be made any necessary entries or endorsements in the register book concerned and do and execute all such other acts, matters and things as may be necessary and proper to record the fresh deed of grant.

…

(5) The Registrar of Titles shall enter on the fresh deed of grant any and every mortgage, charge, encumbrance, lease, easement or other transaction which is entered on the surrendered instrument of title at the date of the surrender thereof and all notings made by him and appearing on such surrendered instrument at such date, save any such entry or noting duly cancelled prior to such date.

Every such entry or noting shall be made without demand for or payment of any fee, anything in any Act to the contrary notwithstanding."

[67] The effect of s 9 of the *Land Act 1962* was not materially different to that of the s 8 of the *Land Act 1910*. Similarly, s 6 of the *Land Act 1962* was in materially the same terms as s 6(1) of the *Land Act 1910*. At the time of the 1985 deed, s 6(3) of the *Land Act 1962* provided that reservations with respect to minerals that were to be contained in Crown grants were as declared and prescribed by the MPLA.[26] There had been no material change to s 6 of the MPLA from those set out in [43] above.

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26 And those in the *Petroleum Acts 1923-1958* (Qld), which are not relevant to the separate questions.

[68] The steps taken by Naroo and the State in 1984 and 1985 pursuant to s 9 had no relevantly different effect on Naroo's estate and interest in the Lot 18 land to the effect of the steps taken by Robertson and the State in 1934 and 1935 pursuant to s 8 of the *Land Act 1910* (referred to at [29] to [34] above) had had on Robertson's estate and interest in the Lot 1 land.

[69] The State's contentions – that, when Naroo surrendered the 1893 and 1899 deeds, the State regained ownership of the coal in the Lot 18 land, and that the State did not grant or convey to Naroo any property in the coal when it issued the 1985 deed to Naroo – are contrary to the proper construction of s 9 of the *Land Act 1962*.

[70] From the time of the surrender of the 1893 deed and the 1899 deed on or about 9 May 1984 and the subsequent grant by the 1985 deed on 1 February 1985, the coal in the land, the subject of those deeds, was not the property of the State.

[71] Question 1 should be answered, "No".

[72] In August 1985, the land the subject of the 1985 Deed was subdivided. The part of the land below 225 metres AHD[27] became Lot 18. The State issued a separate certificate of title for Lot 18. In August 1986, Naroo transferred Lot 18 to Islemond Pty Ltd. In October 1990, Islemond transferred Lot 18 to APD. On 12 October 1990, APD became the registered owner of the estate in fee simple in Lot 18.

[73] As the owner of the estate in fee simple in Lot 18, ADP is the successor in title to Tyson and QTL and the owner of the coal in Lot 18.

**Question 2**

***Is Glencore's restitutionary claim precluded by chapter 11 of the MRA or section 36 of the TAA?***

[74] The State says Glencore cannot recover the amount it paid to the State for royalties under Glencore's restitutionary claim, even if the State did not own the coal in Lot 1. The State says the MRA chapter 11 provisions and s 36 of the TAA "cover the field" and exclude any common law remedy of restitution.

[75] The MRA provisions about the refund of payments for royalties, formerly in chapter 11, were repealed from 1 October 2020 by the *Royalty Legislation Amendment Act 2020* (**RLAA**). Chapter 11 retains s 319,[28] which relevantly provides:

> "**319 Relationship with Taxation Administration Act 2001**
>
> (1) This chapter does not contain all the provisions about royalty payable under this Act.
>
> (2) The *Taxation Administration Act 2001* contains provisions dealing with, among other things, the following –
>
> (a) …;

[27] Australian Height Datum, which sets mean sea level as zero.

[28] The other remaining provisions in chapter 11 (ss 320, 321, 321A, 323, 324, 325 and 327A) are not said to be relevant to the separate questions.

(b) payments and refunds of royalty;"

[76] By the RLAA, a new part 20 was inserted in the MRA. The provisions in that part confirm that the *Taxation Administration Act 2001* (**TAA**) applies in relation to a liability for royalty or a royalty-related amount before or after the commencement of the amendments on 1 October 2020.[29] They also declare that the TAA applies in relation to an act or omission after 1 October 2020 if it relates to a liability for a royalty-related amount arising before that date.[30] References in the TAA to a tax law, a tax law liability, an assessment or reassessment, unpaid tax interest, a penalty tax, a civil penalty, and a royalty fee, unless the context otherwise requires, include respectively the former chapter 11, a liability for a royalty-related amount, an assessment or reassessment, unpaid royalty interest, a royalty penalty amount, a civil penalty, and a prescribed fee under a former provision or provisions of MRA.[31]

[77] By the RLAA, the repealed statutory rights were replaced with the provisions in the TAA. However, the former chapter 11 part 3 of the MRA (and provisions relating to that part) still apply to an assessment or reassessment of a liability for a royalty-related amount arising before 1 October 2020, save that they apply as if each reference to the Minister is a reference to the revenue commissioner.[32]

[78] In construing provisions of the TAA, it is relevant to consider this statutory purpose. By s 3 of the TAA, Parliament provided:

"**3 Purposes of Act and relationship with revenue laws**

(1) The main purpose of this Act is to make general provision about the administration and enforcement of revenue laws.

(2) Nothing in this Act prevents a revenue law making specific provision about the administration and enforcement of that law.

(3) Each revenue law must be read together with this Act as if they together formed a single Act.

(4) Another purpose of this Act is to make provision about the administration and enforcement of recognised laws."

[79] It may also be relevant that chapter 11 of the MRA is a revenue law,[33] to be read with the TAA, perhaps making specific provision about its administration and enforcement.

[80] The State relies on ss 36 and 37 of the TAA:

"**36 Refunds made only under this division**

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29 MRA, s 886.
30 s 887(3)
31 s 888.
32 s 891.
33 TAA, s 6(6)(a).

A person is not entitled to a refund of any amount paid, or purportedly paid, under a tax[34] law other than under this division.

"**37 Commissioner to refund tax and other amounts**

(1) An entitlement to a refund of an amount paid under a tax law arises if—

(a) under a reassessment, a taxpayer's liability for tax is decreased; or

(b) the amount paid by a person is more than the amount stated in any notice as payable by the person under the tax law.

(2) Subject to sections 38 and 39, the commissioner must refund the overpaid amount.

(3) However, the commissioner must not make a refund under subsection (1)(b) more than 5 years after the payment of the amount."

[81] The State says that on the proper construction of ss 36 and 37 of the TAA, and ss 331B, 319, 886, 887, 888 and 891 of the MRA, a reassessment under s 331B of the MRA is the exclusive mechanism for refunds of overpaid royalties from 1 October 2020, regardless of when the overpayment arose. The State says from the legislative changes effected by the RLAA from 1 October 2020, "there can be no doubt that the intention of the legislature was to oust any restitutionary claim from the operation of the MRA for any refunds from 1 October 2020."

[82] Both s 36 and s 37 are provisions about an entitlement to a refund of an amount paid, relevantly under a royalty law. The repealed provisions in the chapter 11 were also concerned with a right to a refund of an amount paid as a royalty-related amount that was excessive in light of an assessment or a reassessment. These provisions set out a statutory entitlement to a refund in certain circumstances.

[83] The repealed provisions in chapter 11 part 3: required the Minister to make an assessment of a royalty related amount payable by a person for each royalty return lodged by the person under chapter 11;[35] authorised the Minister to make a reassessment of a royalty-related amount if the Minister was reasonably satisfied the original assessment (or an earlier reassessment) was or is no longer correct;[36] required a reassessment decreasing the royalty-related amount payable to be made within five years after the original assessment was made,[37] or within a reasonable time if the Minister agrees, or if required under a provision of the MRA or another Act.[38] Those provisions also provided that a reassessment did not replace a previous assessment of a royalty-related amount "but merely" varied it by decreasing the royalty-related amount payable or changing the basis on which it was assessed.[39] Where a person has paid a royalty-related amount greater than that payable on a reassessment or an original assessment, the repealed chapter 11 part 3 provisions set out the circumstances in which the Minister was required to refund

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34 By s 6A(1) of the TAA, the term "tax" relevantly includes "royalty" payable under the MRA.

35 Former s 331A(1).

36 Former s 331B(1)

37 Former s 331B(4).

38 Former s 331B(5).

39 Former s 331B(6).

the excess amount or credit it against an amount the Minister is reasonably satisfied is or will be payable.[40]

[84] These chapter 11 part 3 provisions provided a statutory process to seek a reassessment by the Minister (now by the revenue commissioner)[41] and afforded a person a statutory right to a refund of an excess amount in certain circumstances. None of the repealed provisions referred to, acknowledged, concerned, or was directed to a restitutionary claim or any court proceeding.

[85] The State says s 36 of the TAA has "the same effect as s 90AA(1) of the *Land Tax Act 1958* (Vic)". The latter provision, since repealed, was considered in *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd*.[42] It was in these terms:

> "**90AA. Refund of tax**
>
> (1) Proceedings for the refund or recovery of tax paid under, or purportedly paid under, this Act, whether before or after the commencement of section 22 of the *State Taxation (Further Amendment) Act 1993*, must not be brought, whether against the Commissioner or otherwise, except as provided in this section."

[86] Unlike s 90AA(1), neither s 36 nor s 37 of the TAA expressly limits or excludes any right a person may have, outside the statute, to commence a proceeding in a court (such as the restitutionary claim) to recover money paid or purportedly paid under a mistake. As the High Court found, the proceedings prohibited by s 90AA(1) included claims to mandamus and restitution.[43]

[87] The TAA provisions do not prescribe mandatory pre-proceeding steps, as s 90AA(1) and its related provisions did. Sections 36 and 37 expressly circumscribe limits for a refund under the TAA statutory scheme, but do not address any common law right or cause of action not arising by the statutory scheme. The present provisions may be distinguished from those considered by the High Court in *ACN 005 057 349 Pty Ltd.* The conclusions reached in that decision about the proper construction of s 90AA(1) could not be reached here about ss 36 and 37 of the TAA.

[88] As the State's contention must be rejected, I have considered whether the court should imply such an exclusionary provision.

[89] As the High Court has observed, when a right is sourced in common law:

> "The approach of the courts has consistently been to require very clear legislative intent before treating a statutory provision as taking

40 Former s 332AA.

41 s 891.

42 (2017) 261 CLR 509, 516-517 (Keifel CJ and Keane J), 519 [16], 520 [22], 523 [35], 534-535 (Bell and Gordon JJ).

43 Ibid, 535 [72] (Bell and Gordon JJ).

away common law rights of a plaintiff, where there is an alternative construction available."[44]

[90] In *Wade v NSW Rutile Mining Co Pty Ltd*, Barwick CJ described as "the fundamental principle" that "if Parliament intends to derogate from the common law right of the citizen it should make its law in that respect plain".[45] His Honour continued:

> "The courts are not entitled, and ought not, to eke out a derogation of such private rights by implications not rendered necessary by the words used by Parliament but merely considered to be consistent with the policy which the courts conclude or suppose the Parliament to have intended to implement."[46]

[91] No such intent is clear or plain in the TAA provisions (or the MRA chapter 11 provisions) on which the State relies. As the State accepts, the explanatory memorandum for the amendments it contends excluded restitutionary claims does not contain an explanation "regarding whether correlative restitutionary awards were intended to be excluded."

[92] Later in *Wade*,[47] Windeyer J quoted "the general principle" expressed by Griffith CJ in *Nolan v Clifford* that:

> "It is always necessary in dealing with any law that alters the common law, and especially where the common law rights of the liberty of the subject or relating to property are concerned, to consider what was the previous law, and what were the apparent reasons for the alterations made".[48]

[93] The subject matter of a reassessment under the former chapter 11 of the MRA is confined to questions about the royalty-related amount payable by a person for a period. It includes whether the amount should be increased or a decreased. The provisions about reassessment do not extend to questions about the person to whom a royalty-related amount is payable. Parliament has gone no further than to give a person to whom a royalty-related amount is payable a right to recover it as a debt by a claim brought in a court.[49] The TAA does not contain a provision like s 39 of the repealed *Land Tax Act 1958*, to the effect that once assessed, every sum payable for a royalty is deemed to be a debt due to the State by the miner and is required to be paid to the revenue commissioner.

[94] With the repeal of most of chapter 11, including the provisions referred to in the preceding paragraph, the TAA was applied to royalties payable under the MRA. The TAA provisions, perhaps because initially they were framed to deal with taxes, do not deal with the identification of the person to whom a royalty might be

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44 *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, 373 [23] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ**)**.

45 (1969) 121 CLR 177, 181.

46 Ibid.

47 (1969) 121 CLR 177, 185.

48 (1904) 1 CLR 429, 444.

49 MRA, s 333.

payable. They made no relevant change to the position before the RLAA commenced.

[95] The scheme in the TAA, as that formerly in the MRA, is concerned with the assessment or reassessment of an amount. The State says it is open to the revenue commissioner "to alter the particulars on the reassessment of the identity of the recipient of the royalty." No authority was identified in the TAA or the MRA for this contention.

[96] The State also submitted that the royalty amounts it received from Glencore "were the amounts assessed as such by the Minister under s 331B of the MRA". The State says "the assessed amounts became a debt owing to the State at that time under s 333 of the MRA." There is no evidence that the Minister made any assessment. So, this submission lacks a proper foundation.

[97] In advancing its restitutionary claim, Glencore must prove it owned the coal mined from Lot 1. The TAA makes no provision for the determination of such a matter. It does not express or imply a restriction or prohibition on bringing a claim for a common law remedy.

[98] Glencore's restitutionary claim is not precluded by reason of chapter 11 of the MRA or s 36 of the TAA. The answer to Question 2 is "No".

**Final disposition**

[99] For the reasons set out above, it is possible to decide the separate questions. It follows that orders should be made by way of relief under r 484 answering the separate questions. Each of the separate questions should be answered "No".

[100] Glencore and ADP have succeeded in their case as to the separate questions. The State has failed. The State should pay the costs of Glencore and ADP of the hearing and determination of the separate questions.