Mining Agreements Intensive

Perth

Wednesday, 28 March 2018

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Program

Mining Agreements Intensive

Wednesday, 28 March 2018

Parmelia Hilton, 14 Mill Street, Perth

9:00am	***Opening Comments by the Chair*** Leigh Warnick, Barrister, Francis Burt Chambers
9.00am to 10.00am	***Mining Rights Agreements*** Goran Galic, Partner, Allen & Overy
10:00am – 11:00am	***Mining State Agreements: Understanding the Framework*** John Southalan, Barrister, WA Bar Association
11.00am to 11.15am	***Morning Tea***
11:15am - 12:15pm	***Sale Agreements for Mining and Resources Projects*** Luke Nicholls, Counsel, Allen & Overy
12:15pm - 1:15pm	***Mining Tenements - Key Issues in Acquisition, Management and*** Mark Gerus, Barrister, Francis Burt Chambers

Mining State Agreements: Understanding the Framework

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Legalwise Mining Agreements Intensive
28 March 2018

Mining State Agreements: Understanding the Framework

1 Western Australia – State of [agreement] Excitement

A State Agreement is the legislative approval of a contract between the executive government and a company to build/operate a specified development. Most State Agreements comprise a long contract between the company and the executive (eg. Minister, Premier) which is scheduled to a short covering statute documenting the legislature's approval. This enables government and company to structure regulation for the operation where existing law is absent or inappropriate.[1]

Western Australia, of anywhere in world, makes the most use of State Agreements in regulating mining projects and associated infrastructure.[2] In WA, over 60 extractives projects currently operate under State Agreements, which is about 80% (value) of minerals & petroleum produced in WA.[3] The State Agreement structure is used in many areas outside mining, including oil & gas projects,[4] land & industrial developments,[5] inter-governmental agreements,[6] entertainment & shopping complexes[7] and agreements with Indigenous groups.[8] WA is the only Australian state with a statute specifically for these legal structures.[9]

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[1] eg. *Commissioner State Revenue -v- OZ Minerals* [2013] WASCA 239, [179].
[2] Horsley 2013, 284.
[3] Barnett 2014, 13.
[4] eg. *Gorgon Agreement* (2003).
[5] eg. *Albany Plantation Agreement* (1993), *Cockburn Cement Agreement* (1971), *Dampier Salt Agreement* (1967), *Ord Hydro Agreement* (1994), *Alumina Refinery Agreement,* (1961).
[6] eg. *Commonwealth - State Financial Relations Agreement* (1927).
[7] eg. *Burswood Agreement* (1985), *Morley Shopping Centre Agreement* (1992).
[8] eg. *Browse Agreement* (2012).
[9] *Government Agreements Act 1979* (WA).

Many legal disputes and court cases involve State Agreements, ranging well beyond traditional 'mining law', eg:

- environmental protest obstructing work, criminal law;[10]
- parliamentary power to cancel mining rights;[11]
- effect on native title rights and interaction of common law and statute;[12]
- relation between historic & current mining statutes;[13]
- control of port infrastructure, and arrangements with third parties;[14]
- tax and other arrangements between joint venturers;[15]
- executive government preferencing of established operators;[16]
- competition law and rail access;[17] and
- company's entitlement to remove resources, third party rights to contest.[18]

State Agreements are less frequent these days for new mining projects.[19] But there are many large, existing projects operating under State Agreements which are structured to regulate each operation for its entire life.

2 'State Agreements and the Famous Five' ways of regulating infrastructure

A State Agreement is just one way to regulate a large infrastructure project.[20] Four other ways which are/have been commonly used are:

(1) direct government involvement,

(2) project-specific legislation,

(3) through contracts without parliamentary ratification, and

(4) through general law applicable in the jurisdiction.

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[10] *Margetts -v- Campbell-Foulkes* (unreported, WASC, 29 November 1979, FC, SCL 2764). *Buzzacott -v- Sustainability Minister* [2013] FCAFC 111

[11] *Comalco -v- Att Gen (QLD)* [1976] Qd R 231.

[12] *WA -v- Brown* [2014] HCA 8.

[13] *WA -v- Graham* [2016] FCAFC 47.

[14] *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55.

[15] *Hancock Prospecting -v- Wright Prospecting* [2012] WASCA 216.

[16] *Re: Minister for Resources; ex p Cazaly Iron* [2007] WASCA 175.

[17] *Pilbara Infrastructure -v- ACT* [2012] HCA 36.

[18] *Buurabalayji Thalanyji -v- Onslow Salt* [2017] WASC 19.

[19] The most recent new (as opposed to amendment of existing) State Agreement for a mining project is the *FMG Agreement* (2005). Recent State Agreements include *Canning Basin Agreement* (2012), *BBI Rail Agreement* (2017), and *Roy Hill Infrastructure Agreement* (2010).

[20] Other options are summarised in AUS Gov 2013, 71 & 75.

The objective 'ideal' is through (4) but that is not always achievable.[21] These days, (1) & (3) are rare, and legally difficult for mining in Australia because management of public land and resources must be by parliamentary law, not executive prerogative.[22]

State Agreements, in mining projects, usually provide a structure for the operations to be proposed and approved in stages, known as the 'proposals procedure'.[23] This involves the company first submitting a proposal, which the government then considers/requests revision and, when the government has approved the proposal, the company is then *obligated* to implement that approved proposal.[24]

The State Agreement specifies the proposals required to come from the company, for example:[25]

- provide a feasibility study of $A for whole operation;
- submit a mine-plan for a mine of B magnitude, and then constructing that;
- operate a mine to extract C tons/year;
- provide mining infrastructure to process/transport D amount;
- ensure social infrastructure for E people; and/or
- have environmental management to ensure F outcomes.

The 'usual' State Agreement content has changed over time. Earlier versions gave extensive land with little control over operations (similar to other forms of mining regulation at that time) but contemporary State Agreements have greater attention to community impacts and lesser exemptions from general laws.[26] South Australia's *Olympic Dam Agreement*[27] was described as the 'modern paradigm' in 2005.[28] More recent developments in WA have seen increased requirements for local industry and community development, through a planning and reporting structure.[29]

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[21] Cameron & Stanley 2017, 61-62 & 88-89; Southalan & o'rs 2015, [6]-[9].
[22] *Forrest & Forrest P/L -v- Wilson* [2017] HCA 30, [65] & [69].
[23] Hunt & o'rs 2015, 16; eg. *Commissioner State Revenue -v- OZ Minerals* [2013] WASCA 239, [180]-[183].
[24] *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55, [229] & [232].
[25] Summarised from Southalan & o'rs 2015, [8].
[26] Southalan & o'rs 2015, [17]. This is consistent with contemporary 'best practice' of mining regulation, which encourages balancing of impacts and benefits across mine-life, eg. NRGI 2014; Cameron & Stanley 2017.
[27] *Olympic Dam Agreement* (1982).
[28] Fitzgerald 2005, 687.
[29] eg. *Canning Basin Agreement* (2012), cl 6 & 7; and these frameworks have also been added to earlier State agreements eg. *Iron Ore Agreements Legislation Amendment Act 2011 (WA).*

The autonomy which State Agreements provided in previous decades is diminished in contemporary times.

- State Agreement operations are subject to increasing regulation of particular aspects by structures outside WA, including Commonwealth laws (eg. environmental biodiversity, native title, Indigenous heritage) and international law (eg. international investment law, anti-corruption measures, human rights).
- Western Australia also has more extensive procedures for making regulation, making a different context within which any new State Agreement is made (eg. regulatory impact assessment[30]), and any decision-making and processing by government agencies (eg. application of freedom of information[31]).

International human rights mechanisms and standards, in particular, provide increasing responsibilities on companies regardless of the law of the specific jurisdiction.[32]

- International procedures have rejected claims of breach where the relevant domestic law and engagement process was extensive.[33]
- International procedures have identified state/company failures where the domestic laws or engagement was inadequate.[34]
- Many human rights *can* be limited through parliamentary laws, but at an international level this is not recognised unless there has been careful parliamentary /judicial review of the necessity of limitations.[35]

3 When is a statute not a statute? When it's a contract

Legally, the terms in a State Agreement can be one of two broad options, either: remaining clauses of a contract (between the two parties), or having direct statutory force (generally binding everyone). The 'default' situation is the terms of a State Agreement are not given statutory force

[30] WA Gov 2010.
[31] Applied in a State Agreement context in *McGowan -v- Minister for Regional Development & Mineralogy P/L* [2011] WAICmr 2 (politician FOI request for documents concerning director and a company which held a State Agreement).
[32] Southalan 2016.
[33] eg. *Länsman -v- FIN* (1994, UN doc CCPR/C/52/D/511/1992) (quarrying impact on reindeer herding); *Mahuika -v- NZL* (2000, UN doc CCPR/C/70/D/547/1993) (fishing permits and indigenous rights); NOR NCP 2016, (the laws and engagement regarding impact assessment were sufficient).
[34] eg. *CERD Decision 2(54) on Australia* (1999) (parts of 1998 native title amendments); NOR NCP 2011 (domestic law certification regarding consultation was insufficient).
[35] eg. allowed in *Animal Defenders -v- GBR* (2013, ECHR Application 48876/08) (controls on political advertising), but rejected in *Hirst v GBR* (2005, ECHR Application no 74025/01) (prisoners' right to vote).

unless that is specifically stated in the parliamentary statute.[36] The status of the agreement (eg. contract or statute) is relevant in how to interpret the document and what implications it has for third parties.

Even if not a statute, there are variations in the extent of parliament's approval/endorsement of the agreement terms.[37]

Parliament can indicate which laws takes priority in the event of any inconsistency (eg. State Agreement terms, or other statutory law). If the particular matter is not addressed, any areas of inconsistency then fall to be addressed through interpretation and construction of the relevant documents.[38] This has resulted in the relationship between State Agreements and existing law being addressed within each the particular dispute, rather than in a context of uniform constitutional theory.

- The Full Federal Court in 2016 examined mining leases granted pursuant to a State Agreement and ruled: 'The State cannot, by contract, give to itself a right to alienate Crown land. Accordingly, the government agreement in such a case cannot be the source of power to grant a mining lease. The source of power remains the [mining] Act'.[39]
- A subsequent Full Federal Court suggested that parliamentary ratification overcomes contractual inabilities of the executive: 'The State Agreement was then ratified by the Parliament ... Ratification by Parliament of the State Agreement was necessary because dealing in Crown land, including minerals, can only be authorised and supported by Statute: *Western Australian Constitution Act 1890* (Imp)'.[40]

4 Enforcement / implementation – who and how

The legal status of proposals, and their implications, is likely to be area of increasing attention. The 'usual' State Agreement terms mean:

- the Government cannot reject a proposal, but can only approve or suggest changes;[41]

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[36] *Hancock Prospecting -v- BHP Minerals* [2003] WASCA 259, [65]-[66]; *WA -v- Graham* [2016] FCAFC 47, [38].
[37] A useful schema is provided in Warnick 1998, 882-890.
[38] eg. later law can impliedly repeal earlier inconsistent law, but a general law is subject to a specific law (cases summarised in Southalan 2013, 174-175) recent examples are *BHP Coal -v- Resources Minister (Qld)* [2011] QSC 246, [33]-[46] and *Genbow P/L -v- Griffin Coal* [2013] WAMW 11, [79]-90] & [99]-[108].
[39] *WA -v- Graham* [2016] FCAFC 47, [38]. Special leave to appeal was refused in *Graham -v- St Ives Gold* [2016] HCATrans 241.
[40] *Mineralogy P/L -v- Sino Iron* [2017] FCAFC 55, [195].
[41] *Mineralogy -v- WA* [2005] WASCA 69, [34].

- a document requires some connection with the project in order to be a proposal, eg. 'in relation to', 'in conformity with the primary purpose'[42] – so something not 'relevantly related to/connected with a Project' is not a proposal which the Government can consider;[43]
- however a document need not comply with every detail of a State Agreement in order to be a 'proposal' the Government must consider – the essence is a document describing a project and the methods or plan to be used to achieve performance of that project;[44]
- the executive government does not have complete autonomy to deal with public land and resources because that is parliament's remit;[45] BUT,
- parliamentary 'delegation' of decisions and structures to the executive is a common and legally valid regulatory form (eg. in framework legislation[46] and Henry VIII clauses[47]).

A generalisation might, therefore, be as follows. Absent any specific requirement of parliamentary oversight/reporting of proposals in the particular State Agreement in question, there seems little *legal* basis which obligates such a role for parliament.[48]

Enforcement by company:

- where State Agreement creates a *duty* on the government to do something, then the courts can enforce that,[49] but where no duty is created by the State Agreement then damages are likely the only remedy for breach;[50]
- judicial review of government action under a State Agreement can be available;[51]
- there has been one arbitration against WA Government (regarding approval of proposals).[52]

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[42] *Mineralogy -v- WA* [2005] WASCA 69, [67].
[43] *Mineralogy -v- WA* [2005] WASCA 69, [68] & [1].
[44] *Mineralogy -v- WA (Award)* (2014), [55] & [24].
[45] *Forrest & Forrest P/L -v- Wilson* [2017] HCA 30, [65] & [69]; *Wright Prospecting -v- Hancock Prospecting* [2016] WASCA 50, [40]-[41].
[46] eg. AUS Plmnt 2012, ch 5.
[47] eg. '[A] statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law': *Victorian Stevedoring -v- Dignan* [1931] HCA 34, 101 per Dixon J (Rich J agreeing)
[48] eg. 'In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the [executive] to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed.': *Morton -v- Union Steamship* (1951) 83 CLR 402, approved & applied in *NSW -v- Commonwealth* [2006] HCA 52, [415] per Gleeson CJ, Gummow, Hayne, Heydon & Crennan JJ.
[49] eg. *BHP Coal -v- Resources Minister (Qld)* [2011] QSC 246.
[50] *Ansett Transport v Commonwealth* [1977] HCA 71.
[51] eg. *BHP Coal -v- Resources Minister (Qld)* [2011] QSC 246, [3] & [68]-[69].
[52] *Mineralogy -v- WA (Award)* (2014).

Enforcement by government:

- disputes are usually negotiated/agreed, or (very unlikely) resort to arbitration, but if there is no resolution through these, then government usually only has the 'nuclear option' to terminate everything;[53]

A significant issue, however, is failure by Government to monitor/implement the terms which it had earlier agreed. The WA Auditor-General has issued reports identifying concerns about inadequate monitoring of State Agreements.[54] These reports have been used by proceedings in determining the actual realities of implementation (as opposed to the words in the statutory scheme).[55] There have been changes following Auditor General's report, with increased reporting required of local content.

Enforcement by third parties:

- where State Agreement passed, third parties unlikely to be able to challenge the government's action in negotiating and passing that law,[56] nor the company's subsequent actions under the agreement;[57]
- references in a State Agreement to third parties can give them justiciable rights;[58]
- there are increasing moves toward greater agreement transparency and accountability[59] but not (yet) seeing legal implications in WA.

Third party (fundamental) rights are generally unimpeded by statute unless the parliament explicitly indicates otherwise,[60] and this approach would apply to State Agreements. There have been examples where the State Agreement (and covering statute) have restricted or removed third party rights.[61] There may well be changes in the interaction and efficacy of these types of domestic laws, with increasing international mechanisms addressing corporate impacts on human rights.[62]

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[53] eg. *Aurukun Associates Agreement Repeal Act 2004* (QLD); Young & o'rs 2005.
[54] eg. WA Gov 2004, 20; WA Gov 2011, 21 & 31.
[55] eg. *Karajarri Traditional Lands Assn -v- ASJ Resources* [2012] NNTTA 18, [85] & [91].
[56] Southalan 2013, 172-173.
[57] Hillman 2006, 325. But contrast *Buurabalayji Thalanyji Corp -v- Onslow Salt* [2017] FCA 1240.
[58] eg. *Hancock Prospecting -v- BHP Minerals* [2003] WASCA 259, [69]-[70].
[59] eg. Pitman 2018; Cameron & Stanley 2017, 74.
[60] eg. *Lacey -v- Attorney-General (QLD)* [2011] HCA 10, [17]. Cases and circumstances detailed in AUS Gov 2016, [2.22]-[2.34].
[61] eg. *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA), s9; *Government Agreements Act 1979* (WA), s4.
[62] Recent publications assisting commercial lawyers to understand and advise on human rights aspects include IBA 2016 & IBA 2017.

Other contracts can give third party rights similar to State Agreement obligations, and related commitments could thereby be enforceable through that other contract.[63]

5 Three perspectives on State Agreements:

Transparency International:

'The State Agreement process ... involves considerable Ministerial discretion. When combined with a lack of transparency, and the ability of industry to negotiate directly with politicians regarding projects, considerable risk is created of state and policy capture, and the potential for corruption is increased'[64]

Hon. N Moore MLC

'The alternative is just a process in which Parliament has no involvement whatsoever. I therefore quite like state agreements as a general way of doing business in Western Australia; they have been extraordinarily successful. Indeed, most of the development of the Pilbara has been as a result of state agreement acts that have been put in place over time. Some have not worked; some have. Some have not proceeded; others have. In fact, I think there are some on the notice paper to be removed in due course as they are past their use-by date. However, as a general rule, state agreement acts have been very successful. We have a very successful resource sector as a result, in many cases, of state agreement acts that have been put in place over time. Anybody who disputes that is simply ignoring the reality of our economy at the present time'[65]

IM4DC Research Report:

'Countries aiming to attract large mining operations may consider parliamentary-approved agreements to assist in regulation, and these agreements continue to be used in other countries with existing large operations. This paper identifies improvements for parliamentary-approved agreements in two broad areas:

(1) **In the negotiation and establishment of a new parliamentary-approved agreement**:

i) the executive should assess the four areas of regulatory impact assessment (i.e. explain the context, explain the proposal, conduct cost-benefit analysis, and describe the public consultations) as part of its negotiations and formulation of any agreement terms, and then report this work and results to parliament;

ii) international standards of social and environmental protection should be non-negotiable, and so any proposal that parliament endorse any variance from these standards, through approving an agreement, should be specifically identified for parliamentary consideration; and

iii) parliament should be provided with adequate time and resources to be able to consider whether to approve any agreement, and that process may be assisted by committee deliberations.

(2) **In the operation of an existing parliamentary-approved agreement**: regular reports should be provided to parliament about the agreement's implementation.'[66]

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[63] eg. *Buurabalayji Thalanyji -v- Onslow Salt* [2017] WASC 19, [34]-[35], [38] & order 1(d).
[64] TI Aus 2017, 23 (see, in response: Audeyev & Hancock 2018).
[65] Moore 2006, 6145.
[66] Southalan & o'rs 2015, [2].

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