COMMENT ON GOVERNMENT PARTICIPATION IN THE MINERALS INDUSTRY

By D. Hunter

Mr. Roberts has presented a paper, intended to provide no more than, and I quote a "most general treatment of a complex subject".

None of us will, I'm sure, argue about the complexities involved, but I feel that seldom would one encounter a general treatment of the subject that paid such commendable attention to accuracy and to detail. For obvious reasons, Mr. Roberts has paid close attention to the period between 1972 and 1975. I do not propose in my remarks to add extensively to that part of the paper, because my own association with events of the time could well prejudice my objectivity as an historian. I approach the topic as that of a policy advisor rather than a lawyer, which I am not. This will no doubt be reflected in my commentary. In the main, it is my intention to take up salient points in the paper with a view to providing some measure of amplification in the hope that by so doing I can lend some further perspective to the subject under examination. Before detailing these points, I would like to make one general comment. I suspect that the reader, in absorbing the great deal of detail in the paper on the many facets of Government participation could miss significant points of summary made throughout the paper. For example, the paper concludes that Government involvement in the mining sector in the period to 1972 was primarily in the form of a supportive role, that is, one of assisting and encouraging mineral development by private enterprise rather than entering into direct competition with private enterprise. There are, of course, examples of direct Government involvement in mineral developments, for defence and strategic reasons and as part of the provision of Government services, such as electricity generation.

Notwithstanding the initiatives taken in the 1972-1975 period however, I contend that the form of Government participation at least at Federal level remains much as it was in the 1960's. The degree of that participation is another matter. One important element in this, that could arise in the context of the development of uranium policy, is the nature of the Government's involvement in the production and marketing of uranium. I do not need to say to this audience that there are special circumstances surrounding the development of this mineral which are a study in themselves. What is to happen is not yet clear. I will, therefore, not go into this in detail here, other than to say that Australia's ratification of the Non Proliferation Treaty carries with it binding obligations bearing on future sales of Australian uranium overseas. This is reinforced by the obvious interest within Australia in these matters. While the pattern of direct Government participation may not have changed significantly there have been some very significant changes in other aspects of Government involvement in mineral development. Some might consider it a sad commentary on modern life, but in just about every aspect of human endeavour Government controls and regulations have tended to become more pervasive — mainly in response to changes in community values. So it is with the mineral sector.

Mr. Roberts' paper effectively brings out the background to the changes in community values that have occurred over the last decades and which have been a prime force behind the changes in Government policies. This is not to deny the importance of the other major force, that is, the political philosophy of the particular

Government in power. Nevertheless, changing community aspirations are bound to be reflected to greater or lesser degree in the policies of the Government of the day.

Turning now to the first part of the paper, Mr. Roberts identifies the range of motives that can lead to Government participation, both in resource producing and resource consuming countries. In a paper presented to a conference in Canberra earlier this month, the Chairman of the Utah Development Company made the statement that mining and its relation to the prosperity of nations is almost as old as recorded history. In support of this thesis, he cited the mining of copper as far back as 4,000 B.C. in the southern part of present day Israel and the exploitation by the Greeks some 2,500 years ago of rich silver deposits which bolstered the economic power of Athens and led to the Golden Age of Greek commerce and culture. I regret to say, however, that no reference was made in that paper to the nature of the participation agreements by which the Governments of the day extracted what they considered their due tribute. I am pleased to note that Mr. Roberts has not been distracted by unproductive speculation of this sort and has quite properly related his comments to a more contemporary time frame. The lesson I learn from this is that from the time of the industrial revolution and the development of colonial empires extremely pragmatic reasons have dictated the extent of Government participation in the minerals industry. I suspect that it was ever thus.

Part 3 of the paper is concerned with the nature of public sector participation in the minerals industry in Australia prior to 1972. Resource assessment and the economic imperative of adequate and stable supplies of energy resources were key issues in the period. In the section on coal, attention is invited to the existence of franchise agreements in respect of Bowen Basin coal developments whereby the Queensland State Government has stipulated that any steaming coal which is mined is to be stockpiled on behalf of the Government and sold to the Government at cost. The essence of this arrangement, as I understand it, is the fact that the steaming coal in question overlays much more valuable coking coal deposits which commodity of course commands premium returns on overseas markets. Queensland is indeed a fortunate State when it can burn mine overburden in its power stations.

In Part 4, critically important questions of processing and transportation receive attention. Processing of Australia's mineral resources as a prerequisite to export is a bi-partisan policy objective at the Federal level. For many years, interest in the concept of uranium enrichment in Australia has been evident, as has the recognition that scope exists for expanded processing of bauxite to alumina and aluminium. Australia is undoubtedly well placed to expand domestic mineral processing industries. It makes good economic sense, in terms of resource endowments, for Australia to encourage this type of activity rather than industries that need to be assisted by high tariff walls or other types of Government assistance. Australia's advantages in terms of our abundant energy resources (primarily coal), and suitable sites for development, contrast with the situation in some industrialised countries, such as Japan, where the future of high energy-using and "dirty" industries is being seriously questioned. The present Commonwealth Government has foreshadowed an intensified policy thrust towards expanded processing. Consultations with the States and with industry have commenced and I expect that the matter will be pursued with overseas consumers, particularly the Japanese. It should be mentioned at this point that the Commonwealth recently introduced a number of important taxation changes aimed at improving the investment climate following its consideration of the proposal to develop the North West Shelf gas reserves. These included the

allowance of expenditure on the liquifaction plant for processing natural gas and the extension of the 20 per cent phase of the investment allowance.

On the question of transportation, perhaps the only comment I need to make is that as natural gas is expected to become increasingly important as an industrial fuel and feed stock, the interest of Governments in its reticulation is unlikely to grow less. The planning and construction of pipelines, particularly over the distances often involved in the Australian environment, can raise issues that sit uneasily with shorter run commercial aims; hence the tendency for the public sector to become directly involved. The legitimacy of the concept of a national natural gas pipeline grid seems, if anything, to have become less subject to criticism. The manner in which individual State Governments view the concept of a reticulation system transcending State boundaries tends, of course, to be a function of the resources of natural gas the State in question has available to it and of its dependence, actual and potential, on the commodity for energy generation or other industrial purposes.

Part 5 of the paper deals with the period 1972-1975. I have stated my position on that, but, purely by way of supplementary data, could I mention the following. Details are provided in the paper on action taken by the then Government in 1974 to facilitate the development of uranium. It might also be noted that prior to the October 1974 announcement of the Government's programme, the Government had sought to introduce Regulations under the Atomic Energy Act which would have authorised the Minister to issue licences for the development of uranium in respect of a Territory under s. 38 of the Act. The Regulations were also intended to apply to the States, where it was necessary for the purposes of the defence of Australia. The Regulations were disallowed by the Senate in September 1974. I leave it to others to speculate on what the position might now be had those Regulations not been disallowed by the Senate, but I recall the actual vote was very close and depended on the vote of an Independent Senator from South Australia. The second point of information is provided in the paper about the Atomic Energy Commission underwriting a share issue by Mary Kathleen Uranium Ltd. I think it is also worthy of note that in 1976, Kathleen Investments, a shareholder in Mary Kathleen Uranium, brought a legal action claiming that the Atomic Energy Commission did not have the power to subscribe to shares in Mary Kathleen and that the allotment of shares to the Commission was void. The action has been discontinued, but it did serve to affect any move by the Commonwealth to divest itself of those shares.

The question of Government "take" is central to many of the events discussed in Mr. Roberts' paper. He understandably decided earlier in his paper not to cover this matter in any detail, but significantly he has been drawn back to it in his summary at the end of his paper. The taxation of the mining sector is, of course, different from the taxation of other sectors of the economy in that exhaustible mineral resources have a scarcity value, known in economic parlance as "rent". Strictly defined, economic rent is the profit derived from the extraction of a resource which is in excess of the profit required to attract and retain investment in the project. The development of Australia's mineral resources, primarily by private interests, determines that Governments must rely on their taxation and royalty measures to ensure an adequate level of government "take". Also, the development of a foreign investment policy, which attempts to maximize the Australian equity in new resource projects and thereby maximize the level of profits accruing to Australian interests is related to the question of Government, or more properly community, "take" from mining development.

Mr. Roberts has correctly pointed to the complications in taxing the mining sector arising from the Australian Federal system where income tax powers are vested in the Commonwealth, and the States have powers to levy royalties. The areas of past differences between the Commonwealth and the States are well documented in the paper. It is patently clear that the existence of major differences between State and Commonwealth policies is not conducive to the development of the mining industry and hence the welfare of the nation as a whole. It is in recognition of this fact that the Commonwealth and the States have sought regular consultation at ministerial level through the Australian Minerals and Energy Council.

Another form of Commonwealth involvement in the mining sector aimed at maximizing the benefits to Australia from the exploitation of our natural resources is control over exports under the Government's international trade powers. This control has been instrumental in ensuring that Australian exporters, acting individually, are not commercially disadvantaged in dealing with countries where buying is done on a uniform basis, that is, by a single negotiator. The Government approach to foreign investment is discussed in the paper in terms of the different approaches taken by the major political parties to achieve increased Australian ownership and control. It is concluded that, in the absence of a vehicle such as an amended Petroleum Minerals Authority, it seems inducements to investors to attract finance to existing Australian companies through, for example, the Australian Industries Development Corporation may be necessary if the prescribed level of Australian ownership and control is to be attained. While the Australian Industries Development Corporation has an important role in assisting Australian resource companies obtain development funds, it is apparent that growth in the Australian capital market in recent years has been such that Australian funds are more readily available for investment in resource projects. Also, Australian resource companies, which have grown considerably as a result of the last phase of mineral development, are now hopefully in a better position to finance participation in new projects from retained earnings. I might also mention that overseas borrowings by Australian companies of international standing can be expected to be an increasingly important source of funds for new development, which will assist in enabling participation by Australian companies on much the same basis as foreign companies.

Notwithstanding what I have just said, the raising of large amounts of capital to finance resource development in remote locations is a real barrier to Australian participation. However, the situation seems to be changing to some extent as indicated by initiatives taken in the Loan Council context that suggest, by comparison with the 1960s, a trend towards greater public sector involvement in the initial financing of infrastructure. None of this, of course, is to deny Australia's continuing dependence on private, foreign equity capital for resource developments. The foreign investment policies of the major parties recognize this. One other aspect of Government involvement, worthy of mention, is the matter of extra-territorial enforcement of law by certain industrialised countries. This matter has caused particular concern recently in Australia in relation to the United States' anti-trust laws. Because of these developments, the Commonwealth Government is giving careful consideration to the way in which Australian uranium is to be marketed.

I do not wish to get immersed in this topic today other than to say that, whether Governments wish it or not, this is an area where Government-to-Government consultations will tend to increase.

The final point relates to statutory corporations. In Part 6 of his paper, Mr.

Roberts has quite a deal to say about statutory corporations as a vehicle for Government participation and he cites reasons enunciated for Governments proceeding by way of statutory corporations. Firstly, insulation from political pressures; secondly, the facilitating of the attaining of technical expertise from the private sector; thirdly, a way in which we can get across Commonwealth and State boundaries — the illustration being the Joint Coal Board, and fourthly, the question of legal accountability.

Can I add two more components? One is that statutory corporations are often adopted because of the flexibility they afford. This can be illustrated in terms of funding. Most statutory corporations get their funds from the budget by way of a single line appropriation and operate their funding operations outside the Commonwealth public account. This means, in turn, that they get away from strict annual appropriation mechanisms. They can carry forward funds from one financial year to another and they are not subjected to the line-by-line parliamentary scrutiny that Departments of State are. This can be a positive factor, in terms of adding flexibility to the operation.

The second point I would make is that Mr. Roberts has laid some stress on the question of political interference in the context that some public authority legislation allows for directions to be given by Ministers. I don't lay as much stress on that aspect. I think I lay more stress on the fact that with statutory authority legislation there is a closer relationship between the authority (as an arm of Government being set up to do a specific thing) and the Parliament. The Parliament enacts the legislation and the legislation in most cases outlines in specific detail the aims and functions of the authority. In addressing himself to this matter, Mr. Roberts tends to talk about the Petroleum and Minerals Authority; I find it of no little interest that he chooses this Authority as an example, because I have it on the best of legal authority that it never existed.

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By M. Gray

I rather suspect that I may have been invited here as the role of an apologist for Government participation. I am comforted in that regard by the unexpected support from the Victorian Gas and Fuel Corporation which I think has become a rival Prince Charming for the instrumentalities of the Government of South Australia. I might also say that the views that I am going to express are my own and I do reserve the right, at any time to unequivocally withdraw them in any negotiations that I may have with the mineral industry. I would like to comment from the standpoint, that one way or another, there will be Government participation in the mineral industry and no matter which way you look at it, the mineral industry is engaged in resource exploitation. In respect of the energy minerals, particularly today, there is plainly considerable motivation, for extensive Government intervention. There is perhaps much less motivation in respect of other minerals but the broad principles are the same.

The form of intervention will be, either what I will call "external participation" or what I will call "internal participation". External "intervention" or "participation" I define as "controls, directions and limitations imposed by legislative or administrative action authorized generally by legislation". Internal participation may be authorized by legislation but essentially it seeks to join in the enterprise by working on the inside of the venture some might say "like a fifth column", but in reality participating to a greater or lesser extent as a commercial venturer. Of course, internal participation is almost always accompanied by external participation and it is this feature which, I think, gives rise to the uneasiness that Mr. Roberts has expressed. At the outset, and in defence, if that is needed, I say that it is unreal not to consider the limitations of external Government resource management without the wisdom of Solomon, the ruthlessness of Ghengis Khan, the cold-blooded foresight of Matthew Paris and not all Governments exhibit these attributes. It is not possible, by the use of external controls to properly regulate an industry that has the changeable facets and the commercial complexity of the minerals industry.

External controls tend to develop after the need for them have become apparent. They have the real problem of enforcement and vigilance in enforcing them is economically expensive. External controls often do not allow for sympathetic adjustments to suit the unusual situation and are often inflexible when flexibility is desirable. There are, in my view and as I see it, considerable limitations on external resources management. It may be lack of detailed composite information upon which it can be based; a none-awareness of commercial problems; a restriction on the methods that may be employed; a restriction on the ability to communicate in the industry on a day to day level and the expense and inefficiency of the modes of external control. There is also a restriction on the types of stimulus that can be applied. The advantages of internal resource management is the ability to give general flexibility from an unusual source to the project and the gradual and controlled replacement of foreign ownership without the trauma of expropriation and of course the overcoming of the disadvantages that I referred to earlier. The ideal approach by Governments, in my view, is to ensure management in such a way as to confirm optimum benefits on the citizens of the nation in respect of the minerals industry, a combination of external and internal participation, in my view, can ensure this.

The ill-fated Petroleum and Minerals Authority demonstrates an attempt by a Government to play a more involved role in the minerals industry. You may recall Mr. Whitlam's words that he did not regard rape of resources as inevitable, nor did his Government intend to lie back and enjoy it. Rather, they cast themselves, by the creation of the Petroleum and Minerals Authority, in the role of a seducer by forming that Authority, albeit an impotent seducer, as it turned out. I think that Mr. Roberts' analysis of the Petroleum and Minerals Authority episode, in his paper, points to some important lessons to be learned and I think it useful to consider the special problems that Government participation generally has in the minerals industry. Not only because they affect me as an advisor to a Government, but because in my view, they are important considerations for all those who advise corporations involved in an enterprise which contains internal participation by Governments.

Some of these problems are touched on in Mr. Roberts' paper, and one of them in particular, he has touched on here today in some detail. I think the starting point is, that there can be no doubt that the entity chosen by the Government as its participating instrument is of fundamental importance to the extent of its involvement. The forms that may be chosen are generally either the Government or a Government department itself; a statutory corporation usually a corporation sole; a company in which the Government has a controlling shareholding or the total issued shareholding or a company limited by guarantee and made subject to effective Government direction; or some form of investment company. Now in the case of the Government department itself, the actual use of that raises directly the question of Crown immunity, and the problems that arise as a consequence of Crown immunity. Indeed I think that internal participation in a commercial project by a Government department or by the Government as a whole because of the unincorporated nature and the lack of ability to function as a separate entity, both financially and administratively, make it an unattractive vehicle in most cases, and one I think to be avoided.

I appreciate, and I think everyone should appreciate too, the point made by Mr. Roberts in his paper, that a statutory corporation sole generally will have a first charge or some charge over its assets in respect of its borrowings or grants from General Revenue and that, in its turn, can cause restrictions in its ability to act. However, provided that the statutory corporation is formed for a particular venture with that limitation in mind the legislation can cater for that eventuality.

Of perhaps more concern, particularly to those who advise companies in mineral ventures, is the necessity to give the statutory corporation the detailed express powers to carry out the function it has been assigned. Like any company, its capacity to act must be so expressed so as to give it the power to engage in the activity and all the incidental contretemps. As such, its capacity deserves detailed examination by both Government and commercial enterprise, and more particularly in the case of the Commonwealth, whether it is *intra vires* the Commonwealth's legislative power for the company to act in the manner that is intended. All of this, of course, leads to the significant area of Government control of the vehicle. Now I do not share the reservations that I think Mr. Roberts has in relation to Government interference of statutory vehicles and I think Mr. Hunter's views are probably closer to mine than Mr. Robert's are. But it seems to me in any event that (other than in the case of a Government department) the degree of control exercised by the Government is capable of infinite variation. A statutory corporation can be created in a form whereby its freedom of action is circumscribed by the operation of a variety of circumstances. The effective

Governmental policy changes of the statutory corporation can operate to a greater or less extent, dependent upon the machinery of setting the corporation up. Similar requirements can be built into a company in which the Government has a majority or all of the shares, but of course such limitations are not so obvious, to public scrutiny.

I think in summary, the effect of this is to require care in setting up the appropriate vehicle to ensure that it meets the desired objective. I agree also that for those who advise those dealing with the Government body, it is essential that they understand the factors which expand or limit the Government body's freedom of action in its participation.

I return, very briefly, to Crown immunity. I think it can be fairly said that the courts are slow to construe commercial enterprises of the Crown, as the Crown, so as to invoke the doctrine of Crown immunity. But if the particular body or corporation, and particularly statutory corporations under direct Government control can claim that immunity, certain rather interesting consequences follow in the trade practices area in the case of a State. It may be argued that Crown immunity innures for the benefit of the parties that contract with the Crown and therefore, if the State authority can take the benefit of Crown immunity, then the Trade Practices Act will not only not bind them, but not bind the parties who contract with it. It is also speculative at the present time as to whether the Trade Practices Act binds the Crown in the right of the State and in fact it is that question that is being litigated at the moment, in the High Court. If participation agreements are freed from the Trade Practices Act so may be the commercial contracts that the State Government Crown enters into. This has significance, because from the point of view of s. 51 of the Trade Practices Act that gives very little comfort really to the States because of the provision that enables the Commonwealth to counter-legislate by regulation against the practice that the State has specifically authorized.

Also, in respect of trade practices as far as the Commonwealth Government is concerned it is bound by the Trade Practices Act. But the qualifications to that ought to be noted; it is not bound as the Commonwealth, where it carries on business under the authority of the Commonwealth and its instrumentalities are not bound in so far as they do not carry on business. Given the restrictive interpretation by the High Court to trading corporations in the *St. George County Council Case* (1974) 48 A.L.J.R. 26 it is quite conceivable that an instrumentality or Commonwealth Government corporation formed for the purpose of resource control and public utility is not a trading corporation and whether it is still caught by the provisions in carrying on business is speculative.

It is said, with some force, that ministers who have responsibility in respect of Government bodies or corporations can hardly be objective when it comes to exercising statutory ministerial discretions under their external regulation powers, but in my view, this ignores the rationale of Government internal participation. If resource management and the State and national interest is the objective of participation then the objectives will be the same. It's only when crass profit becomes a consideration that fears may be entertained in respect of conflicting decisions by ministerial responsibility. Mr. Roberts' paper makes a plea for safeguards in the area of ministerial discretion where that discretion is to be exercised in the area where a Government instrumentality or corporation is participating. The suggestions for them are made broadly; a restriction of the discretion; the provision of specific grounds for its exercise; and anti-discriminatory provisions. The difficulty with all these suggestions is the difficulty of review or control of ministerial discretion. In setting out

criteria for the exercise of discretion, it is almost impossible to avoid value judgements as forming a basis for some of the criteria. Expressions such as "fit and proper", "satisfactory financial arrangement", "able to economically carry out" all imply value judgements. The courts, of course, are most reluctant to review the exercise of a discretion unless given the specific mandate to do so, and the prerogative remedies do not lend themselves to such a review. I would like to think that the necessary tension between the objectives of commercial enterprise and Government participation would provide the appropriate safeguards.

The last topic that I think we are touching on is that of confidentiality. I think that fears on this account are more apparent than real. True, there is an increasing note of Government involvement in all aspects of mineral exploitation and an ever increasing use of diverse bodies under the Governmental umbrella, but there is also an increasing requirement of accountability in the private sector. Generally, a minister does not have to report to Parliament on the corporations formed outside the statutory authority and it is generally unlikely that the commercial secrets of trading corporations are of public interest to parliamentarians.