COMMENTARY ON THE ROXBY DOWNS INDENTURE

By M.L.W. Bowering*

I would like to thank Leigh Warnick for his well prepared and comprehensive paper — it is so comprehensive that it is an impossible task for me to comment upon the entire field covered by him, and I shall not endeavour to do so. May I say how pleased I am to be able to share this commentary with Geoff Witham, from Western Mining Corporation. The situation in which one has a representative from both sides of the negotiating table to comment upon the resulting Indenture is probably unusual, and as this is the first occasion upon which I have publicly commented upon the Indenture, I should like to commence by paying a tribute to the W.M.C.-B.P. negotiating team. It would be both foolish and untrue to suggest that there were no disagreements (perhaps even scraps) around the conference table, but, just as Warnick suggests in his paper, the need, on both sides of the conference table, for a recognition of reality was an essential ingredient to the successful outcome of the lengthy negotiations. In addition, I believe it true to say the Indenture is evidence that both sides gave due observance to what I might call 'concepts of common fairness' and for this I thank the Joint Venturers negotiating team.

Lest anyone think that, in so saying, I am giving the Joint Venturers an idle pat on the back, may I add that it is essential that the spirit of co-operation and unanimity of endeavour, so alive during the negotiations, be preserved well into the future. At the conclusion of his paper, Warnick suggests that the principal battle ahead is for the men in hard hats to get the mine up and running, and although the truth of that statement is obvious, there are many battles to be fought before that battle is even waged, let alone won. Even the most casual perusal of the Indenture will disclose that there is an incredibly large number of matters, many of them crucial, left to be agreed between the parties in the future. If the spirit of unanimity of endeavour can be maintained, then the necessary negotiations will not only be substantially easier for all concerned, but are more likely to result in a conclusion which is acceptable to all concerned. Personally, I see this as being important.

This may go part of the way to explaining the amount of detail in and the length of the Indenture. When providing for the numerous areas in which later agreement must be sought, the parties strove, as far as was possible, to lay down the guidelines (or, in some cases, the limits) for the future agreements so as to reduce as much as possible the extent of any area of dispute. The arbitrator was seen as a 'course of last resort', or, alternatively, an unseen presence at the negotiating table encouraging the parties to be reasonable. It is hoped, and, indeed, expected, that recourse to the arbitrator will be the exception rather than the rule, as those experienced in the field of arbitration will appreciate that arbitration can not only be expensive in terms of time and money, but may well result in an award which pleases neither party. I might add that we were precluded from following the Western Australian example of simply adopting the normal provisions of the Arbi-

*LL.B (Adel.) Principal Assistant Crown Solicitor, South Australia

tration Act, as the nature and extent of the arbitration process provided for in the Indenture is illegal under South Australian Law. Section 24a of our Arbitration Act 1891–1974, renders void any provision of an agreement which, in effect, requires the disputing parties to go to arbitration instead of to court, unless the issue concerned involves either a major building work (as defined) or a dispute already existing at the time of the submission to arbitration.

Whenever one is deciding upon the context of an Indenture such as this, the question of the extent to which the normal law of the State should be either waived or varied so as to accommodate the Joint Venturers and to facilitate the implementation of the project is also both contentious and subjective. The greater the extent to which the normal law of the land is either waived or varied the greater the amount of ammunition placed into the hands of those who wish to criticize or frustrate the project concerned. This was a matter to which the government of the day gave both lengthy and careful consideration, and it was decided that departure from the normal State laws would only be accepted on one of three grounds, namely

1. Security — as Warnick states in his paper, the Joint Venturers need for security was acute.
2. Specially applicable standards or requirements — it was recognized that the nature of the project was such that some laws or standards, generally applicable, will not be appropriate to a project of this magnitude; e.g., royalty and some of provisions relating to local government.
3. Adoption of appropriate procedures — it was recognized that a decision to vary the law need not (and in many cases did not) mean that the Joint Venturers should not be exempted from the substantive operation of the law, but that certain procedural requirements should be waived or varied in the interests of both speed and efficiency.

Naturally enough, many of the departures from the normal State law evident in the Indenture will fall under more than one of the grounds to which I have referred. For example, clause 7 of the Indenture, which provides for a centralized application procedure by, in effect, permitting the Joint Venturers to place all of their applications for approvals into one letterbox, does more than merely simplify channels of communication. It has the following additional consequences

1. As pointed out by Warnick, clause 7 imposes important time restraints upon the State — two months where details in respect of the subject matter of the application have been previously supplied by the Joint Venturers pursuant to clause 6 of the Indenture, and four months where such details have not been so supplied.
2. Thus it provides a strong incentive to the Joint Venturers to supply, to the State, as much detail as is reasonably possible.
3. The rights of appeal which exist under the statute pursuant to which the approval is sought are swept away and are replaced by recourse to the arbitrator pursuant to clause 49. This is particularly important in those cases in which the statute concerned confers rights of appeal upon the third parties. For example, third party (or objector) appeals are becoming common under statutes dealing with planning, and the South Australian Planning Act 1982, (which Act repealed the Planning and Development Act 1966–1981, referred to in the Indenture) is no exception. As the Minister

administering the Roxby Downs (Indenture Ratification) Act is not a 'planning authority' as defined by the Planning Act, he is not bound to publish notice of applications received by him pursuant to clause 7, and thus no third party rights of appeal arise. To say that this confers additional security upon the Joint Venturers is to state the obvious.

4. It will be appreciated that many statutes which confer rights of appeal against administrative decisions also specify the various criteria upon which the appellate tribunal is to base its decision. The diversion of the appeals away from the normal appellate tribunals in the direction of arbitration means that those criteria are no longer applicable. The ground rules are significantly changed. The criteria to which the arbitrator must have regard are found in sub-clause 49(4) of the Indenture which sub-clause is in the following terms:

> 49(4) The arbitrators after hearing the representations of all parties directly involved in the question difference or dispute shall make such decision as is proper and just having regard to integration into the Initial Project or the relevant Subsequent Project (as the case may be) as a whole of the question, difference or dispute the subject of the arbitration.

5. From the State's point of view, clause 7 means that the due administration of the Indenture is not fragmented amongst a number of Ministers and public servants. As pointed out by Warnick, the Minister administering the Ratification Act is required, upon receipt of an application under clause 7, to consult with and obtain the agreement of the Minister administering the Act under which the relevant approval is sought. The practical effect of this requirement is, I think, that where there is a dispute between the two Ministers concerned the application will become a matter for resolution by Cabinet.

However, it was the question of the Joint Venturers' security of title, and security of right to undertake and implement a defined project in accordance with established rules which are not to be the subject of change prejudicial to the Joint Venturers, which provided the most fertile ground of contention and which resulted in most of the departures from the State laws normally applicable. It is recognized, I think, by both the Government and the Joint Venturers, that neither the Ratification Act nor the Indenture impinged, in any way, upon well accepted principles of supremacy of Parliament, so that the Joint Venturers' security is not absolute — it may be eroded by deliberate and specific legislative action, and Warnick has referred to some of the possible consequences of such action. He tells us that he has been 'told that a form of words has been devised which in the opinion of eminent counsel is effective to protect a State agreement against subsequent legislation' although, speaking quite personally, I am of the view that, even if such a form of words can or has been devised, the doctrine of the supremacy of Parliament is such an important part of the legal and social fabric of our society that (as a matter of legal philosophy) such a form of words should never be used, especially in cases involving projects with such a time span as Roxby. Be that as it may, the degree of security conferred upon the Joint Venturers, by both the Ratification Act and the Indenture, is substantial, and goes, I believe, about as far as one can go without resorting to so called 'entrenchment'. In that portion of his paper entitled 'Security Against State Executive Action', Warnick refers to section 10 of the South Australian Crown Proceedings Act (which section says that the Crown shall be liable in contract to the

same manner to the same extent as a private person), and postulates that this has the effect of legislatively abolishing the adoption of executive necessity and rendering the State liable in contract for breach of the Indenture. In this I think that he is probably correct, although I believe it worth considering the question of whether one of the effects of sub-section 6(2) of the Act might not be to render the Ministers of the Crown subject to the prerogative process, and, in particular, whether the Joint Venturers may not, in some cases, have the right to force a Minister of the Crown to adopt a course required of him by the Indenture by means of obtaining an order in the nature of mandamus. After all, sub-section 6(2) directs, *inter alia*, that the government of the State and all statutory bodies and authorities are authorized, empowered *and required* to do all things necessary and expedient to carry out and give full effect to the Indenture. Can it not be argued that the sub-section imposes a statutory duty, the performance of which, in many cases, is not discretionary, upon the relevant Minister of the Crown to 'do all things necessary or expedient to carry out, and give full effect to, the Indenture', and is not mandamus commonly issued by the courts to require the performance of statutory duties? True it is that the Joint Venturers may have an alternative remedy in the law of contract, but the days in which the courts exercised their discretion against the issue of the writ if an alternative remedy was available have long gone, and it is now recognized that the writ may issue in those cases in which it represents the most convenient, beneficial or effective mode of legal redress, notwithstanding the availability of an alternative remedy. The Indenture is liberally sprinkled with situations in which this may be the case, *e.g.*, if the State failed to issue a Special Mining Lease as required by clause 19, I find it difficult to envisage that the Supreme Court would decline an order of mandamus to compel the issue of a Special Mining Lease purely on the ground that the Joint Venturers have an alternative remedy available in contract.

When one considers the Indenture and the nature and extent of the proposed project or projects as a whole, I do not believe that it can be reasonably said that the degree of security thus conferred is prejudicial to the interests of the State, even though it represents, as Warnick suggests, a substantial (I cannot accept his term 'very substantial') acceptance of what the Joint Venturers wanted in the way of security, although, in some cases, the manner in which the security is conferred is not the manner originally envisaged by the Joint Venturers at the commencement of the negotiations. However, this security has not been without a price, for there are some areas of the Indenture in which the Joint Venturers, in order to gain the desired security, have agreed to accept standards which are higher or more onerous, or to undertake control procedures which are more detailed, troublesome and expensive, than those applicable under the general law of the State. I will refer briefly to two such areas, the first of which is clause 10 — Compliance with Codes. Section 8 of the Act guarantees, to the Joint Venturers, the issue of such permits or licences as they will require under the South Australian Radiation Protection and Control Act (the Radiation Protection and Control Act is not specifically referred to in section 8 because, at the time of the execution of the Indenture, it had not been introduced into Parliament and its proposed provisions were regarded as confidential). In return, the Joint Venturers undertook the obligations set out in clause 10. Section 26 of the Radiation Protection and Control Act does not authorize the imposition (by either licence, condition or regulation) of exposure limits which are more stringent than those set out in 'the codes, standards and

recommendations approved or published under the Environment Protection (Nuclear Codes) Act 1978 of the Commonwealth or any other Act or law of the Commonwealth or by the National Health and Medical Research Council, the International Commission on Radiological Protection or the International Atomic Energy Agency'. Clause 10 impqses standards which are (or may be) more stringent than those from time to time enforceable under the Radiation Protection and Control Act in two respects, namely, that those codes which are referred to in both section 26 and clause 10 will apply to the Joint Venturers at an earlier time than they would were the normal provisions of the Radiation Protection and Control Act only applicable, and secondly (and more importantly), Clause 10 requires the Joint Venturers (irrespective of the content of the codes) to:

> use their best endeavours to ensure that the radiation exposure of employees and the public shall be kept to levels that are in accordance with the principles of the system of dose limitation as recommended by the International Commission on Radiological Protection (publication number 26 of 1977) as varied or substituted from time to time.[1]

The second example to which I wish to refer relates to the protection and management of the environment. Clause 6 requires the Joint Venturers to prepare an environmental impact statement for approval by both the Commonwealth under the Environment Protection (Impact of Proposals) Act and the State. However, apart from the provisions of the Indenture itself there is, at present, no legal obligation imposed upon the Joint Venturers to submit an environmental impact statement for State approval. Under section 49 of the South Australian Planning Act, the responsible Minister may require the preparation of an environmental impact statement, although he has not presently done so with respect to the Roxby Project. However, be that as it may, the Joint Venturers have prepared and submitted to the State a draft environmental impact statement, so there now seems to be little point in any requirement under section 49 being implemented. Under the Planning Act, an environmental impact statement becomes, in effect, a control document, in the sense that its conclusions and recommendations can be enforced by the medium of planning approvals (or refusals). The environmental impact statement prepared by the Joint Venturers is not such a document — having reared its head in clause 6 it disappears forever from the face of the indenture and plays no further direct role in the protection and management of the environment, which matter is dealt with in clause 11. (Doubtless it could become very relevant should disputes arise between the Minister and the Joint Venturers under clause 11 and be referred to arbitration.) Clause 11 provides comprehensively for the agreement and implementation of a detailed programme of environmental protection, including significant obligations upon the Joint Venturers to report regularly to the Minister on the matters related to the programme. Thus, in exchange for being relieved of certain obligations under the Planning Act and for having the right to arbitrate all aspects of environmental protection and control, the Joint Venturers have, in clause 11, undertaken obligations with respect to environmental protection and control which are significantly in advance of any which could be imposed or enforced under the normal provisions of the Planning Act and which confer, upon the State, a strong and continuous role in the due management of the environment.

1. See sub-clause 10(2).

May I conclude by saying, as a very small cog in the negotiating machine which produced the Indenture, that it is not appropriate for me to pass comment upon Warnick's closing comment to the effect that the Indenture represents 'a battle won for the Joint Venturers without being a battle lost for South Australia'. Regardless of whether his view on this is right or wrong, I believe it true to say that none of the participants in the negotiating process, from either side of the conference table, regarded the negotiating process as a battle, but rather a process of logic and reason, even though, at times, the negotiating table may have resembled a mini battlefield in appearance. Speculate, if you wish, upon the question of whether the Joint Venturers or the State gained more than the other at the conference table. Such exercises necessarily involve, I think, a high degree of speculative prophecy, for the answer must surely be well into the future.