COMMENT ON CHANGING ENVIRONMENTAL CONTROLS OVER THE MINING INDUSTRY: THE WEST AUSTRALIAN PERSPECTIVE

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To speak of 'controls' over mining activities is to conjure up in the minds of public lawyers (that breed of legal specialists who spend their time government-watching) an essentially negative vision. 'Control' is a word in the legal vocabulary that inhabits the same territory as 'restrict', 'suppress' and, at the extreme end of the verbal spectrum, 'prohibit'. The concept of control implies that the relationship between the mining industry and environmental law and administration is something akin to that of a malicious dog and its leash. This is hardly the way in which the industry sees itself: rather it portrays itself as the fountain of goodness and wealth; indeed, a source of 'commonwealth'. For that reason, among others, the writer prefers to address the topic in terms of the 'regulation' of the mining industry, a more positive concept that, properly pursued and fully realised, contemplates an ordering of the inter-active process between the industry and government with an intent on both sides to achieve and maximise the public benefit.

To commence with these observations is not simply to indulge the lawyer's propensity to engage in superficial semantic quibbles, but out of a deeper concern, flowing partly from the writer's experience in environmental administration in Western Australia. To discuss a legal system in descriptive terms of its prescriptions and how they are administered, without regard to its objectives and purposes (as they are understood by those who are responsible for its implementation) is to understand that system from a two, rather than three, dimensional perspective. Later in this commentary some of the these policy issues and the debate they have engendered will taken up. Now to turn to the task that Brian Hayes, in his already impressively comprehensive paper, has allocated: the regulation of mining under the legal regime in Western Australia. Necessarily there will be no repetition of what he has said about the operation of Commonwealth environmental legislation, save to remark on two local features.

The first is that, in an endeavour to avoid unnecessary administrative duplication, under an agreement reached between Western Australia and the Commonwealth in 1978 and modified since, assessment of major proposals is co-ordinated so that, for instance, information and documentation to satisfy the Commonwealth's Environment Impact Statement requirements may also function to serve the State's environmental review processes. The second matter is that Western Australia is also experiencing the impact of Commonwealth heritage concerns, both national and world. This is so most immediately in respect of Shark Bay and the Southern forests. As yet it is too early to say whether the history of inter-governmental co-operation in environmental matters will continue

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(so that an accommodation acceptable to both governments will be achieved) or a more adversitive climate, as evident in some Eastern States, will ensue.

LEGISLATIVE FRAMEWORK FOR ENVIRONMENTAL PROTECTION

Mining in Western Australia is principally regulated by either the Mining Act 1978 or in an appropriate case, a special Agreement Act. In most cases it will be the former. Where, however, the proposed mining venture is of unusual size and complexity, for example, if there are major infrastructure requirements in a remote area, or where there is some other unusual feature such as the recent Kaltails proposal involving treatment of above-ground tailings near Kalgoorlie, the device of an Agreement Act is used.[1] This entails the proponent entering into an agreement with the State Government in which the various rights and obligations of the parties are set forth and the agreement is ratified by the State parliament. It is the common practice in such a case for a general environmental clause along the following lines to be included:

> Nothing in this agreement shall be construed to exempt the (Corporation) from compliance with any requirement in connection with the protection of the environment arising out of or incidental to the operations of the (Corporation) hereunder that may be made by the State or State agency or instrumentality or by local or other authority or statutory body of the State pursuant to any Act for the time being in force.

The effect of this clause is thus to place the company under the regime of the State's environmental legislation. This is consistent with the major piece of such legislation, the Environmental Protection Act 1986. That Act, by section 5, provides that the Act prevails over an inconsistent provision in any written law. Section 5 itself is subject to a narrow exception however. It does not apply to Agreement Acts that were assented to prior to 1972 and which do not include a general environmental clause of the kind set forth above. There are barely a handful of the latter so that for general purposes the position is that most Agreement Acts are subject to the Environmental Protection Act. Of course, in any future Agreement Act an issue of construction could arise if it did contain inconsistent provisions and did not have a general environmental clause. In that event there might be scope to argue the Agreement Act, being later in time, impliedly repeals the Environmental Protection Act in its application to the Agreement Act.

The everyday variety of mining venture, as suggested above, is regulated in relation to environmental matters by the Mining Act in conjunction with the Environmental Protection Act. This follows from section 5 of the latter (mentioned above), reinforced by section 6 of the former which reads:

> The Act shall be read and construed subject to the Environmental Protection Act 1986 to the intent that if a provision of this Act is inconsistent with a provision of that Act, the first mentioned provision shall, to the extent of the inconsistency, be deemed to be inoperative.

1 Tailings Treatment (Kalgoorlie) Agreement Act 1988.

The combined affect of these provisions ensures the paramountcy of the Environmental Protection Act.

The most immediate restriction on mining in sensitive areas flows from section 24 of the Mining Act which empowers the Minister for Mines to refuse mining on land reserved under the Land Act 1933, in State forests reserved under the Conservation and Land Management Act 1984, or in a water reserve under the Country Areas Water Supply Act. In each of these instances the Minister for Mines is obliged to consult with the relevant responsible Minister. More stringent again is the requirement in section 24(4) that mining in a national park, or Class 'A' nature reserve, to which section 6 of the Conservation and Land Management Act applies, may not proceed unless both Houses of Parliament consent to it by resolution. This matter has recently been reviewed by the State government (see below) and may be amended to apply also to exploration in those designated areas.

Section 25 of the Mining Act addresses mining on the foreshore or sea-bed. The consent of the Minister for Mines is required in such a case and before such consent is given the Minister must consult the Minister for the Environment.

It should also be noted that in granting a prospecting licence under section 40 of the Act a Mining Warden may impose conditions calculated to protect the environment. The same is true of an exploration licence granted by the Minister under section 57 of the Act. Finally, a mining lease itself, granted by the Minister under section 71, may be subject to conditions preventing or reducing injury to the land, or requiring its rehabilitation. Conditions of these kinds are included as a matter of course when the requisite tenement is granted.

Over and above the imposition of these standard environmental conditions, a mining proposal 'that appears likely, if implemented, to have a significant effect on the environment' is required by section 38 of the Environmental Protection Act to be referred by the relevant decision-maker (here effectively the Minister for Mines) to the Environmental Protection Authority. This raises the question, by what standards does one measure when a proposal is likely to have a *significant* impact? By practice, inter-departmental agreement, and understandings worked out between the Environmental Protection Authority and the Department of Mines proposals likely to affect any of the following are prima facie candidates:

— existing or proposed nature reserves, or national parks;
— areas subject to EPA 'Red Book' recommendations;
— seabed and islands;
— the immediate coastal zone including beaches and dune systems;
— rivers, estuaries and wetlands;
— ground- and surface-water resources; or
— special locations having recognised flora, fauna, scenic, scientific, educational, historical or cultural value.

Also projects involving:

— mining or processing radioactive material;
— solution mining;

— works approvals under Part V of the Environmental Protection Act;
— Commonwealth government approval;
— disturbance of more than 300 hectares; or
— a total extraction of more than 20 million tonnes.

The Authority also inclines to the view that projects likely to give rise to social concern because of *perceived* risks should be referred even if on first impressions the fear may be unfounded.

On receiving a reference, the Environmental Protection Authority, (EPA) must decide, under section 40, whether or not to assess it; and if the former, whether formally or informally. If the proposal is not to be assessed the Mines Department is so advised and it continues to deal with the matter internally. Where informal assessment is appropriate the matter is dealt with by the Environmental Protection Authority giving advice, recommendation and comment to the Mines Department.

If the impacts are likely to be considerable, the EPA requires *formal* assessment under Part IV of the Act which at the lowest level can be by way of Notice of Intent, a brief but detailed document outlining the project and its impacts which is not subject to public review but which can provide to governmental agencies and interested groups an opportunity for comment. In more serious cases a Public Environment Report (PER) or Environmental Review and Management Programme (ERMP) may be called for. These are both documents required by the EPA to be put out for *public review* and comment, the difference between them turning mainly on how comprehensive they have to be, the PER tending to be used more commonly, with the ERMP reserved for major projects. It needs to be understood these are not statutory creatures: they are terms used as convenient descriptions of administrative processes. Even within the designated levels there is considerable flexibility.

After review, the EPA reports to its Minister under section 44. The report contains recommendations and advice and in turn the Minister for Environment, after forming a view as to the conditions he or she considers should be imposed on the project, informs and consults the Minister for Mines pursuant to section 45. If the Minister for Mines disagrees as to those conditions, the matter is referred to Cabinet for resolution.

It will be appreciated that this process of environmental assessment leading to the imposition of conditions on a mining venture, is probably the most important aspect of environmental protection. However it should not be overlooked that other parts of the Environmental Protection Act have significance for mining concerns. Under Part III, the Authority can propose, and after public review, submit (revised as it sees fit) for the approval of the Minister for Environment, an Environmental Protection Policy. A policy, after approval and gazettal, establishes the basis for programmes and measures, including offences, for the protection of the environment in a defined location. In effect, a policy functions very much like a set of regulations. A recent example, and one with major implications for the gold mining industry, is the policy prescribing limits on sulphur emissions in the Kalgoorlie area.[2]

2 Environmental Protection (Kalgoorlie-Boulder Control of Sulphur Dioxide in the Air) Order 1988, Government Gazette, WA, 29 July 1988, p 2536.

Also relevant to environmental protection, Part V of the Act addresses air, noise, and water pollution arising from emissions and wastes. The powers and sanctions of the Chief Executive Officer and delegated officers under his control are wide ranging and potentially severe. The part also provides for a system of licensing and works approvals. Breaches of its provisions carry heavy penalties by way of fines.

CRITICISMS OF THE SYSTEM OF PROTECTION AND RESPONSES THERETO

In its recent publication, 'Shrinking Australia: The problem of access to land'[3] the Australian Mining Industry Council (AMIC) criticised various pieces of legislation, including environmental, in terms of its cumulative effect in denying the mining industry access to land throughout Australia.

It noted, in relation to Western Australia, the proposals put forward in the 'Report of the Committee on Exploration and Mining in National Parks and Nature Reserves'[4] (the Bailey Report). The report recommended stringent controls on exploration, in addition to those on mining, in national parks and nature reserves. After receiving a further report on those recommendations by the EPA (August 1987),[5] the State Government announced its policy in regard to the matter. This was that national parks and nature reserves are to be closed to exploration and mining activities unless 'opened' for exploration by agreement of both Houses of Parliament, after receiving a recommendation supporting exploration from the EPA. This imposes a more stringent requirement than that presently operative under section 24 of the Mining Act. AMIC sees this as part of a movement throughout Australia to reduce and restrict the land area available for exploration. Its principal criticism is that this represents a deep 'erosion' of the basic tenets of 'public ownership' of minerals flowing from the fact that most minerals in Australia are owned by the Crown. The unarticulated assumption that underlies this view is that the communal interest is best served by exploitation of minerals and that this should prevail over sectional interests of various groups and individuals. This is a view that is widely held and oft repeated in the mining industry. But it meets a substantial challenge in the proposition that the common good (or public interest) is not necessarily identical with that of the mining community. Rather it is a composite of many parcels of 'public interests' that have varying characters. These characteristics may even have incompatible elements such as mining in conflict with the preservation of unique high value conservation areas. To say that the Crown *owns* the minerals is not to say that the Crown *must exploit* them. In evaluating the public interest, it has as much right to decree that there should be no exploitation as that there should.

The writer mentions this logical fallacy because in his view, whilst it may have some superficial plausibility in public relations terms, it tends to distract attention from the real issues involved in the more contentious

3 April, 1988.
4 December, 1986.
5 EPA Bulletin 287.

aspects of governmental regulation of mining. It seems that a more sophisticated era is developing, where rather than simplistic, black and white propositions, more flexible and complex prescriptions of multi-use environmental management are called for. This would entail accurate delineations of sensitive conservation areas in terms of their geographic extent, values and functions, and using advanced technological techniques of exploration such as aerial and satellite geo-magnetic mapping and under-surface mining.

In this respect the writer would suggest members of the mining lawyers community have a special role to play, and one that is not, as yet, at least in the writer's opinion, widely evident. Lawyers have the skills of mastery of details, detachment, and objectivity. Instead of occupying a peripheral role at the margin of the relationship between the mining industry and the environmental agencies of government, often with hostile and adversitive intent, lawyers should be taking a more central role in exercising a special kind of advocacy.

Environmental agencies are more likely to be persuaded by carefully articulated, well-founded arguments, especially where they show a sensitive appreciation of the ecological values and vocabulary of conservationists, than broad, partisan and single value-laden declamations of the industry client. The changing nature of environmental regulation requires, in other words, changes in approach, style and substance on the part of lawyers associated with the mining industry.