RECENT DEVELOPMENTS

COMMONWEALTH

ENERGY MARKET REVIEW*

Background

In 2002, the Council of Australian Governments (COAG) commissioned a four-member panel chaired by the Hon. Warwick Parer to develop a medium to longer-term strategy for Australia's energy markets. This review generated considerable interest, receiving more than 250 submissions from governments, regulators, industry participants, industry consultants and the public.

The result of the review is a 290 page report entitled "Towards a Truly National and Efficient Energy Market", which was released on 20 December last year.

The thrust of the report is that, while the reform of Australia's energy markets has resulted in substantial benefits, there remain significant deficiencies which must be addressed.

The Panel has accordingly made a number of far-reaching recommendations for reform. It estimates that, if these recommendations are fully implemented by 2005, Australia's real GDP would be increased by around $8.3 billion in five-year net present value terms to 2010. In addition, it forecasts that they will reduce real retail electricity prices by between 12.1% and 14.4%, real wholesale electricity prices by between 8.8% and 11.4% and real gas prices in the eastern States by 9%.

These are significant potential rewards. However, a number of the Panel's proposals are controversial, and have generated vigorous debate between governments, industry participants and energy consumers.

The Panel's principal recommendations are described below.

Single regulator

Panel's proposal

The large number of energy market regulators has long been an area ripe for reform: the multiplicity of jurisdictional-specific regulators and regulatory instruments imposes significant costs on energy industry participants who trade in more than one State or Territory or who trade in

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both electricity and gas. However, concerns relating to jurisdictional sovereignty and the accommodation of regional differences make this a politically sensitive matter.

The Panel has nonetheless tackled this issue head-on. It proposes the establishment of an independent national regulator (the National Energy Regulator or NER) that will take over:

- the regulation of the electricity and gas transmission and distribution access regimes that are currently administered by the ACCC and various jurisdictional regulators;
- the electricity and gas licensing functions that are currently performed by jurisdictional regulators;
- the National Electricity Market Reliability Panel's role in setting technical standards for power system security;
- the role of the NECA (National Electricity Code Administrator Limited) in monitoring compliance with, and enforcing, the National Electricity Code; and
- the role of the NCC (National Competition Council) and the Commonwealth in deciding on pipeline coverage under the National Gas Access Code.

In addition, the National Electricity Tribunal would be abolished, with decisions of the NER being open to appeal on their merits to the Australian Competition Tribunal.

Accompanying this regulatory rationalisation is a proposed streamlining of the process for changing the National Electricity Code (NEC) and the National Gas Access Code (NGAC). Under the proposed new process, changes to these codes would be developed and sponsored by two new statutory end-user and industry committees, the National Electricity Code Change Committee and the Gas Advisory and Code Change Committee. The NER would then be responsible for simply approving or rejecting any proposed change following a merits review (but with no further consultation); it would have no power to initiate code changes or to amend code changes submitted to it.

One issue that is left unresolved by this approach is the role of the ACCC in authorising changes to the NEC. The NEC has been authorised by the ACCC and so any changes to it are also subject to ACCC authorisation. Typically this has involved the ACCC in undertaking its own assessment of, and consultation in relation to, proposed Code changes despite NECA having undertaken a similar process in developing the changes. If the ACCC is to retain its role in authorising Code changes (including its power to require the Code changes to be modified), this potentially perpetuates the duplication that is inherent in the existing structure.

Commonwealth's proposal

The Commonwealth Minister for Industry, Tourism and Resources (the Hon. Ian Macfarlane) has released his own proposal for a new regulatory regime. Under this proposal, three new bodies would be created:

- the Australian Energy Commission (AEC), a separate legal entity within the ACCC, which would act as the national energy market regulator and the decisions of which could be appealed to the Australian Competition Tribunal;
- the Australian National Energy Corporation (ANEC), which would be responsible for market development, system planning, market monitoring and changes to the NEC and

the NGAC, and the decisions of which could be appealed to the National Energy Tribunal (currently the National Electricity Tribunal); and
- the Australian Energy Market Management Company (AEMMCO), which would be responsible for electricity and gas market operations.

The perceived benefit in this approach is that there is a clear separation between market regulation (AEC), market development (ANEC) and market operation (AEMMCO), all of which would be undertaken in the context of a policy framework established by the Ministerial Council on Energy. The distinction between "policy" and "market development" is one that will, in practice, require some degree of refinement. Moreover, the role of the ACCC in the authorisation of NEC changes (see above) will need to be clarified if it is not to blur this distinction.

Alternative approach

The proposal to establish a single national regulator has already provoked a strong response from the States. Accordingly, it may be short-sighted to close off other options. For example, if licensing conditions are rendered consistent between jurisdictions (with due regard for any necessary jurisdictional deviations), there is no reason why the resulting licensing system could not be administered and enforced by separate jurisdictional regulators, as this would not entail the exercise of much discretion. The main task in this regard will be to achieve a high degree of uniformity between licence conditions – this is likely to involve considerable debate between the jurisdictions as well as with industry participants, not least because it will raise issues of the policy behind various licence conditions and because it will entail changes to existing licence conditions (which may have cost implications for industry participants). Similarly, distribution pricing could remain with the jurisdictional regulators, with the necessary uniformity being introduced through a legislatively enshrined common set of pricing principles and a mechanism for appeal to a single body (such as the NER) if a party is dissatisfied with the price review. This would enable any appropriate jurisdictional differences to be addressed by the jurisdictional regulators, with uniformity in approach being assured by a common appellate body.

Policy formulation

The Panel recommends that the Ministerial Council on Energy should be solely responsible for electricity and gas market policy oversight. It further recommends that such policy should only be established through legislation (eg. changes to the National Electricity Law or the National Gas Access Law) and not through participation in the code change process. The Macfarlane proposal imposes a gloss on this and would enable the Council to initiate or prevent code changes relating to protected (or "core") code provisions.

Price signals

The Panel considers that the energy-only design of the National Electricity Market (NEM) is well-placed to provide a strong set of investment signals but that this potential is impeded by market distortions. Accordingly, it recommends:

- the abolition of the NSW Electricity Tariff Equalisation Fund and Queensland's Benchmark Pricing Agreement as soon as possible; and

- the introduction of full retail contestability in all markets, and the removal of retail price caps, as soon as practicable but in any event within the next three years.

In order to minimise the distortionary impact of price caps pending their removal, the Panel suggests that the jurisdictions should set any price caps "based on the bilaterally negotiated contract rates secured by each affected retailer and the other costs reasonably associated with retailing electricity". It also suggests that price caps should be set by time of day and season. The purpose of this approach is to avoid retailers being exposed to unmanageable risks. However, this presumably means that end-users would correspondingly be exposed to such risks and, to this extent, to at least some of the volatility of the spot market. Moreover, this approach will entail considerable complexity because retailers' bilateral contract positions are likely to vary over time and to differ from each other.

Demand-side management

An important element of demand-side management is the provision of time-of-use meters so as to enable retailers to develop, and electricity consumers to take advantage of, innovative products that encourage load reduction at peak time. Accordingly, the Panel recommends that all contestable customers be provided with interval meters within 5-10 years.

In order to provide further impetus to demand-side involvement in the NEM, the Panel also recommends the introduction of a revised demand-reduction bidding system which would enable users (including retailers and aggregators) to bid price and volume into the market to reduce load. These demand-reduction bids would be paid on an "as bid" basis (rather than at the system marginal price) so as to enable bidders to reap the financial benefits associated with demand-reduction. A failure to reduce demand in accordance with a bid would result in the bidder paying the associated costs (eg. the costs of acquiring the required ancillary services).

Electricity transmission regulation

The Panel recognises that an integrated electricity transmission network is essential to inter-regional trade and the reduction of regional generator market power. It has therefore made four key recommendations that are directed at achieving a properly functioning and cohesive interconnected transmission system.

The first recommendation is the development of firm financial transmission rights (FTRs), which are to be auctioned by NEMMCO. These FTRs would be funded by inter-regional settlement residues and the proceeds arising from the FTR auctions, with any funding deficiency being met by a separate market levy.

The second recommendation is the introduction of incentives and penalties to encourage regulated transmission network service providers to improve their network performance. The incentives would be structured so as to encourage the minimisation of outages during peak periods. Conversely, penalties would be payable where a significant price separation between regions occurs and the interconnecting transmission line is operating below a target capacity level.

The third recommendation is that the cost-reflectivity of transmission pricing arrangements be increased, eg by eliminating loss-averaging and postage-stamp pricing and requiring generators to

pay transmission use of system charges. Consistently with this, the Panel recommends an increase in the number of NEM regions, followed by the introduction of full nodal pricing in 7 to 10 years. To the extent governments consider it desirable to ameliorate any resulting price differentials between consumers, this should be done through the payment of transparent direct subsidies.

The fourth recommendation is the introduction of a more nationally focused and coordinated approach to transmission network planning. Under the proposed new planning regime:

- NEMMCO would continue to provide information in relation to the potential for transmission augmentation opportunities; and
- if the market fails to react to any such augmentation opportunity, NEMMCO would conduct a competitive tender process for the augmentation as a regulated investment - in the case of non-reliability related investments, the "trigger" for this process would be the traded price of firm FTRs sustainably exceeding the unit cost derived from the net present value of the new transmission augmentation.

Natural gas

The Panel's view is that, despite encouraging developments, "[s]ome significant barriers to a truly competitive natural gas market remain". This is largely the result of a high level of upstream ownership concentration across the basins that supply the eastern gas markets. This is a vexed issue because upstream competition is vital for gas consumers to benefit from downstream reforms, but the Panel has not been able to make any substantial recommendations in this regard. Instead, its principal suggestion is that joint venturers must (for informational purposes only) notify the ACCC of all future joint marketing arrangements, and that the ACCC must assess the feasibility of separate marketing when considering any authorisation.

In addition, the Panel recommends that acreage management regimes should include, as award criteria, the "promotion of competition" where there is a reasonable prospect of a commercial gas discovery.

The Panel has, however, made a number of more substantive recommendations in relation to the regulation of natural gas pipelines – in particular, that:

- the NER be able to make a binding pre-investment determination that a proposed pipeline is not covered by the NGAC;
- transmission pipeline owners be given an option not to have price regulation imposed on a proposed new pipeline for the first 15 years of its operation (following which it would be assessed for coverage based on whether the pipeline owner exercises market power) – this option is only to be exercisable if there is a sufficient vertical separation of ownership of the pipeline from upstream or downstream market participants, tariffs for access to the pipeline are published and the pipeline's capacity is fully tradeable;
- prospective pipeline owners be able to enter into an agreement with the NER to "lock in" for extended periods key regulatory parameters such as the WACC and depreciation schedules; and
- a code of conduct be introduced for non-covered pipelines – this code of conduct would, for example, address the ringfencing of pipeline operations, the publication of pipeline tariffs and the offering of tradeable capacity.

Greenhouse gas emissions

The Panel recommends that the existing range of diverse greenhouse gas measures (including the Commonwealth's Mandatory Renewable Energy Target) be replaced with an economy-wide national emissions trading system that is not specific to any particular technology or fuel type and that focuses on carbon reduction (rather than the use of renewable energy sources). In this way, the Panel seeks to ensure the adoption of greenhouse gas abatement measures that are the most efficient and least costly. Energy-intensive users in the traded goods sector would be exempted from this scheme (subject to meeting world best practice in energy use) until Australia's main competitors have joined a greenhouse gas scheme.

The proposed emissions trading scheme would be designed so as to achieve the same level of emission reductions as the greenhouse gas abatement measures that it replaces. Moreover, given that a number of renewable energy projects have been established on the basis of financial incentives provided under these existing measures, the Panel recommends the grandfathering of the effective subsidies that these investments currently receive.

Conclusion

The COAG Energy Market Review Panel has made a valuable contribution to the debate about the reforms that are required to Australia's energy markets. Further contributions to this debate can be expected with the Commonwealth's formal response to the report in March and its consideration by the COAG Energy Ministers in April.

NEW SOUTH WALES

WORKERS COMPENSATION ACT – INTERACTION WITH MOTOR ACCIDENTS COMPENSATION ACT[*]

***Pender v Power Coal Pty Ltd* [2002] NSWSC 925, 26 September 2002, NSW Supreme Court, Wood CJ at CL**

Facts

The Plaintiff filed a Statement of Claim claiming damages under the NSW Workers Compensation Act for injuries sustained while working in the Angus Place Colliery of the Defendant. The Plaintiff asserted that he was injured when workers were attempting to unwind a 50mm reinforced water hose which had been wound around a 750kg metal drum by means of a forklift. The operator of the forklift reversed the vehicle pulling the drum along the ground without lifting it free of the ground. The drum then fell off the forklift and rolled onto the Plaintiff causing injuries to him.

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[*] Suchada Songvejkasem, Summer Clerk, Allens Arthur Robinson.

The Defendant filed a Notice of Motion seeking an order that the proceedings be struck out for lack of jurisdiction on the grounds that the NSW Motor Accidents Compensation Act 1999 applied and the Workers Compensation Act did not apply in these circumstances.

Section 151E of the Workers Compensation Act provides that modified common law damages under the Workers Compensation Act does not apply to an award of damages to which part 6 of the Motor Accidents Compensation Act 1999 applies.

A claim may be made under the Motor Accidents Compensation Act where it is for damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle. Where there is an unregistered vehicle, an owner of the motor vehicle is defined as any person who solely or jointly or in common with any other person is entitled to the immediate position of the vehicle.

Issue

The issue in the case was whether, on the above facts, the injury to the Plaintiff was caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle. It was accepted that the forklift was a motor vehicle and that the above definition meant that the Defendant was the owner of the vehicle as it was entitled to the immediate possession of the vehicle. The Court did not determine the fault issue but concentrated on whether the injury was caused in the use or operation of the vehicle.

Decision

The Court determined that having regard to other case law in the area, it could be said that the injury was caused in the use of a motor vehicle. The proceedings could not therefore be brought under the Workers Compensation Act.

The Statement of Claim was struck out but without prejudice to the Plaintiff being able to bring, in the appropriate Court, fresh proceedings under the Motor Accidents Compensation Act.

Judge's caution

The Judge's final note was that close consideration on the part of the industry and legislation is required of the question whether accidents in underground mining situations, which involve the use of equipment falling within the definition of motor vehicles, should be exempt from the operation of the Motor Accident Compensation Act. The use of vehicles with the modifications required for mining purposes, and the nature of the activities in which they are displayed arguably places them in a very different category from that which would apply to the use of conventional vehicles aboveground.

BINDING AGREEMENT – ROYALTY VARIATION*

Cumnock No 1 Colliery Pty Ltd v Pacific Power & Anor [2002] NSWCA 278

This case concerned an appeal from a decision of Bergin J in the NSW Supreme Court in *Pacific Power & Elcom Collieries Pty Ltd v Cumnock No 1 Colliery Pty Ltd, John Hodge, Helen Janice Dalton & Thomas James Johnson [2001] NSWSC 1100* (refer (2002) 21 AMPLJ 6). The appeal questioned whether certain variations made to a Royalty Agreement were binding.

Facts

The appellant Cumnock No.1 Colliery Pty Ltd (Cumnock) purchased the Liddell State Coal Mine from the second respondent, a subsidiary of the first, Elcom Collieries Pty Ltd (Elcom). At this time two contracts were exchanged in relation to the purchase. These were a Deed called the Royalty Deed, and an agreement referred to as either the Supply Contract or Contract No 4180. The combined effect of the two contracts was to provide the respondents with an income stream consisting of royalty payments and discounts built into the scheduled price of coal obtained by the appellant. It was included in cl 11 of the Royalty Deed that any variation to the Deed must also be by Deed.

On 21 May 1993 Elcom assigned all its contractual rights and interests to the first respondent (Pacific Power). On 6 January 1994 the appellants sent a letter to Pacific Power seeking to vary the Royalty Deed in a number of ways. Further negotiations continued with matters coming to a head when on 2 February 1994 Cumnock sent a letter to Pacific Power entitled the Variation of Coal Supply Contract No 4180. Although this was in the form of a letter from Cumnock to Pacific Power, it was in fact drafted by Pacific Power. Certain aspects of the letter dealt with the Supply Contract whilst others with the Royalty Deed. The final line of the letter read "we look forward to finalising documentation for these arrangements".

In way of response Pacific Power replied with a letter on 30 May 1994 essentially accepting the changes proposed by Cumnock. Following the letters of February and May the parties acted as if final agreement had been concluded. This included payment by Cumnock of royalties in accordance with the details of the February and May letters. These were paid until April 1998 at which time the appellant ceased paying.

By the two letters dated 2 February 1994 and 30 May 1994 Cumnock accepted that the terms of the Supply Contract were varied, though asserted that the Royalty Deed was not varied by the same interchange. The appellants submitted (i) that the case was one which fell into the third category of Masters v Cameron (1954) 91 CLR 353 where the parties make it clear there is no binding contractual relationship contemplated until there is the execution of the contract; (ii) that cl 11 of the Royalty Deed required that any variation of the Deed must also be by deed.

Held

Meagher JA with whom Handley JA and Foster AJA agreed dismissed the appeal.

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* Tim Stewart, Summer Clerk, Allens Arthur Robinson.

Reasons

Meagher JA agreed with the trial judge at first instance that the parties acted, and intended to act, as if bound by a contract, even though the formalisation of that contract (which both anticipated), had not occurred. He affirmed Her Honour's use of the description of a contract from *Scott & Co Ltd v Naughton (1929) 43 CLR 310 at 317 as*:

"one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms".

The court found, that even the words on the Royalty payment certificates that "The royalty paid is pursuant to our revision of the agreement currently being finalised" were not conclusive evidence that an agreement had not been reached.

Meagher JA similarly agreed with the trial judge on the second assertion of the appellants which questioned the precedence of cl 11 of the Royalty Deed over and above the correspondence of February and May. This clause provided that any variation of the Deed must also be by Deed. Meagher JA found that parties cannot be found by a clause such as cl 11 to be depriving themselves of their own liberty to contract. He thus held that cl 11 had no effect on the status of the contract between the parties.

NSW COAL MINE HEALTH AND SAFETY ACT 2002[*]

Introduction

This Act will replace the Coal Mines Regulation Act 1982 and the regulations made under that Act. It will commence after new regulations have been prepared, which may take a number of months. The main new obligations are set out below.

OH&S Act

The Act places special additional obligations, protections and procedures on persons that own and operate coal mines to control particular risks arising from coal operations. The obligations, protections and procedures in the NSW Occupational Health and Safety Act 2000 continue to apply to coal operations. Compliance with this Act is not of itself a defence for proceedings for an offence against that Act.

This Act applies to all places of work that are within a registered colliery holding, a coal exploration site or the subject of a licence to mine coal under the Offshore Minerals Act 1999 and a coal operation is such a place at which coal is mined.

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[*] Tony J Wassaf, Partner , Allens Arthur Robinson.

Colliery holder obligation

A colliery holder must not undertake any mining or allow any other person to undertake any mining at a coal operation within a colliery holding unless the colliery holder has nominated a person who is the employer with the day to day control of the coal operation as the operator of the coal operation.

Nomination process

The colliery holder may nominate itself as the operator. Where there is more than one separate and distinct coal operation within a colliery holding, the colliery holder may nominate the person who is the employer with the day to day control of each coal operation within the colliery holding. The nomination must be in the prescribed form and must be made in writing to the Chief Inspector. The Chief Inspector may reject the nomination if he believes the nominated operator is not the employer with the day to day control of the coal operation or in other limited circumstances. If a nomination is rejected, it is taken not to have been made. The operator may be changed by another nomination made which is subject to the same rejection provisions.

Operator obligations

The operator of a coal operation must ensure that mining is not carried out by any person at the coal operation unless a Health and Safety Management System (***the System***) that complies with the Act and the regulations is implemented for the coal operation. The Operator is required to prepare a statement of its System and the System must provide the basis for the identification of hazards and the assessment of risks arising from those hazards, for the development of controls for those risks and for the reliable implementation of those controls.

The system

The System must include system elements, major hazard management plans, the management structure of the coal operation, any contractor management plan and any prescribed matters by regulation. Persons working at the coal operation must be consulted during the preparation of the System and before its amendment.

The information relating to the System must be supplied to the Chief Inspector and an industry check inspector. The Chief Inspector may object to the System if he forms the view that it does not comply with the Act or the regulations, there was insufficient or inadequate consultation in the preparation of the System or the System is insufficient to protect the health and safety of workers.

If the Chief Inspector has an objection, he must notify the operator in writing of the objection and the System must not be implement until the objection has been resolved. If the Chief Inspector notifies an operator of an objection, the operator must revise the System taking into account any matters raised in the objection and submitted to the operator within the prescribed time. If the Chief Inspector has not notified the operator of an objection within 21 days or within any other prescribed period the operator may implement the System. The System may not be implemented before that period ends.

An industry check inspector may raise objections with the Chief Inspector regarding the content of the System and the Chief Inspector must have regard to such objections.

Contractors

As part of the System for a coal operation, the operator of a coal operation at which contractors are proposed to be used must prepare a contractor management plan stating how the risks arising from use of contractors at the coal operation would be managed.

The operator must ensure that each contractor provides the operator with a written safe work method statement and, if applicable, a site specific occupational health and safety management plan prepared by the contractor before the contractor commences work. The operator must ensure that the contractor is directed to comply with the requirements in that statement and plan and the Act and regulations. There are also other obligations on contractors in respect of subcontractors.

Review of the system

The operator must regularly review the System and the review must occur at least every three years.

An immediate review is also required 12 months after the commencement of mining at the coal operation, if there is a fatality or a dangerous incident that could reasonably have been expected to result in a fatality, if there is a significant change in operations that may affect health and safety, if the operator is required to do so by the Chief Inspector in writing or if the operator is required to do so by the regulations.

Workers at the coal operation must be consulted as part of the review. A review must be completed within 6 months after it is required to be undertaken.

Emergency management system

An emergency management system must also be prepared by the operator and the operator must ensure that mining is not carried out at the coal operation unless an emergency management system that complies with the Act is implemented for the coal operation.

Offence

An operator or former operator of the coal operation who contravenes whether by act or omission any of the above requirements is guilty of an offence. The maximum penalty for a corporation is 5,000 penalty units for first time offenders and 7,500 penalty units for a previous offender. (A penalty unit is currently $110).

Employee's obligations

An employee who works at any coal operation is required to comply with the System for the coal operation and to follow the operator's procedures for emergencies set out in the emergency management system.

Stop work orders

The Minister may issue stop work orders for up to 28 days if the Minister is of the opinion that a serious breach or likely serious breach of the Act or the Occupational Health & Safety Act is to be committed. The order may be extended for a further 28 days. Those orders override any direction or notice previously issued by an inspector.

Coal Competence Board

A Coal Competence Board will be established which is subject to the control and direction of the Minister. The functions of the Board include to oversee the development of competence standards for people performing functions at coal operations that may impact on health and safety, to undertake initial and on-going assessments of competence of those people and to advise the Minister on matters related to the competence required of people to perform those functions.

Oversight of coal operations

There are provisions for the appointment of the Chief Inspector, check inspectors, mine safety officers and investigators and their functions and powers are broadly similar to their current functions and powers.

Codes of practice

The Act contemplates coal mining industry codes of practice being prepared and approved by the Minister. If the Minister thinks appropriate, there is to be consultation with relevant persons and organisations on the code contents. Any such codes may be relevant in prosecutions of an offence.

QUEENSLAND

QUEENSLAND LAND AND RESOURCES TRIBUNAL DECISIONS*

The full text of these cases can be accessed via the LRT's website: www.lrt.qld.gov.au

***Boral Bricks Pty Ltd v Caboolture Shire Council* [2002] QLRT 49 (Koppenol P)**

DETERMINATION OF VALIDITY OF OBJECTIONS – WHETHER OBJECTION INCORPORATED BY REFERENCE

Background

Caboolture Shire Council (the objector) lodged an objection to the applicant's mining lease under the *Mineral Resources Act* 1989 (MRA) and the *Environmental Protection Act* 1994 (EP Act). Section 260 of the MRA sets out various requirements for making an objection including, in subsection (3), that an objector must state the grounds of objection and the facts and circumstances

* Richard Brockett, Research Officer to the Presiding Members, Land and Resources Tribunal.

relied on by the objector in support of those grounds. Section 217(1)(f) of the EP Act stipulates the same requirement for making an objection.

The objector in purporting to fulfil these requirements wrote a letter stating, "Refer attached correspondence on Council letterhead". Attached to the letter was a document which referred to an organisation Citizens Rally Against Superquarries Haulage (CRASH) which had also lodged an objection to the subject mining lease application. The Council's objection was forwarded to the mining registrar with a covering letter which referred to the Council's having resolved to lodge a written 'submission' to the mining registrar, requesting that certain issues 'be considered in its assessment of the subject mining lease application'. The letter also requested the mining registrar to defer any decision regarding the application until the rock haulage route/method had been resolved, and that the submission of CRASH be assessed and comments made.

The issue arose as to whether the objection fulfilled the requirements of s. 260(3) of the MRA and s. 217(1)(f) of the EP Act.

Arguments

The Council submitted that those parts of the letter mentioned constituted a good objection. The Council also submitted that the CRASH objection, being expressly referred to in the Council's objection and the covering letter which referred to a Council memorandum which referred to the CRASH objection, was incorporated by reference into the Council's objection. The applicant submitted that the Council's objection was unintelligible and did not set out any grounds or supporting facts and circumstances.

Decision

Koppenol P noted that the term 'objection' was usually understood as an expression of disapproval or complaint. Koppenol P held that when viewing the letter he was unable to view it as conveying disapproval of, or complaint about, the proposed mining lease; the words and expressions used were not consistent with the concept of objecting to a mining lease application. As to whether there was incorporation of the CRASH objection by the Council, Koppenol P noted that the Council did not expressly adopt the CRASH objection and had merely stated that it had no comment or no additional comment about most of the CRASH objection. Koppenol P held that the Council's objections were unintelligible and failed to articulate the grounds of objection or the supporting facts and circumstances, and accordingly ordered that the objections be struck out.

***Papillon Mining and Exploration Pty Ltd & Ors v Brough & Ors* [2002] QLRT 50 (Koppenol P)**

APPLICATION FOR DETERMINATION OF VALIDITY OF OBJECTIONS

Facts

The Respondents had applied for a mining lease pursuant to the *Mineral Resources Act* 1989. In response to this application, 14 tenement objections were lodged with the Registrar. Each of the objections were forwarded by registered post, from various post offices, to the Mining Registrar's post office box as outlined on the objection form.

Registered mail to collect cards were placed into the Registrar's box on 20 May 2002, at some time after 10:00am. The evidence demonstrated that the box was cleared by Registry staff normally between 8:30am and 9:00am. Consequently, the objections were not collected and then stamped as having been received by the Registry until the following day, 21 May 2002. Pursuant to s.260(1) of the MRA, objections were required to be lodged by 20 May 2002. Therefore, the issue arose as to whether the objections were lodged on, or before, the last objection day and therefore whether they were valid objections or not.

Arguments

The Applicant argued that actual physical receipt of the form of objection by the mining registrar or at the mining registrar's office was required. The Respondents relied upon s39A(1) of the *Acts Interpretation Act* 1954 to demonstrate that actual physical receipt of the objections was not required.

They argued that once the evidence demonstrated that the objections had been properly addressed, prepaid and posted they were then regarded as having been received in the normal course of the post.

Decision

Koppenol P considered the objections in two groups and dealt with each individually as each raised different concerns. Eleven objectors had retained their registered mail receipt numbers and the evidence demonstrated that these had been delivered on 20 May 2002. Koppenol P following *Macrae v St Margaret's Hospital*[1] held that as the form of objection specified the post office box as the mining registrar's address then this was effectively a part of that business's business address. Further, following *Hong Ye v Minister for Immigration and Multicultural Affairs*[2], Koppenol P held that an objection should be regarded as having been lodged with the mining registrar when it is received at the mining registrar's nominated post office box. The objections were therefore valid.

Three other objectors could not provide their Australia Post registered post receipt numbers. Various affidavits were filed in support of the contention that these had all been sent on 17 May 2002. Koppenol P agreed with the submissions made by counsel for the respondents regarding the effect, and application of, s.39A(1) and that the evidence demonstrated that by the ordinary course of the post, registered mail sent on 17 May would have been received by the Registrar by 20 May 2002. These objections were therefore, also valid.

Two other objectors, who had failed to make any submissions to the Tribunal prior to the hearing, were granted leave to make written submissions about their objections.

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1 (1999) 19 NSWCCR 1.

2 (1998) 82 FCR 468.

***Reefway Pty Ltd v Kalkadoon People [No. 2]* [2002] QLRT 65 (Koppenol P and Kingham DP)**

APPLICATION TO REFER A QUESTION OF LAW TO COURT OF APPEAL

Background

In March 2002, the parties had reached agreement over the terms of an access agreement as required by the *Mineral Resources Act* 1999. Before the agreement was executed, one of the claimants died and another was said to be reluctant to sign. Consequently, the Applicant requested that the matter be referred to the Tribunal. Shortly before this referral was made, two changes were made to the list of registered native title claimants in the Kalkadoon People's native title claim over the area.

Application for leave to appeal

The Respondent brought an application seeking that the Tribunal refer a question of law to the Court of Appeal for an opinion, pursuant to s.70 of the LRT. The respondent asked the following question:

> "Can the new 7 [native title claimants] execute access agreements pursuant to the MRA and have them accepted by the Mining Registrar as access agreements complying with the MRA?"

Arguments

The Respondents argued that the relevant legislative provisions, sections 485-491 of the MRA, were not ambiguous or unclear, but rather that they produced a result which was said to be unintended or inconvenient.

The Applicant opposed the referral on three grounds. Firstly, the Mining Registrar was not required to do anything; secondly, the Kalkadoon People could have executed the agreement prior to amending the registered native title parties; and thirdly, the provisions of the Act were clear and that there were no unintended consequences.

Decision

Koppenol P and Kingham DP firstly outlined the need for caution in proceeding to refer a point of law to a higher court as set out in *Re Alcoota Land Claim No 146*.[3]

In considering whether to grant leave, the Tribunal considered the definitions of "access agreement" and "registered native title party" as provided by s.485(1). It does not define the term "registered native title claimant". However, s.423(1) provides that the term has the same meaning as it does in the *Native Title Act* 1993 (Cth).

These provisions were considered by the Members and they held that the definition of "registered native title party" focuses upon the entity on *particular prescribed days.* It was clear from the

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[3] (1998) 82 FCR 391, at 394.

evidence that the registered native title claimants on the consultation period advice day[4] or the first day of the consultation period[5] were not the same as those stated in the claim.

Koppenol P and Kingham DP held that on the clear words of the Act, the "new 7" could not execute an agreement. They were not satisfied that the statute led to unintended consequences and therefore saw no reason to refer the question of law to the Court of Appeal. The Tribunal also took into account the fact that the two parties had had a lengthy history and that the intention of the MRA in dealing with low impact exploration permits and access agreements would be further frustrated by any referral to a higher court.

***RAG Australia Coal Pty Ltd & Anor v Barada Barna Kabalabara and Yetimarla People, State of Queensland & Ors* [2002] QLRT 101 (Koppenol P)**

APPLICATION TO DISQUALIFY PROPOSED PANEL MEMBER

Background

Five mining leases were to be considered by the Tribunal. Koppenol P had directed that those matters were to be heard by a panel comprised of Smith DP, Dr E. Fesl, and Mr J. Sheehan. Dr Fesl was concurrently an applicant in 4 native title claims in the Federal Court and also a member of the claimant group in a fifth claim. Substantial similarities existed between the issues to be determined by the Tribunal and the claims in the Federal Court.

Argument

The Applicants submitted that a potential conflict of interest arose under s.27 of the *Land and Resources Tribunal Act* 1999. The Applicants acknowledged that Dr Fesl's role was not one of decision-maker, however, as there arose from the situation an objective perception concerning the similarity of interests claimed by the native title parties in the present applications and those in the Federal Court, Dr Fesl should be disqualified from the panel.

The Respondents argued that the Act envisaged that non-presiding members with specialist knowledge, such as Dr Fesl, should bring their experience to bear on such matters. Furthermore, as Dr Fesl's role was merely advisory, no conflict of interest as envisaged by s.27 existed.

Decision

At the outset, Koppenol P remarked that no one would suggest that Dr Fesl would act other than in an honourable, professional and appropriate way. Rather, he stressed that the question was whether someone in Dr Fesl's position, might (albeit subconsciously) be influenced or affected by those interests. Koppenol P held that s.27 combined with recent pronouncements by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, emphasised the fundamental need for independence and impartiality in any judicial office. After acknowledging the advisory role of Dr Fesl, Koppenol P held that similar principles as espoused in Ebner should also apply to those who

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4 Defined in MRA s.490(2).

5 Defined in MRA s.490(1).

advise the ultimate decision maker, as was the issue in the present case. Consequently, Koppenol P held that Dr Fesl did have a conflict of interest in terms of s.27 which thereby precluded her membership of the panel for those applications.

***Armstrong v Salmon* [2002] QLRT 104 (Koppenol P)**

APPEAL AGAINST DETERMINATION OF COMPENSATION

Background

The Applicants appealed under s.282 of the *Mineral Resources Act* 1989 (MRA) against a determination of compensation by Kingham DP[6]. The landowners appealed on 8 grounds including loss of value, blot on title, and injurious affection.

Grounds of appeal

Loss of value

The Appellants argued that the amount allowed for loss of value of the mining land was a realised loss and should have been part of the up-front payment rather than as part of the annual instalments. Koppenol P, following the approach of the Land Court in *Zimmerebner v Hawkins & Anor*[7], concluded that Kingham DP had exercised her discretion in relation to when payment of loss of value should be made and that as he was not satisfied that it was erroneously exercised, dismissed the first ground of appeal.

Blot on title

The determination in respect of blot on title was appealed on the grounds that the Deputy President, without the benefit of either alternate evidence or any valuation expertise of her own, rejected the expert assessment offered by the appellants. The landowners claimed $15,905 for blot on title, which reflected a 5% reduction in value discounted by 33%, in accordance with their valuation. The Deputy President accepted the discount rate but halved the reduction in value figure to 2.5%. Koppenol P, noting and agreeing with the Deputy President's rejection of parts of the Appellant's evidence, held that no errors had been demonstrated and therefore this ground of appeal should be dismissed.

Further, the Appellants argued that the Deputy President had failed to provide compensation for access. Koppenol P pointed out that Kingham DP's determination for compensation for blot of title included compensation for access. As the Appellants had not appealed the quantum of that determination, Koppenol P rejected this aspect of the appeal.

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6 [2002] QLRT 54.

7 (1999) 20 QLCR 71 at 92.

Injurious affection

Similar arguments were advanced by the Appellants with respect to Kingham DP's determination for injurious affection. In respect of the proposed 500m buffer zone, Kingham DP had reduced it by two-thirds on the grounds that it was excessive, representing more than 157% of the area of the lease itself. Koppenol P agreed with the reasoning of the Deputy President and held that this determination should not be disturbed.

Costs

The Appellant's appealed against Kingham DP's refusal to grant compensation for the costs incurred by their agent in the formulation of their claim. Koppenol P rejected this limb of the appeal on two grounds. Firstly, agreeing with the approach of Scott M in *Wills v Minerva Coal Pty Ltd [No.2]*[8] that such costs were not incurred "as a consequence of the grant of the mining lease" pursuant to s.281 of the MRA and therefore were unrecoverable. Secondly, as the Tribunal's rules do not address the issue of costs for para-professionals, recourse should be made to the *Supreme Court Act* 1995 (SC Act), pursuant to s.65(1) of the *Land and Resources Tribunal Act* 1999. In this case s.209(2) of SC Act provides that costs cannot be claimed by a person who is not a solicitor or barrister. Therefore, the agent's fees were not recoverable.

Other grounds of appeal concerning judgement composition, environmental conditions and depreciation were all rejected by Koppenol P as misconceived.

NEW COAL SEAM GAS REGIME IN QUEENSLAND[*]

New regime proposed

On 25 November 2002, the Queensland Government released details of its new Coal Seam Gas ("CSG") regime. It focuses on issues arising from overlapping coal and CSG production tenures.

The Government intends the forthcoming *Petroleum and Gas (Production and Safety) Bill* 2003 to be the principal source of rights to commercially produce CSG. This is intended to clarify issues of *who* holds CSG commercial production rights.

Issues under the current law

The regime is intended to remedy current gaps in the law.

An independent Government review panel had identified that the current law relating to the production of coal and CSG was unsatisfactory for the following reasons:

Rights to extract CSG for coal mining purposes and rights to produce petroleum in the form of CSG are governed by two different Acts, namely the *Mineral Resources Act* 1989 and the

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8 (1998) 19 QLCR 297.

* Gavin Scott and Mark Hourigan, Blake Dawson Waldron.

Petroleum Act 1923 respectively. Therefore uncertainty can arise as to *who* holds the rights to CSG.

Where CSG and coal are simultaneously extracted from the same location, operational safety may be compromised because it is unclear which tenure holder bears the ultimate responsibility for safety management practices.

Since CSG occurs in coal seams, production rights of one commodity (either coal or CSG) necessarily affect the production rights of the other commodity. However, petroleum tenure holders are not subject to regulatory obligations to consider the impact of their activities on current coal resources and future coal mining and this could cause conflict between the two industries.

How it will work

Under the new regime, commercial production rights for CSG will usually be granted through a petroleum lease pursuant to the relevant petroleum legislation. Production leases for either coal or CSG will not be granted over an area, where there is an existing production lease for the alternate commodity unless:

(a) the applicant also holds the existing production lease; or

(b) the applicant and the existing production leaseholder have concluded a commercial agreement to coordinate their respective production activities.

Where an application overlaps an existing tenure, all parties are required to negotiate in good faith and use their best endeavours to reach an agreement.

Holders of mining leases for coal without a petroleum lease for CSG production over the same area are entitled to release CSG at any time during coal extraction or for safety purposes. However, they are not entitled to use the CSG for commercial purposes. This is subject to one exception. Holders of current mining leases with mineral "hydrocarbons" do not lose their exclusive right to CSG. These rights will be clarified in the proposed legislation. The mining lease holders will be encouraged (but not obliged) to apply for a petroleum lease, and if granted will have their mining lease amended to remove reference to "hydrocarbons".

Implementation process

The State has indicated that it intends to attend to the following:

(a) Legislative amendments to the *Petroleum Act* 1923, *Minerals Resources Act* 1989 and the *Coal Mining Health and Safety Act* 1999 will be drafted.

(b) Release of draft *Petroleum and Gas (Production and Safety) Bill* 2003 in March 2003.

(c) Further consultation with industry will be sought at the draft Bill stage and in the development of standards and protocols.

(d) Legislative amendments will be introduced to Parliament in June 2003.

APPEAL SEEKING TO LIMIT AMBIT OF THE DEFINITION OF "MINE" IN THE MINERAL RESOURCES ACT 1989 (QLD)

Armstrong & Anor v Miles & Anor

[2002] QCA 504, Supreme Court of Queensland Court of Appeal 2659/02; 22 November 2002 per McPherson and Davies JJA and Dutney J

Facts and nature of action

Appeal from a decision of the President of the Land and Resources Tribunal refusing leave to appeal a decision by Ms Kingham, a Deputy President of the Tribunal. Ms Kingham recommended that, amongst other things, an application pursuant to s245 of the *Mineral Resources Act* 1989 (Qld) ('Act') by the first respondent for a mining lease on land owned by the appellants be granted.

The appellants had objected to the mining lease on the basis that the proposed activities constituted exploration and not mining, thus did not comply with the Act and therefore the mining lease could not be lawfully granted. The appellants based their argument on the proposition that the ambit of the definition of "mine" in s6A(1)(a) of the Act should be limited to exclude activities that occur for the purpose of sampling or testing only. In recommending that the mining lease be granted, Ms Kingham rejected the appellants ground of objection raised above, and held that the proposed activities were for the purpose of mining minerals within the meaning of s234(1)(a) of the Act.

Decision

The court dismissed the appeal and ordered that the appellants pay the first respondent's costs. The proposed activities of the respondent, as described by Ms Kingham, were mining minerals, and therefore appropriately the subject of a mining lease granted under s234. The appeal must therefore fail.

Reasoning

The Appellants objected to the application on grounds including that the application proposed activities that constituted exploration and not mining. The term explore is defined in the schedule to the Act to mean "take action to determine the existence, quality and quantity of minerals …by - …(c) extracting and removing from land for sampling and testing an amount of material, mineral or other substance in each case reasonably necessary to determine its mineral bearing capacity or its properties as an indication of mineralisation; …." The appellants claimed that the definition of "mine" in s6A(1)(a) of the Act which provides for the winning of mineral from a place where it occurs, should be limited by excluding from its ambit those activities where the purpose is for sampling or testing only.

The respondent's application outlined the mining program as commencing a testing program of 1 – 2 years, with samples to be taken, and with areas proven to be economic becoming targets for

further lease applications for mining. Ms Kingham summarised the nature of the mining program as follows:

"It is clear from other material tendered by the Applicant and from the evidence he gave at the hearing, that the activities proposed are intended to ascertain the viability of areas for subsequent production. The Applicant stated that if he finds economic deposits he will peg them out and apply for a mining lease or leases to cover the area or areas identified. Further he stated that none of the area applied for may be economically viable and that this will not be known until the testing is done."

As the first respondent's activities were for the purposes of sampling and testing only, the appellant contended that they were not for the purpose of mining minerals within the meaning of s 234(1)(a) of the Act and thus a mining lease could not be lawfully granted. The applicant asserted that the testing program was a proper facet of mining and a necessary preliminary aspect of mining.

The Court applied the reasoning of the majority of the Supreme Court of Queensland in Gonzo Holdings No 50 Pty Ltd v McKie [1996] 2 QdR 240 stating that in that case where samples were taken of the extracted material, the relevant facts were not substantially different to those in this case. Davies JA went on to state that "what was being done there was excavation and removal from the land of material for the purpose principally it seems, of testing mineral content. Yet their Honours plainly thought that was mining within the meaning of the Mineral Resources Act."

Davies JA concluded that:

(a) the appellants argument appeared to be that although exploration may sometimes also constitute mining, if extraction and removal from land of an amount of material is only for the purpose of sampling or testing within the meaning of paragraph (c) of the definition of "explore" it cannot also constitute mining with the definition of "mine";

(b) the appellants were unable to advance any basis for limiting the meaning of "mine" in this manner other than by inference from the definition of "explore"; and

(c) that this is not a sufficient basis upon which to limit the meaning of "mine", and noted that this also seems to have been the view of the majority in Gonzo.

For these reasons, Davies JA held that the proposed activities of the respondent, as described by Ms Kingham, were mining minerals and therefore appropriately the subject of a mining lease granted under s234. The appeal must therefore fail. McPherson JA and Dutney J agreed with the reasons given by Davies JA.

SOUTH AUSTRALIA*

***De Rose and Others v The State of South Australia and Ors* [2002] FCA 1342**

De Rose and Ors v The State of South Australia and Ors was the first determination of a native title claim in South Australia. O'Loughlin J of the Federal Court found that the claim failed principally because the claimants had no continuing connection with the claimed land. The decision is subject to an appeal to the Full Federal Court.

The decision is important as it considers the inter-relationship between pastoral leases granted in South Australia and the rights of Aboriginal persons under section 47 of the *Pastoral Management and Conservation Act* 1989 (SA) ("the *Pastoral Act*") which is quoted below. O'Loughlin J also made certain evidential rulings in favour of the claimants which are also relevant to other native title determinations.

Facts

The claim covered a cattle station known as De Rose Hill Station ("the Station") in far north-western South Australia. The Station was held pursuant to three pastoral leases. The first respondent was the State of South Australia and the other respondents were the present Station owners known as the Fullers. The claim was at various times described as a claim on behalf of the Yankunytjatjara people and at other times on behalf of a group in the Western Desert Bloc. The claimants argued that there is a group within the Western Desert Bloc who are connected by language, myth and their environment.

The Station was originally leased as a sheep station in the 1930s. From that time a group of Aboriginals assisted in working the Station. When the homestead was built in the early 1940s, a group of Aboriginals and their children camped near the homestead.

The number of Aboriginal people camping at the station began to decline in the late 1960s as they moved to work on other stations and settled at Indulkna, a township set up just south of the Station. The last Aboriginals who were part of the claim group left the station in 1978. The claimants alleged that the Fullers had forced them off the Station by threats of violence and by killing their dogs. This allegation was not accepted by the Court.

*Ngura*ritja was the Yankunytjatjara expression for persons who could speak for the land or were the traditional owners of the land. A person could become *Ngura*ritja by various means. The first and principal means was if a person was born on the land. Also, if the person lived on the land for a long time and became aware of the Dreaming for the land, then he or she could become *Ngura*ritja.

A great portion of the judgment concerns an examination of the evidence of the Aboriginal witnesses. A substantial part of this evidence was evidence of what they were told as to their birth place by deceased persons and where their parents were born and raised. This evidence is

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* John Keen, Barrister, Adelaide. The author was one of the junior counsel for the Station owners.

normally regarded as hearsay but O'Loughlin J decided that such evidence needs to be received in native title claims otherwise it would be impossible to prove continuing connection with the land. His Honour admitted this type of evidence, as to the truth of the statements, under the exception of section 82 of the *Native Title Act* which provides that the Court is to apply the rules of evidence "except to the extent that the Court otherwise orders" [271].

Pastoral leases

O'Loughlin J held that the pastoral leases were non-exclusive pastoral leases [5] as all of the leases were originally issued with a reservation of rights in favour of the Aboriginal people. When those rights were removed by the introduction of the 1989 *Pastoral Act* they were immediately replaced with the statutory rights under section 47 of the Act which provided:-

"(1) Despite this Act or any pastoral lease granted under this Act or the repealed Act, but subject to subsection (2), an Aborigine may enter, travel across or stay on pastoral land for the purpose of following the traditional pursuits of the Aboriginal people.

(2) Subsection (1) does not give an Aborigine a right to camp –

(a) within a radius of 1km of any house, shed or other outbuilding on pastoral land; or

(b) within a radius of 500m of a dam or any other constructed stock watering point."

The claimants sought native title rights greater than section 47. However, due to his Honour's finding of no continuing connection this issue wasn't examined further.

Extinguishment

O'Loughlin J held that the non-exclusive pastoral leases did not wholly extinguish native title and only partially extinguished native title. He also confirmed that the native title claimants did not have the right to control access to the land, following the High Court in *Western Australia v Ward*[1] [534 and 541].

Operational inconsistency

The Fullers argued that improvements to the Station such as roads, cattleyards and fences created an operational inconsistency such as that discussed by Gummow J in *The Wik Peoples v The State of Queensland*[2] at 203 and Gaudron J at 166.

In *Ward*, the High Court limited the concept of operational inconsistency and commented that it "will not suffice to extinguish native title" [151].

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1 (2002) 191 ALR 1.

2 (1996) 187 CLR 1.

Despite these comments of the High Court in *Ward* and the fact that *Ward* says the critical issue is inconsistency of rights and not use, O'Loughlin J still considered that inconsistency of use was important and relevant as it may demonstrate "that such rights have been created or asserted" [534-5]. His Honour held that native title had been extinguished in regard to improvement such as the homestead, sheds, watering facilities and airstrips and a buffer zone around them consistent with section 47 of the *Pastoral Act*. The extinguishment held to have occurred in this case in relation to the airstrips may be at odds with *Ward*.

Continuing connection

The State of South Australia submitted that the Station was inhabited by the Antikirinya at the time of sovereignty, who were displaced by the Yankunytjatjara in the early 20th century. There was also some evidence that the Pitjantjatjara had moved the Yankunytjatjara people from the Musgrave Ranges and in turn pushed the Antikirinya people to the east of the state. Many of the parents of the witnesses were Pitjantjatjara people. The claimants argued that the Yankunytjatjara people and the Antikirinya were one people and had one language.

O'Loughlin J found that the evidence as to whether the Antikirinya people were a separate group was confusing and contradictory. He found they were two closely related aboriginal groups speaking the same language and dialect. He was however unable to make any finding that the Antikirinya people once inhabited the claim area but were dispossessed by the Yankunytjatjara people [144].

As to the proof of ancestral connection, O'Loughlin J was of the view that the claimants did not have to prove continuing connection back to the time of sovereignty [371] as His Honour was of the view that such an onus of proof would be oppressive upon native title claimants. He held that it was sufficient if the claimants could prove a continuing connection back to recorded time and then an inference would be made that the continuing connection existed back to the time of sovereignty [579].

His Honour accepted there was migration and inter-marriage between the Pitjantjatjara people and the Yankunytjatjara people and this was part of the history of the Western Desert Bloc. O'Loughlin J did not accept the evidence of the claimant's anthropologist Mr Craig Elliot, that the Yankunytjatjara, Pitjantjatjara and Antikirinya people were part of "one community within the boundaries of the Western Desert Bloc". Unfortunately, His Honour failed to make any firm finding in relation to the anthropological evidence.

O'Loughlin J recognised that in *Ward* the High Court said that the connection of a claimant group does not need to be physical. Despite this recognition His Honour thought a physical connection was very important [377]. His Honour assessed the evidence in great detail and held that there was no spiritual or physical connection to the land, and if there was any physical connection it ceased in 1978 when the last two Aboriginal Stockmen left the Station [905]. O'Loughlin J was of the view that adherence to traditional laws and traditional custom had eroded away [907]. There was no evidence that the traditional songs or dances had been performed in the last 20 years upon parts of their country other than De Rose Hill. Further he held that there had been a total failure to make any attempt to care for any of the secret sacred sites and that the occasional hunt for a kangaroo does not constitute any physical or spiritual activity [911].

His Honour stated obiter, that if he was wrong in his finding that there was a lack of continuing connection, he would have made a determination that entitled the claimants to follow the traditional pursuits of hunting, conducting ceremonies etc., as set out in paragraph 922 of his reasons. These rights were not to be expressed in an exclusive or non-exclusive manner as such terminology is inappropriate to native title [918-9]. Unfortunately O'Loughlin J omitted to discuss whether his hypothetical determination extended beyond the rights granted to Aboriginals under s.47 of the *Pastoral Act*.

Summary

No mining tenements are on the Station so the interaction between native title and mining rights in South Australia was not directly considered. However, as most mining tenements are on pastoral lease land the ruling that native titleholders do not have the right to control access to such land does clarify the law for the mining industry in South Australia.

Finally, the appeal will concern the factual finding of loss of connection and, like *Yorta Yorta*,[3] will be difficult to overturn.

TASMANIA

MINING AND GAS AMENDING LEGISLATION[*]

Mining (Strategic Prospectivity Zones) Amendment Act 2002

Three significant pieces of legislation were passed by the Tasmanian Parliament in the latter part of 2002.

The *Mining (Strategic Prospectivity Zones) Amendment Act* 2002 (Tas) commenced after receiving Royal Assent on 27 November 2002. The main purpose of the legislation is to amend the *Mining (Strategic Prospectivity Zones) Act* 1993 (Tas) by extending the Beaconsfield Strategic Prospectivity Zone to the west of Beaconsfield to include a further gold-bearing region and nickel-cobalt deposit area (see second reading speech, House of Assembly Hansard Wednesday 23 October 2002 - Part 2 - Pages 33 – 99).

Gas Infrastructure (Miscellaneous Amendments) Act 2002

The *Gas Infrastructure (Miscellaneous Amendments) Act* 2002 (Tas) also entered into force after receiving Royal Assent on 27 November 2002. This Act amends the *Gas Act* 2000, the *Gas Pipelines Act* 2000 and the *Local Government (Highways) Act* 1982. The Act provides for a number of amendments to this legislation to facilitate the installation of gas distribution infrastructure. In particular, it deals with general planning approvals for the installation of gas infrastructure, permits required for installation of gas pipelines under council-owned roads and conditions that can be attached to those planning approvals and permits (see second reading speech, House of Assembly Hansard, Tuesday 29 October 2002 - Part 2 - Pages 28 – 100).

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[3] [2002] HCA 58.

[*] Dianne Nicol.

***Gas Pipeline Planning and Safety (Miscellaneous Amendments) Act* 2002**

The *Gas Pipeline Planning and Safety (Miscellaneous Amendments) Act* 2002 (Tas) entered into force following Royal Assent on 5 December 2002. This Act amends the *Gas Pipelines Act* 2000, the *Land Acquisition Act* 1993, the *Land Use Planning and Approvals Act* 1993 (LUPAA) and the *Water Management Act* 1999. The Act is an attempt to deal with the difficult problem of monitoring and managing future developments in the use of land along high pressure gas transmission pipeline routes. The *Gas Pipelines Act* 2000 already provides for a 20 metre easement in the vicinity of gas pipelines. The Act also provides for a planning corridor, or attenuation zone. Applications for sensitive developments within the attenuation zone must be referred by councils to the pipeline operator for advice prior to approval. It was noted in the second reading speech to the new Act (House of Assembly Hansard, Tuesday 19 November 2002 - Part 2 - Pages 28 – 99) that this scheme did not integrate well with the existing Resource Management Planning System, and provided insufficient clarity and certainty for landowners, councils and the pipeline operator. Furthermore, landowners came to perceive that a pipeline operator would act as the de facto planning authority.

The aim of the Amendment Act is to create a more refined three-tiered planning process for uses or developments in areas adjacent to gas transmission pipelines that distinguishes between:

- uses or developments that do not require a planning permit under LUPAA, are defined as exempt uses or developments;
- uses or developments that are defined as permitted or discretionary, and that require a planning permit under LUPAA; and
- uses or developments that would require amendments to a planning - or re-zoning - before a permit could be considered. (extracted from the second reading speech)

ARBITRATION - THE SUBMISSION AND REFERENCE - POWER OF COURT TO STAY - GENERALLY - FACTORS RELEVANT TO EXERCISE OF POWER TO STAY[*].

***Origin Energy Resources Limited v Benaris International NV & Anor; Woodside Energy Limited v Benaris International NV & Anor* [2002] TASSC 50 (14 August 2002)**

(Supreme Court of Tasmania; Slicer J*)*

This matter involves a complex contractual (farmin) dispute between Origin Energy Resources Ltd (Origin), Benaris International NV (Benaris) and Woodside Energy Ltd (Woodside) concerning the farmin terms for the exploration and testing for and development of natural gas and petroleum in the Bass Strait. Origin applied to the Supreme Court of Tasmania for an order restraining Benaris from terminating the contract. Woodside has a subsidiary contract with Origin and will be affected by the outcome of the dispute between Origin and Benaris. Woodside has commenced separate proceedings against the other parties to protect its interests.

The proceedings in issue concern an application by Benaris to stay the proceedings instituted by Origin. The basis for the application by Benaris is that the contract provides for determination of

[*] Dianne Nicol.

contractual disputes by arbitration. Benaris also made an application for the proceedings by Woodside to be stayed pending the determination of the dispute between Origin and Benaris. The arbitration clause requires determination of contractual disputes under the farmin agreement by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Arbitration Centre. The clause also states that the applicable law is the Singapore *International Arbitration Act* Cap 143A. The contract also has a clause providing that it is to be governed by the law of Tasmania and that the parties agree to submit to the non-exclusive jurisdiction of the Tasmanian courts (clause 11).

The contract that forms the subject of the dispute is a farmin agreement between Benaris and Origin pursuant to which an 80% interest in the permit was transferred to Origin in 1998. The further farmin agreement between Origin and Woodside requires Woodside to carry out seismic and drilling operations in return for Woodside obtaining a 50% interest in the permit.

Slicer J described the nature of the dispute in paragraph 3 of is judgment. Apparently Origin carried out drilling operations on the commitment well but Benaris alleged that Origin failed to perform its obligations and thus earn the interest. Ultimately Benaris served notice on Origin alleging material breach of the farmin agreement, entitling Benaris to terminate and have reassigned the 80% interest in the permit notwithstanding the work performed to date.

In considering whether the proceedings instituted by Origin should be stayed, Slicer J noted that section 7 of the *Corporations Act* 2001(Cth) requires a court to stay proceedings where they involve determination of a matter that is capable of being settled by arbitration pursuant to an arbitration agreement. Slicer J also referred to the *Commercial Arbitration Act* 1986 (Tas) and concluded that its general purport was similar to the Commonwealth legislation, although it is expressed in discretionary terms. His Honour noted at paragraph 29:

> A court ought not decline to refer a matter for arbitration unless it is satisfied that there is good reason to permit the issue to be litigated in the court.

Slicer J ordered that the stay should be granted in respect of the matters between Origin and Benaris that are capable of resolution by arbitration. However, he refused to stay the Woodside proceedings. His Honour noted that the outcome of the arbitration proceedings between Origin and Benaris might automatically determine Woodside's interest in the exploration permit, but concluded that this outcome is not inevitable and that certain rights claimed by Woodside are not dependent on it.

In his reasoning His Honour emphasised that determination of the dispute will involve interpretation of terms by reference to industry practice and experience and the application of technical expertise, experience or specialist knowledge on the part of the fact finder. He added at paragraph 32:

> The parties specifically referred to a specialist tribunal as being the appropriate institution to determine disputation. The oil and gas industry is trans-national and presumably requires some degree of consistency in its operations, terms and methods of ascertaining respective rights and obligations arising within that industry…

In his analysis of the dispute, His Honour concluded that the claimed breach was internal to the contract and did not involve matters external to the text. Hence certain aspects of the matter were susceptible to resolution by arbitration. However, because some of the matters pleaded by Origin did not come within the ambit of an arbitration matter, it may be necessary to impose conditions to ensure that Origin would not be further prejudiced by any delay by Benaris in proceeding with the arbitration. The parties were invited to consider the matters that should be referred to arbitration and those that should be considered by the court.

ARBITRATION - SUBMISSION AS A DEFENCE AND AS A GROUND FOR STAY OF PROCEEDINGS - WHETHER DISPUTE IS A "MATTER AGREED TO BE REFERRED TO ARBITRATION" OR CAPABLE OF ARBITRATION

***Origin Energy Resources Limited v Benaris International NV & Anor* (No 2) [2002] TASSC 104 (22 November 2002)**

(Supreme Court of Tasmania; Slicer J*)*
This case involves the same matter as outlined in the above case note. It arose out of the invitation by Slicer J for the parties to consider conditions that might be imposed resulting from the order to stay the proceedings. Since the parties were unable to reach agreement, Slicer J was required to consider the matter further. His Honour concluded that such matters as the terms of the agreements between Origin and Benaris, performance, international practice, technical issues and the determination of contractual rights and obligations were susceptible to arbitration. However, other matters, particularly equitable issues involving both Origin and Woodside, are the province of the court (see paragraphs 53-56 of Slicer J's judgment).

An application for summary judgment by Woodside is still pending.

VICTORIA

INDUSTRY QUALITY STANDARD DEFINITION AND INTERPRETATION - COMMERCIAL ARBITRATION ACT 1984 (VICTORIA)[*]

***Qenos Pty Ltd v Mobil Oil Australia Pty Ltd (No1)* [2002] VSC 379**

Background facts

Qenos Pty Ltd ("**Qenos**") made an application to the Supreme Court of Victoria seeking leave (pursuant to section 38(4) of the *Commercial Arbitration Act* 1984 (Victoria)) to appeal against an interim arbitration award made on 12 June 2002.

The arbitration arose out of a dispute which had arisen between Qenos and Mobil Oil Australia Pty Ltd ("**Mobil**") with respect to the purchase by Mobil's Altona oil refinery of certain chemical coproducts produced by Qenos at its petrochemical manufacturing plant.

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[*] Maria Palawelek, Solicitor, Corrs Chambers Westgarth, Melbourne.

On 15 February 1999, the parties entered into a petrochemical supply agreement ("**Supply Agreement**") which replaced a pre-existing arrangement in place since 1962. By virtue of the Supply Agreement, Mobil sold feedstocks to Qenos and purchased coproducts.

Article 4 of the Supply Agreement made provision for the quality and quantity of the coproducts to be sold by Qenos to Mobil. The relevant sections of Article 4 read as follows:

> "S4.01 [Qenos] agrees to sell to Mobil, and Mobil agrees to purchase from [Qenos], those Coproducts derived from the manufacture of Petrochemical Products in [Qenos]'s Petrochemical Plant from Feedstocks supplied by Mobil providing that such Coproducts conform to the applicable quality specifications as contained in Schedules 1(c), 1(d) and 1(e).
>
> ….
>
> S4.02 Mobil shall apply all reasonable endeavours to encourage the retention of Government legislation or industry quality standards which enable the Altona Refinery to accept Coproducts from [Qenos] for use in finished products blending without adverse impact to Mobil. Notwithstanding such endeavours, if changes to Government legislation or industry quality standards are introduced which adversely affect the Refinery's acceptance of such streams, then Mobil shall have the option to nominate revised Coproduct quality specifications to [Qenos]."

The dispute between the parties arose as a consequence of an increase in the incidence in late 1999 of a deleterious condition in the motors of certain motor cars referred to as sludging. After some investigation, Mobil was on 14 February 2000 informed that the source of this condition was petrol produced at the Mobil refinery at Altona. Furthermore, the component of this petrol responsible for the sludging was a di-olefin contained in significant quantities in untreated steam cracked naphtha ("**untreated SCN**"). Untreated SCN was one of the coproducts purchased by Mobil from Qenos under the supply agreement.

As soon as this link between untreated SCN and the sludging was established, Mobil withdrew from the market and recalled all premium unleaded petrol, which included significant quantities of this coproduct. On 14 February 2000, it ceased blending untreated SCN in its premium petrol products. Notwithstanding this, Qenos continued to supply untreated SCN as a coproduct under the Supply Agreement and to insist upon payment for it. Mobil was faced with the difficulty of storing and, in due course, disposing of the unwanted untreated SCN.

On 23 June 2000, Mobil wrote to Qenos nominating revised coproduct quality specifications pursuant to s4.02 of the Supply Agreement. These new specifications stipulated that coproducts should contain virtually none of the offending untreated SCN. Qenos disputed the validity of this nomination on the basis that no changes to government legislation or industry quality standard had occurred. This was a central issue in the arbitration, an issue which was determined by the arbitrator in favour of Mobil.

Arbitrator's decision

At the outset the arbitrator held that Article 4 dealt with two quality standards (the industry standards and those set out in the schedules) and that only a change in the industry standards could

trigger the right for Mobil to revise the coproduct quality specifications. The standards set out in the schedules were therefore not considered further by the arbitrator. The arbitrator held the relevant industry quality standard to be considered was that which existed immediately prior to the date of change in the standards and not at the date of the Supply Agreement as argued by Qenos.

The arbitrator rejected the submission put on behalf of Qenos that an industry quality standard must be a standard imposed by some independent and authoritative body. He concluded that absent such an imposed standard, a standard might be established by agreement between the major suppliers in the industry or by industry practice or both. The arbitrator also held the obligation to make reasonable endeavours to encourage retention of existing standards was imposed on Mobil only where the maintenance of existing industry quality standards in the face of change would have no adverse impact upon its acceptance of the coproducts.

The arbitrator then turned to determining what the relevant industry standard was. He found the Australian Standard for petrol, namely AS 1876-1990, standing alone would not provide a satisfactory standard to meet modern motoring requirements. Consequently, he also considered the specifications established in respect of petrol supply in the industry, specifically the "Product Exchange Specifications" ("**PESs**") established by the four major suppliers of petrol to govern the supply of petrol between them.

As there was no uniformity in the PESs, the arbitrator held it was not possible to conclude that these alone or together with AS 1876-1990 represented an industry quality standard. Instead, the arbitrator said they represented minimum acceptable requirements.

On the basis that neither the Australian Standard or the PESs contained any mention of untreated SCN, he decided that unless the inclusion of untreated SCN affected some performance requirement of the Australian Standard or the PESs, the inclusion was not a breach of these minimum acceptable requirements. Accordingly, he held the minimum acceptable requirements were silent on the issue of untreated SCN. The arbitrator also accepted that no refinery other than Mobil's Altona refinery blended untreated SCN in its petrol and said he was therefore unable to conclude that this limited usage itself amounted to a quality standard affecting the industry.

In conclusion, the arbitrator held that the silence of the industry quality standards with respect to untreated SCN was replaced by an express prohibition upon its use and that this amounted to a change giving Mobil the right to nominate revised coproduct specifications under s4.02 of the Supply Agreement.

Grounds of appeal

The grounds of appeal set out by Qenos in relation to the industry standards which were considered by the judge were as follows:

1. THE ARBITRATOR ERRED IN THE PROPER CONSTRUCTION OF S4.02 OF THE SUPPLY AGREEMENT IN THE FOLLOWING RESPECTS

(a) in finding the phrase 'industry quality standards' encompassed the practice of Mobil supplying to, and BP, Shell and Caltex accepting, petrol blended with untreated SCN;

(b) in finding that Mobil had made an effective nomination under s4.02 when the arbitrator did not determine what the standard for blending untreated SCN into petrol was at the date of the Supply Agreement; and

(c) having found that in the period February 1999 until 2000 there was no relevant industry quality standard imposed by some outside authority, the arbitrator erred in failing to find that there was no relevant industry quality standard in relation to the use of untreated SCN in finished product blending and that therefore Mobil was not entitled to nominate revised coproduct specifications under s4.02;

2. THE ARBITRATOR ERRED IN DISREGARDING THE PRIMARY MEANING OF THE WORD "STANDARD" AS DETERMINED BY THE HIGH COURT IN *R V GALVIN EX PARTE METAL TRADERS EMPLOYERS ASSOCIATION* (1949) 77 CLR 432 AT 447

Decision of Byrne J

Byrne J upheld the arbitrator's findings and noted that even if the arbitrator's findings on the content of the industry quality standards were incorrect, they did not amount to an error of law. The question of law under consideration was the proper construction of s4.02 of the Supply Agreement and, in particular, the meaning of the expression "industry quality standards" which is used in that section.

On this basis in relation to ground 1(a) of the appeal, Byrne J held it was unsustainable for Qenos to argue that the arbitrator erred in his conclusion that an industry quality standard might be established in whole or in part by industry practice. He also said that it was a question of fact, but in any event, not manifestly wrong, for the arbitrator to conclude that it was irrelevant to the content of any industry quality standard that Mobil was the only refinery who blended untreated SCN in their product. Further, His Honour upheld the arbitrator's decision in respect of grounds 1(b) and 1(c).

In relation to the second ground of the appeal, Byrne J held the arbitrator did not fall into manifest error in concluding that the High Court's observations in relation to the meaning of "standard" were of no assistance in the environment in which the present parties were operating as they were concerned with its use in the expression "standard hours of work" in the context where the hours were stipulated by an industrial award.

His Honour concluded that the circumstances in which untreated SCN became outlawed were unusual and that the change in the practice of Mobil in blending untreated SCN in its petrol was forced upon it by the unexpected adverse effect of its petrol on certain motor cars. It was commercially impossible for it to seek to maintain a standard which would cause it to sell to the public a product which would be likely to cause damage to motor cars and damage to its own reputation.

Comments

In his consideration of the arbitrator's decision, Byrne J made a number of comments which could affect the way in which parties interpret contracts which require them to comply with or which refer to industry standards. The main points were that:

3. THE TERM "INDUSTRY STANDARD" IS NOT RESTRICTED TO STANDARDS AND MINIMUM REQUIREMENTS SET OUT BY THE GOVERNMENT OR AUTHORITIES AND THAT GENERAL INDUSTRY PRACTICE MAY BE RELIED ON WHEN DETERMINING WHAT THE INDUSTRY STANDARD IS; AND

4. THE DEFINITION OF THE WORD "STANDARD" WILL BE CONSIDERED BY THE COURT IN THE CONTEXT IT IS BEING USED.

SUMMARY OF GAS INDUSTRY (RESIDUAL PROVISIONS) (AMENDMENT) ACT 51/2002 (VIC)*

The purpose of the Act, which came into effect on 4 November 2002, is to amend the *Gas Industry (Residual Provisions) Act* 1994 (Vic.) ("**GIRP Act**") to provide for the transfer of certain property, rights and liabilities from Gascor Pty Ltd ("**Gascor**") to another state-owned entity.

Gascor acts as a gas wholesaler. It purchases gas from Esso/BHP-Billiton and on-sells it to private sector gas retailers Origin Energy (Vic.) Pty Ltd, AGL Victoria Pty Ltd and TXU Australia Pty Ltd. Until the onset of full retail contestability ("**FRC**") on 1 October 2002, each of the retailers had an exclusive right in a geographical area to supply gas as an agent of Gascor to non-contestable customers. The retailers paid agency fees to Gascor in return. On commencement of FRC, the retailers' obligation to pay agency fees to Gascor lapsed.

When the Bracks Government came to power in October 1999 the gas industry (apart from Gascor) had passed to private ownership. Pre-existing contractual arrangements established as part of the reform process provided the State of Victoria (the "**State**") with options exercisable until 31 December 2002 to transfer one third of the shares in Gascor to each of the retailers.

Certain steps were required before the State would be in a position to exercise the options if it determined to do so. In particular, as a condition to the State exercising the options, the State had to warrant that if and when Gascor was transferred to the retailers it would have no contingent, accrued or prospective liabilities (apart from certain defined liabilities related to its respective contracts with Esso/BHP-Billiton and the retailers).

Gascor (together with 15 other State entities) is a party in the Longford class action. These proceedings arose over fire and explosions at the Esso/BHP-Billiton gas processing plant at Longford on 25 September 1998. The class action is a claim by gas users and stood-down workers for damages relating to the 10-day cessation of gas supplies, which followed the events at Longford.

The purpose of the Act is to transfer Gascor's Longford class action interests, including any liability, to another State entity to ensure that the State could elect to exercise the options to transfer its shares in Gascor to the retailers without being in breach of warranties contained in the contract granting the options. Similarly it ensured preservation of the interests of the state with respect to the class action.

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* Maria Pawelek, Corrs Chambers Westgarth, Melbourne.

On 17 December 2002 the Department of Treasury and Finance issued two notices fixing 27 December 2002 and 30 December 2002 as the relevant dates for the purposes of an allocation statement under section 155C of the GIRP Act relating to the allocation of property, rights and liabilities of Gascor to Gascor Holdings No 1 Pty Ltd and the State Electricity Commission of Victoria respectively.

Although the time for the State to exercise the option to transfer the Gascor shares to the retailers has now lapsed, the Government has not disclosed whether or not the State exercised its option to transfer the shares to the retailers. However, on the basis of the two notices issued by the Department of Treasury and Finance, it appears likely that an election to transfer the shares has been made.

MINERAL RESOURCES DEVELOPMENT REGULATIONS 2002*

The Mineral Resources Development Regulations 2002 commenced operation on 28 October 2002. Made under the *Mineral Resources Development Act* 1990 (Vic), the new regulations revoke the following sets of regulations which were subject to a 10-year sunset period:

- Mineral Resources (Titles) Regulations 1991;
- Mineral Resources (Royalties) Regulations 1991;
- Mineral Resources (Infringements) Regulations 1991; and
- Mineral Resources (Disclosure of Interest) Regulations 1991.

The new regulations consolidate the old regulations and provide a one-stop-shop for the regulation of mining matters, except for health and safety matters which is now found in the Occupational Health and Safety (Mines) Regulations 2002.

While the new regulations are largely similar to those in place before, outlined below are a few of the significant differences.

Royalties

The regulations no longer provide a specific royalty rate for gypsum, but do set a default royalty rate for brown coal. The royalty rates are as follows:

- lignite (brown coal) – $0.0239 (indexed) per gigajoule unit of coal produced;
- tailings disposed under Crown land – $1.43 per cubic metre; and
- all other minerals (except gold) – 2.75% of the net market value.

Under the old regulations, royalties and royalty return statements were due quarterly. The new regulations require royalties to be paid and statements submitted within four weeks of 30 June each year.

Application information

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When applying for a mining or exploration licence (**ML** or **EL** respectively), the procedures and information required to be submitted are largely the same except for a few new matters for which information is required. The first main difference is that applicants are now requested to indicate on the application which option they choose to deal with native title if the application covers Crown land. Applicants can choose to:

- have that portion of Crown land excised from the application;
- go through the right to negotiate procedure under the *Native Title Act* 1993 (Cth) (**NTA**); or
- enter into an indigenous land use agreement under the NTA.

The application form also asks for the applicant's preferred reporting date (for expenditure returns and technical reports) which must be one of 30 June, 30 September, 31 December or 31 March.
Apart from these changes, information requirements remain generally the same.

Marking out

Under the new regulations, the holder of an ML is required to mark out land within four weeks of registration of the licence and the boundary marks must be maintained until rehabilitation is complete, unless they are otherwise removed in accordance with the regulations. This contrasts with the old regulations where an ML applicant was required to mark out the land, showing the necessary application details until the licence was granted or refused. Then, within 14 days of registration of the ML, the application information had to be replaced with the licence information and maintained for the currency of the licence.

Expenditure returns

Under the old regulations, schedule 14 or schedule 15 expenditure returns had to be lodged six months after registration of the licence and then every six months.

The new regulations require the lodgment of returns at the "report date". The report date for MLs is 30 June each year. For ELs registered or renewed after 28 October 2002 the report date is that specified in the licence (being one of 30 June, 30 September, 31 December or 31 March). For ELs granted before 28 October 2002, the report date is that agreed between the holder and the Department (again, being one of 30 June, 30 September, 31 December or 31 March).
Schedule 16 technical reports must still be lodged annually, within four weeks of the report date (with the report dates being as above).

Rental

Despite an increase in rental, the new regulations simplify lodgement requirements. Instead of paying rental every six months after the date of registration of the ML, the new regulations provide two assessment dates; these are 30 June and 31 December. Rent is payable within four weeks of the assessment dates.

Infringements

Most penalties for infringements have increased, some remain the same and new infringements have been added. For instance, the penalty for failing to submit a royalty return or expenditure return within the due period remains at $200, while the penalty for doing work not authorised by a licence has increased from $500 to $1000. New infringements include the failure by an ML holder

to survey and mark out the land ($1000), and entering land to survey or mark out, or carrying out work under a licence without requisite insurance carry penalties of $1000. There are new $1000 penalties for holders of miner's rights and fossicking authorities who disturb Aboriginal places. Penalties for unsafe work practices have been removed and are now in the Occupational Health and Safety legislation.

Summary

With the exception of occupational health and safety matters, the new regulations provide a consolidated source of regulations for Victoria's mining industry. The main differences such as the inclusion of set report dates and annual expenditure returns will help to streamline administration of the state's tenement system and assist licence holders in ensuring compliance.

GUIDELINES FOR DEVELOPMENT OF WIND ENERGY RESOURCES IN VICTORIA*

Unlike South Australia, where wind energy projects have generally been well received, the development of wind energy resources in Victoria has attracted far greater controversy, stimulating intense debate between local communities, environmental lobby groups, heritage organisations, shire councils and energy developers.

The National Trust has called for a state-wide moratorium on developments in order to protect landscapes of significant scenic or botanic value and for the government to undertake a Statewide assessment of landscapes to identify significant areas which should be excluded as potential wind farm locations.

In response to the growing number of wind energy proposals and in an effort to coordinate approvals of wind energy projects, the Victorian Government released its "Policy and Planning Guidelines for Development of Wind Energy Facilities in Victoria" (the "**Guidelines**") in September 2002.

The Guidelines were developed by the Sustainable Energy Authority of Victoria to provide guidance on wind energy planning and development in Victoria and to ensure a framework for community consultation and consideration of environmental, economic, social and cultural issues associated with wind energy projects.

The introduction of the Guidelines is an attempt to address the relatively uncoordinated approach that has been taken to wind energy development in Victoria to date, where individual proposals are considered by local councils and planning tribunals.

The Guidelines contain:

- the Victorian Government's renewable energy policy statement;
- a planning framework for a "consistent and balanced" approach to wind energy projects;
- an outline of information required for planning permit applications;

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* Anne Mustow (Partner) and Miranda Noble (Seasonal Clerk), Blake Dawson Waldron.

- an outline of matters to be considered when assessing applications for developments of 30 megawatts or greater, including appropriate standards to protect the environment and recognise local issues;
- criteria to ensure the protection of critical values under both Commonwealth and Victorian legislation; and
- a requirement that the Minister for Planning be the responsible authority for wind energy proposals greater than 30 megawatts.

WESTERN AUSTRALIA

APPLICATION FOR EXEMPTION FROM EXPENDITURE CONDITIONS [s102(2)(b),(e) & (f) OF THE MINING ACT 1978][*]

General Gold Resources NL v Exmin Pty Ltd [2002] WAMW18

(Mt Magnet Warden's Court, 3 September 2002, Wilson SM)

General Gold Resources NL ("GGR") applied for certificates of exemption from compliance with expenditure conditions in relation to 2 Mining Leases and 2 prospecting licenses at Mt Mulgine south of Yalgoo.

GGR had farmed out the tenements to Normandy which in turn had assigned its rights to Gindalbie Gold NL ("Gindalbie").

At the time of the hearing Gindalbie was establishing a plant to the north of the tenements to exploit known gold deposits at Minjar. Gindalbie was the manager of the Joint Venture between it and GGR. GGR was the subject of a deed of company arrangement. GGR had authorised Gindalbie's lawyers to appear as Counsel.

The Warden held that the fact that GGR was subject to a deed of company arrangement did not prevent it from authorising an agent to act on its behalf as section 102 (1) provides that an application for exemption is to be made by the holder "or his authorised agent". Further Regulations 15 and 31 contemplate expenditure by persons authorised by the holder. The Warden held that Gindalbie was authorised by the holder GGR to bring and appear at the hearing of the applications.

GGR produced evidence that there had been little expenditure on the Tenements and at Mt Mulgine in general and its main focus had been in establishing its plant to the north at Minjar and the nearby "advanced" gold deposits.

GGR sought exemption under paragraphs (b), (e) and (f) of subsection 102(2) and 102(3).

Section 102(2)(b) – Time required to evaluate work and plan future exploration.

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[*] Tim Kavenagh, Corsers, Perth

The Warden was satisfied that considerable information existed that needed to be reviewed and that "the exploitation of the mineral wealth of the State requires a planned and methodical approach, compliance with all aspects of both State and Federal legislation and within the existing financial and economic circumstances that prevail at the time." The Warden was also satisfied that the future development of the tenements was necessary to ensure the long-term future of the applicant's Minjar treatment plant to the North.

Section 102(2)(e) – sub-economic mineral deposit.

Whilst GGR's (and Gindalbie's) primary focus was for gold the tenements also contained a "world class" deposit of tungsten. The price of tungsten has been low for many years but had a substantial increase in late December 2000 which had exited Gindalbie's interest in the deposit. Preliminary reports had been prepared which suggested that a small tungsten concentrate plant could be added to the Minjar treatment plant. Accordingly the Warden held that the deposit was uneconomic but may become viable in the future.

Section 102(2)(f) – sustaining future operations

The uncontroverted evidence was that "ore containing gold from the Tenements is proposed to supplement and increase the operational life of the Minjar Treatment Plant. The tungsten deposit, if exploited would also extend the life of the operation of the Minjar Treatment Plant."

Section 102(3)

The Warden also found that there were "many other reasons which the Honourable Minister would respectfully consider to justify granting the Exemptions."

Accordingly the Warden recommended that the exemptions be granted and adjourned the plaints for forfeiture pending the determination of the applications for exemption by the Minister.

APPLICATION FOR EXEMPTION FROM EXPENDITURE CONDITIONS – SUFFICIENT EXPENDITURE INCURRED[*]

***Resolute Ltd v Hawks* [2002] WAMW 28**

(Before the Warden in Open Court, Warden G N Calder SM, delivered 20 October 2002)

Resolute Ltd ("Resolute") are the holders of M15/259 (the "Tenement"), part of its Bullabulling Mine which was decommissioned and rehabilitated. The expenditure commitment for the year ending 2 August 2001 in respect to the Tenement was $25,100. A Form 5 was lodged by Resolute indicating a shortfall in expenditure. Resolute applied for an exemption from expenditure. Hawks lodged a Plaint for forfeiture based on Resolute's failure to meet the expenditure requirement and objected to the application for exemption.

Resolute discovered prior to the hearing of the exemption application that there had been other expenditure on the Tenement. Resolute led evidence at the hearing that it had, in fact, caused in

[*] Stuart House, Blakiston & Crabb, Perth.

excess of $25,600 to be spent on the Tenement in the relevant tenement year. The Warden accepted that Resolute had met the minimum expenditure requirement. However, the Warden considered that he was bound by the provisions of the *Mining Act* to recommend that the Minister refuse the Application for Exemption.

The Warden acknowledged that if the Minister was to accept his recommendation and refuse the exemption application, the register would, unless amended, (and despite Resolute demonstrating its satisfactory expenditure) continue to show a shortfall in the expenditure and that the application for exemption had been refused.

PARTICULARS OF EXEMPTION APPLICATIONS - WARDEN'S POWER TO MAKE DIRECTIONS IN ADMINISTRATIVE PROCEEDINGS - REQUIREMENTS FOR FORM 18s - PROCEDURAL FAIRNESS AND WARDEN'S POWERS - SECTION 102, REG. 54[*]

Re: NicholLs SM; Ex-Parte Plutonic Operations Ltd **[2002] WASCA 232**

(Full Court, Supreme Court of Western Australia, delivered 28 August 2002)

Background

Plutonic Operations Ltd ("Plutonic") applied for an exemption from expenditure conditions relating to a mining lease. The application listed the reasons for exemption as being "*section 102(2)(b), 102(2)(e) and 102(7) of the Mining Act*" and described those sections of the *Mining Act*. An objector to the exemption application requested further and better particulars of the grounds of exemption. Subsequently, the Karratha Mining Warden ordered Plutonic to file and serve further and better particulars of the reasons for exemption.

Plutonic sought a prerogative writ of *certiorari* to quash the Warden's orders on the basis that the Warden lacked jurisdiction to make an order for further and better particulars. Plutonic submitted that the Warden was not exercising judicial power and had no capacity to direct the form which the proceedings should take or to ensure that the particulars are made available to an objector. Counsel for the Attorney General (as *amicus curaie*) submitted that the Warden had an inherent power to ensure the principles of natural justice are observed.

Decision of the Full Court

The decision of Justice Wheeler, with whom Justices Murray and Miller agreed, was to the effect that most of the orders for answers to the request for particulars sought by the objector were upheld.

The requirements for Form 18

Justice Wheeler considered that it is not necessary in filling out a Form 18 for the applicant for exemption to set out the material facts and circumstances upon which it relies on in order to justify the request for exemption. It is sufficient to identify the grounds of the application broadly by reference to the statute and the reasons listed in section 102(2) or by reference to some other

[*] Mark Gerus, Blakiston & Crabb, Perth.

reason which is either prescribed pursuant to section 102(3) or which the applicant considers the Minister may consider sufficient.

The requirements of natural justice

Justice Wheeler affirmed that the principles of natural justice apply in respect of both an applicant for an exemption and an objector. Justice Wheeler noted that an objector is not entitled to view a statutory declaration sworn in support of the application (which forms no part of the proceedings before the Warden). Accordingly, she considered that an objector is entitled to know (by way of particulars) the factual basis upon which an application for exemption is to be made so that he or she can properly put forward materials in opposition to the application at the hearing.

Directions for statements of material facts and circumstances

Justice Wheeler considered that it is the duty of Warden to ensure the objector is afforded natural justice. This could be done by granting an adjournment of a hearing if an objector had been taken by surprise and had to undertake further investigation. However, Justice Wheeler favoured an approach whereby the Warden programmed the application for exemption by directing the applicant for exemption to furnish the objector with a statement of the material facts and circumstances upon which it proposes to rely at the hearing. In circumstances where material is of a "sensitive" nature the Warden could make special directions. This approach would avoid the inconvenience and expense of adjournments and ensure that exemption/forfeiture proceedings are conducted expeditiously so that the tenement holder did not unduly rely on the benefits of a pending forfeiture application.

Power of Warden to ensure compliance with directions

Justice Wheeler noted that there is no power under the *Mining Act* to enforce directions. Nevertheless, failure to comply with directions will entitle the Warden (in the exercise of his or her discretion) to either grant an adjournment of the hearing or to refuse to permit the applicant to adduce evidence or to rely upon material which had not been made available to an objector in accordance with the direction.

Justice Wheeler also made observations about the scope of the particulars sought by the objector and ordered requiring Plutonic to answer. The requirements of natural justice required Plutonic to provide only that information which was necessary to give notice of the facts and circumstances to be relied upon at the hearing. The judgment of Justice Wheeler sets out the requests for particulars in full and highlights those requests that go beyond the requirements of natural justice.

Justice Wheeler also observed that as a matter of terminology the making of "orders" suggested an exercise of judicial power and, therefore, it was more appropriate in administrative proceedings before the Warden in open court for the Warden to make "directions".

OBJECTIONS TO GRANT OF A MISCELLANEOUS LICENCE – ABORIGINAL HERITAGE AND NATIVE TITLE GROUNDS – FAILURE TO OBJECT UNDER *NATIVE TITLE ACT* - REFUSAL TO HEAR OBJECTOR*

Murrin Murrin Holdings Pty Ltd and Glenmurrin Pty Ltd v Mr Raymond Ashwin

(Leonora Warden's Court, Warden Burton, 16 January 2003, e*x tempore* Reasons)

Background

Two applications for miscellaneous licences were made for the purposes of water management facilities for the Murrin Murrin Project, north of Leonora. Mr Raymond Ashwin ("the Objector") is a registered native title claimant over the land the subject of the applications. An objection to each application was lodged claiming that the grant of the licence will:

- directly interfere with the community life of the native title holder;
- directly interfere with areas or sites of particular significance; and
- involve a major disturbance to the land and waters concerned.

The Applicants' submissions

The Applicants submitted, by reference to the Supreme Court decisions of *Re Warden Calder*[1] and *Re Warden Heaney*[2], that the Warden had a wide discretion when deciding whether or not he should hear the Objector. Particular reference was made to the comments of Justice Steytler in *Re Warden Calder*[3] as to the ability of the Warden, in the appropriate circumstances, to find that there is no occasion or reason for an objection to be heard because:

- the merit of the objection is self-evident;
- the objection is self-evidently without merit;
- the applicant's case reveals the objection to be misconceived; or
- of some other valid reason.

The principal submission of the Applicants was that the Warden should exercise his discretion not to hear the Objector. The objections were based upon native title matters and both miscellaneous licence applications had passed through the procedure under the *Native Title Act* directed specifically at the ventilation and resolution of native title objections, without any such objections being lodged by the Objector, or any other native title claimant. An exercise of the Warden's discretion not to hear the Objector:

- avoided unnecessary duplication, expense and delay;

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* Scott Crabb, Simon Eley and Dane Chandler, Clayton Utz, Perth.

1 *Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 343.

2 *Re Warden Heaney; Ex parte Serpentine Jarrahdale Rate Payers and Residence Association (Incorporated)* (1997) 18 WAR 320.

3 At pages 364-365.

- ensured that objections related to native title are dealt with by the specialist procedures established under the *Native Title Act*;
- prevented the Warden being involved in any collateral attack on the procedures established under the *Native Title Act,* or decisions or outcomes arising from those procedures; and
- avoided any potential inconsistency between the provisions of the *Mining Act* and the provisions of the *Native Title Act* (legislation that the Commonwealth Government fully intended to cover the field).

Orders made by Warden Burton

Warden Burton did exercise his discretion not to hear the Objector and made orders for the grant of both miscellaneous licences. Warden Burton found that in circumstances where:

- a specific native title procedure was established;
- notice triggering this native title procedure had been properly served; and
- there had been no objections lodged within the prescribed time,

he ought to exercise his discretion not to hear the Objector.

APPLICATION FOR MINING LEASE – SN 49 MINING ACT - SURRENDER OF UNDERLYING PROSPECTING LICENCE – APPLICATION FOR DECLARATION[*]

***Castek Pty Ltd v Astro Mining NL* [2002] WAMW 25**

(Perth Warden's Court, Warden Calder SM, 8 November 2002)

Facts

The *Mining Act* (s 49) confers on a prospecting licence holder the right to apply for a mining lease for land over which it holds the prospecting licence/s ("the land"). In accordance with that section, Astro Mining NL ("the defendant") lodged a mining lease application but pending consideration of the application by the Minister it surrendered the prospecting licences it held for the land. Castek Pty Ltd ("the plaintiff") sought a declaration from the Warden that the mining lease application was invalid due to surrender of the prospecting licences.

The plaintiff's submissions

The plaintiff submitted that, to be granted a mining lease, s 49 requires the applicant to hold a current prospecting licence for the land. As the defendant had surrendered the relevant prospecting licences, it was no longer in a valid position to be granted the mining lease.

The defendant's submissions

The defendant submitted that:

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[*] Simon Eley and Daniel Pether, Clayton Utz, Perth.

- a mining lease applicant is not required to hold a current prospecting licence over the land the subject of the application; and
- according to the Supreme Court's decision in *Egypt Holdings Pty Ltd v Esso Exploration & Production Australia Inc*[4], an application for a mining lease made pursuant to s49 is also a valid application under s74 and the lease can therefore be granted in accordance with ss71, 75(7). (These sections confer power on the Minister to grant a mining lease.)

Reasons for decision

Warden Calder applied the principle laid down by *Egypt v Esso* and held that the defendant need not hold a current prospecting licence over the subject land to be granted a mining lease. Expiration or surrender of a prospecting licence does not invalidate an application for a mining lease.

The prospecting licence holder's right *to apply* for a mining lease pursuant to s49 ceases upon expiration or surrender of the prospecting licence, but the right to have a lease *granted* survives beyond termination of the prospecting licence. The Warden held that the surrender of the prospecting licences following application for a mining lease did not jeopardise the defendant's mining lease application.

The Warden also cited policy reasons for rejecting the plaintiff's submissions. Once a prospecting licence holder has lodged a mining lease application the process for granting the lease is beyond the control of the applicant. There may be a significant hiatus between application for, and grant of, the mining lease (in this case over three years) and it would be unfair to expect the applicant to fulfil its prospecting licence obligations for an indefinite period pending grant or rejection of the application.

EXEMPTION APPLICATION AND PLAINT FOR FORFEITURE - USE OF STATUTORY DECLARATION AT HEARING [*]

Tekmet Services Pty Ltd & Quantum Resources Ltd v Hodgkinson **[2002] WAMW 33**

(Perth Warden's Court, Warden Calder SM, 10 January 2003)

Facts

Tekmet Services Pty Ltd ("Tekmet") applied for a certificate of exemption from expenditure in respect of an exploration licence on various grounds. Quantum Resources Ltd ("Quantum") was joined as a defendant to the action as the purchaser and, upon registration, the beneficial owner of the exploration licence. Hodgkinson ("the Plaintiff") objected to the application and sought forfeiture of the licence. By a statutory declaration attached to the exemption application, Quantum

[4] [1988] WAR 122.

[*] Simon Eley and Daniel Pether, Clayton Utz, Perth.

claimed that geologist's evaluations of the potential of the tenement were ongoing and, as yet, an exploration program had not been implemented.

The Plaintiff's submissions

The defendants failed to appear or lead any evidence at the hearing. The Plaintiff submitted that:

- the defendants had no valid basis for seeking an exemption;
- there had been no significant expenditure on exploration of the tenement; and
- they were in breach of their exploration licence conditions.

The Plaintiff requested that the Warden follow the decision in *Nicholls v Roberts and Roberts*[5] and make a recommendation to the Minister that both the application for exemption be refused and the tenement forfeited.

Reasons for decision

Warden Calder held that a statutory declaration made in support of the application for exemption could, in the circumstances, be taken into account for the purposes of his recommendation to the Minister. Warden Calder had no evidence before him to suggest any significant expenditure on the tenement or any reason for lack of exploration. The Warden recommended to the Minister that the application for exemption be refused but withheld his recommendation concerning the plaint for forfeiture until the Minister's decision on the exemption application was published (in accordance with the usual practice).

AN UPDATE ON THE WONGATHA NATIVE TITLE CLAIM*

The Wongatha native title claim[6] *is the first of a number of native title claims to be heard in the Goldfields region of Western Australia. It is significant for a number of reasons, including that it overlaps with and will thus give an indication of the strength of other claims in the region. It will also provide a template for native title litigation in the Goldfields' region*

Background

The Wongatha native title claim is situated in the Eastern Goldfields' region of Western Australia. It is generally north and east of Kalgoorlie and encompasses the towns of Menzies, Leonora, Laverton and Cosmo Newberry (amongst others). It is a consolidation of in excess of 20 prior claims.[7] The extent of the claim can be viewed at the National Native Title Tribunal's web-site at "www.nntt.gov.au".

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5 *Nicholls v Roberts & Roberts* [2000] WAMW 10.

* Marshall McKenna, Partner, Hunt & Humphry.

6 Ron Harrington-Smith on behalf of the Wongatha People v The State of Western Australia and Ors, Federal Court Application No WAG 6005 of 1998.

7 The history of the consolidations, while very interesting, is beyond the scope of this paper.

The area initially the subject of the consolidated claim was approximately 184,000 square kilometres – approximately the area of the State of Victoria. Certain areas of the claim have now been excised to limit overlaps. Notwithstanding the excisions the claim still overlaps with the following claims: *Wutha* – WAG6064/98; *Koara* – WAG6008/98; *Mantjintjarra Ngalia* – WAG6069/98; *Ngalia Kutjungkatja* – W6011/00; *Maduwongga* – WAG0076/98; *Cosmo Newberry* – WAG144/98; and *Ngalia Kutjungkatja #2* – WAG 6001 of 2002.

The overlapping claims can be grouped into two categories. First, some of the overlapping claimant groups claim "shared" native title rights to the area subject of the overlap and might be described as "cooperative" claims. These are *Wutha*, *Koara* and *Mantjintjarra Ngalia*. Others claimant groups seek native title rights to the exclusion of other native title groups and thus might be characterised as "competing" overlapping claims. These are *Ngalia Kutjungkatja* and *Ngalia Kutjungkatja* #2, *Maduwongga* and *Cosmo Newberry*.

There are more than one hundred respondents to the claim, including the State, the Commonwealth, various local governments, various pastoralists and various mining interests. There were previously in excess of 500 respondents, but orders of the Court have reduced the participants to those persons who have a relevant interest in the claim area and who wish to participate (either actively or passively). Industry groups including the Pastoralist and Graziers Association, the Chamber of Mines and the Association of Mining and Exploration Companies are participating in the hearing either directly or indirectly on behalf of industry interests.

Mediation is being conducted in parallel with the litigation process, but it is beyond the scope of this article to speculate on what the outcome of the mediation process might be and/or when any outcome may crystalise.

The proceedings to date

The transcript in the proceedings presently amounts to slightly in excess of 12,000 pages (not including the sometimes extensive video directions hearings). This represents the evidence of in excess of 60 lay witnesses for the Wongatha applicants and overlapping native title claim groups taken over the course of 65 days in Kalgoorlie, Laverton, Leonora, Cosmo Newberry and various sites within the claim area. This portion of the case is now essentially finished, with the balance of the evidence of the applicants and overlapping native title claim groups being either expert testimony or evidence to support occupation of relevant portions of the claim area at the time the claims were made.[8]

It is not the intention of this article to summarise the evidence to date or to draw any conclusions from it. However, it is fair to say that extensive evidence has been given in relation to each claim by many witnesses as to the extent of their claim areas, the rights they may exercise there and elsewhere and the basis of those right. Some evidence has also been given by aboriginal persons from adjacent areas.

One significant aspect of the hearing of evidence from members of the overlapping claim groups is that the decision in Wongatha will have two effects. First, it will resolve which persons have what

[8] This evidence will ultimately be used in support of a submission that any extinguishment ought to be disregarded over relevant areas due to the provisions of section 47, 47A or 47B of the Native Title Act.

native title rights and interests in the claim area. Second, it will give an indication of the merits of the overlapping claims. This is particularly so as potential attacks on the credit of particular witnesses have been foreshadowed.

The balance of the proceedings

Following extensive argument form the parties as to the shape of the further proceedings, the Court has fixed 6 weeks commencing 4 August 2003 for the balance of the evidence in the proceedings including:

- Any outstanding cross-examination of witnesses in respect of whom leave to recall has been given;
- Tender of the applicants' (and presumably the overlapping claim groups') documentary evidence;
- Non-native title claim group respondents' evidence on the establishment of native title;
- All parties' expert evidence (including all cross examination and re-examination);
- All extinguishment evidence (ie documentary evidence of tenure and oral and documentary evidence of occupation by non-indigenous interests (such as pastoralists and mining interests).
- Any evidence of occupation by the applicants or overlapping claim groups for the purposes of sections 47, 47A or 47B of the Native Title Act.

The two noteworthy matters in this regard are the length of time allocated and the orders governing the giving of expert evidence.

The judge has allocated 6 weeks for the balance of the hearing. It has already comprised a total of 13 weeks. Assuming that closing submissions require a further week, the case will exceed 100 hearing days!

Of more practical significance is the manner in which the Court has ordered that the expert evidence be heard. The judge refers to the proposed methodology as "the hot tub". Experts in each discipline are obliged to meet in the absence of orders and prepare a list of topics upon which they agree and a list of matters upon which they disagree. Further, at trial, all experts in the same discipline will be sworn and effectively give evidence at the same time. That is, while each expert will be examined and cross-examined sequentially (as is the normal case) each other expert will have an opportunity to opine about the opinions given and to ask questions of the expert giving evidence. This methodology has been used in other types of cases to assist in the resolution of competing experts (such as economists in Trade Practices matters). This case, to the best of the writer's knowledge, will be the first time the methodology has been used in a native title matter.

In light of the above, the expectation is that the hearing of evidence in this matter will conclude on or about 12 September 2003. There are presently no directions programming the balance of the proceedings.

It is, however, to be expected in a case of this magnitude, that each of the parties will require at least some months to prepare for final submissions. Accordingly, it is unlikely that the closing submissions will be concluded until late this year or early 2004. The process of writing native title judgements is obviously a long one given the vast amount of material applicable. Thus, it is to be

expected that a decision will not be delivered until the middle of 2004 and it may well be longer in its gestation.

Where to next?

As noted above, the *Wongatha* claim is the first hearing to proceed in the Goldfields' region. There are a number of other cases that are presently being case managed with a view to hearing dates being allocated.

Presently, the expectation is that the other Goldfields' cases will be heard in the following order: *Central West Goldfields* WAG 68 and 6216/1998 and part WAG 76/1997, 2 and 6243/1998; *Koara* WAG 6008/1998 and part WAG 43, 6040, 6050, 6059 and 6132/1998; *Mantjintjarra Ngalia* WAG 6069/1998 and WAG 6001/2002; *Central East Goldfields* WAG 70/1998 and part WAG 76/1997 and 6170 & 6243/1998; *Wutha* WAG 6064/1998 and part WAG 43 & 6132/1998; *Ngadju and Ngadjungarra* WAG 6020 and 6221/1998; and *Nullabor* WAG 6162/1998.[9] The consolidated *South West Area 3* claim WAG 6097 and part 6130, 6221 and 6181/1998 has recently been case managed as part of the Goldfields' claims rather than with the "South West" claims. It remains to be seen where that case will placed amongst the other cases.

Mediation is ongoing in relation to all claims – at least in the sense that the Court has referred each matter to mediation. It is to be hoped that a decision in *Wongatha* will assist in the mediation of other claims – but that will, of course, depend on the terms of the decision.

The Court is convening a joint case management conference in relation to the above claims on an approximately biannual basis with a view to overseeing their progress to hearing in an orderly manner, including monitoring the progress in the mediation process. It has been recognised that the hearing of the various cases needs to be staggered to ensure that the relevant parties have the resources to participate in the claims (ie access to relevant experts, experienced counsel and finances, all of which are finite commodities). At the time of writing, no date for a further joint case management conference has been set. While it was initially expected to be convened in February or March, due to the logistical difficulties, it may not be convened until after March.

Conclusion

The above is a recitation of the time that the *Wongatha* claim has taken thusfar. This case illustrates that native title claims require an extremely long time to resolve through the litigation process. It is likely that the resolution of the claims in the Goldfields will not be resolved for some years yet.

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[9] Details of these claims can be obtained form the National Native Title Tribunal via its web-site, referred to above.

AUDITOR GENERAL FOR WESTERN AUSTRALIA PERFORMANCE EXAMINATION: LEVEL PEGGING - MANAGING MINERAL TITLES IN WESTERN AUSTRALIA, JUNE 2002*

Introduction

In June 2002 the Auditor General for Western Australia (AG) published a Performance Examination Report addressing allegations that the Department of Mineral and Petroleum Resources (DMPR) has fallen short in fulfilling its obligations under the *Mining Act* 1978.

The Auditor General stated that it is not acceptable for agencies to ignore rules or devise strategies "in the spirit" of legislation. Consequently, the report's recommendations are relevant not only to the DMPR, but to all government agencies that deliver public services through legislative programs.

Recommendations

Key recommendations were made in three areas:

- **Policy and procedure**

Despite ongoing review by the Mining Industry Liaison Committee (MILC), amendments to the *Mining Act* 1978 have been backlogged since 1996, causing increasing amounts of unauthorised administrative policies and procedures within the DMPR. A primary recommendation was that the DMPR actively pursue the necessary amendments so that all operational procedures are reliably authorised.

The AG also noted the lack of formal guidelines and criteria for staff members to follow when engaging in administrative decision-making, especially with respect to assessing mineral title applications and expenditure exemption applications.

- **Operational**

Significant delays in the mineral titles application process has led to the creation of *de facto* titles which cost the State an estimated $4.58m in lost revenue. The AG recommended that DMPR identify and address delays in the process, and minimise the opportunities for delay or suspense by applicants.

An audit revealed that over half of the titleholders fail to report annual expenditure or report expenditure less than what is statutorily required. Of the portion of tenement holders that do report meeting annual expenditure requirements, over a third provide insufficient evidence to support their claim. Accordingly, the AG recommended DMPR rigorously monitor and enforce compliance with the Act, and tenements that have not complied ought to be subject to forfeiture.

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* Chris Stevenson and Wallis Hearn, Mallesons Stephen Jaques (Perth).

- **Monitoring and review**

Problems were identified with record keeping by DMPR. Multiple record keeping is compromising the integrity of the records, and the absence of a complete single account is affecting the efficiency and reliability of data retrieval. The AG recommended that DMPR review it's practices, including incorporating the creation and validation of mineral title records to become an integral part of their operational procedures. The AG also noted that DMPR needs to annually conduct internal audits of it's records system, and ensure compliance with the *State Records Act* 2000.

Information or queries

Readers can access a full copy of the report from the following link: http://www.audit.wa.gov.au/reports/report2002_01/pfreport2002_01.html. For further queries or a hard copy of the report, readers can contact the Auditor General's Office.

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ARTICLES

RISK ALLOCATION IN PROCESS ENGINEERING PROJECTS

Andrew Stephenson*

Many of the issues which arise in process engineering contracts are similar to those which arise in other engineering contracts. However, because of the risk associated with process engineering projects the usual participants are unlikely to be willing to take full risk. Accordingly, there is usually significant residual risk left for the project vehicle and/or debt. Identifying that risk is important for determining the commercial viability of the project, after considering both the risks and rewards and developing strategies for managing that risk. The principal areas of risk associated with such projects relate to failures of the process engineering, defects in design of other aspects of the engineering (civil, structural, mechanical, electrical or instrumentation), defects in construction, delay in reaching mechanical completion, delay in commissioning and ramp up, and inadequacy of insurance. This paper deals with the balancing of these risks between the four principal players in such projects, namely, the process supplier, the EPC/EPCM Contractor, the Trade or Subcontractors and the insurers.

INTRODUCTION

The purpose of this paper is to consider the special challenges which arise in respect of process engineering contracts.

There are four principal participants in such projects. First, the process supplier, who is usually an engineering company with proprietary technology such as Kellogg in the oil industry and Sherritt/Dynatec in the hydrometallurgical industry. Many of these organisations are not full service. Their primary business is to provide the process engineering design or technology which principally consists of the chemistry necessary to achieve the process which produces the product from the process plant. Secondly, the EPC/EPCM Contractors who are primarily responsible for the other engineering design and construction of the project. However, the risks accepted by these two types of contractors are very different. The risk accepted is a function of the different contracts. Both forms of contract will be discussed in this paper. In each case the EPC or EPCM contractor will be responsible for the co-ordination of the detailed design and construction of the vessels, pipework and other equipment to facilitate process to a timetable and a budget. Thirdly, Trade or Subcontractors engaged by the EPC/EPCM contractor. While sometimes these contractors will have limited design responsibility they are primarily responsible for construction. Fourthly, insurers who assist the parties by taking some of the risk. The nature and extent of the risk which insurers are prepared to take is in a state of flux. This paper will also deal with recent experiences in the market relating to such insurances.

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ENGINEER, PROCURE AND CONSTRUCT

The EPC form of contract is popular with smaller mining companies, particularly those seeking to finance on a limited recourse basis. The principal advantages of this form of contract are that the contractor will take the principal risks relating to the cost of construction, the time for completion and the quality of the finished product.

The extent to which these risks are assumed will depend upon the market from time to time, the nature of the project and the number of competitors in the market place available to tender for the work.

It is unusual for EPC contractors in the process engineering area to assume full responsibility for cost, quality and time. It is common that caps or limitations on liability are negotiated. Notwithstanding this, there are number of examples of contracts having been let in the last 10 years where significant risk has been assumed by the EPC contractor.

How risk is allocated under an EPC contract

Risks and their allocation are considered under the following headings:

(i) Process engineering

(ii) Civil, structural, mechanical and electrical engineering

(iii) Construction

(iv) Time for mechanical completion and liquidated damages

(v) Commissioning and ramp up

(vi) Works insurance.

Process engineering

It is common for the process engineering to be provided by someone other than the EPC contractor. Therefore, it is necessary for the owner to enter into some licence arrangement with the process provider.

In relation to mineral processing no two ore bodies are likely to be the same. Therefore, a process which works in one part of the world will not necessarily work (unamended) with an ore body in another part of the world. It is therefore usual for the owner of the process engineering technology to be engaged to do laboratory and other testing to modify successful processes used elsewhere to accommodate unique aspects of a particular ore body.

The bargaining position of process engineering providers is usually high. They own the intellectual property which the owner wishes to access. Usually the principal has taken care to ensure that the process it has selected is the best available in the market. Therefore the owner of that technology can insist on its terms or there will be no deal.

This produces significant problems in a risk sense, where the process provider insists upon extensive limitations on liability.

For example, in a recent project the contract limited the process provider's liability to:

(a) reperformance of its workscope; and

(b) a further cap which limited the value of such rework to $3m.

Accordingly, there was no allowance for consequential loss in the event that the plant was built and the process did not work.

At the time of contract it was recognised that there was significant risk in the event that the process did not work and further engineering and construction was required (let alone consequential losses, such as loss of revenue). Accordingly an attempt was made to bolster the warranty given by the process provider by the owner taking out, on the process provider's behalf, $50m professional indemnity insurance. That insurance was a conventional "claims made" policy.

Such insurance only responds when:

(a) a claim is made; and

(b) the process provider is liable.

Given that there was a limit of liability in the contract between the process provider and the owner of some $3m, the insurance policy could only respond in respect of a claim up to $3m. However, in this case, the excess under the policy was $3m. Accordingly, the premium had been paid whilst no insurance was actually provided.

In this circumstance the owner's sole rights associated with a process failure were limited to having the process provider redo the design and test work which was the subject of the licence and ancillary service agreements.

A failure of the process engineering may be capable of being fixed relatively easily by introducing more equipment, for example, to deal with impurities that are adversely affecting the product. However, more fundamental problems with the process can result in total project failure as a consequence of the plant being unable to process the particular ore to produce the required product.

Accordingly, care needs to be taken to ensure that the risk is adequately sheeted to an appropriate party. This will usually require careful drafting of the relevant agreements with the process provider together with detailed support from insurers.

Civil, structural, mechanical and electrical engineering design

Pursuant to an EPC contract, the contractor is responsible for both the engineering (ie design) other than process design and the construction. Accordingly, the risk of the proper performance of the design work is with the EPC contractor.

There are 2 common issues which give rise to difficulty in this area being:

(a) early works contractors;

(b) insurance issues.

Early works contractors

It is common in the initial phases of the project for the owner to engage engineers on an EPCM basis (discussed below) for the purpose of drawing design parameters which define the workscope. These design parameters become a contract document in the subsequent EPC contract. At some point it becomes critical to the overall program for the project that long lead time items are ordered. If this time arises before the EPC contract is let, the owner will enter into the necessary contract as principal.

If these contracts remained with the owner, then the risk allocation in relation to the project would be split between the EPC contractor and the early works contractors. From a legal and administrative point of view this is undesirable. Therefore, it is common to provide mechanisms whereby these earlier works contracts can be novated to the EPC contractor so that it can take responsibility for the early works contractors. This requires appropriate provisions in both the early works contracts and the EPC Contract to effect the necessary novation.

However, difficulties arise where the early works contracts are less favourable to the owner than that ultimately negotiated with the EPC contractor. In these circumstances, the EPC contractor (properly advised) will be unwilling to accept responsibility for the early works contractors in circumstances where it cannot pass the liability it is assuming back to those contractors because of unfavourable terms originally negotiated by the owner under the early works contract arrangement. It is therefore important to ensure that all contracts, including early works contracts, are consistent or that the risk allocation in the early works contracts is superior to that contained or to be contained in the EPC contract.

Insurance

As with the process provider, it is common for the EPC contractor to take out professional indemnity insurance to cover itself in the event of a claim by the owner. Often, the EPC contractor will seek to limit its liability to the extent of the insurance available to it.

The example given above in respect of insurance obtained under agreements for the provision of process engineering services is applicable here. Obviously, if the limit of liability under the EPC contract is less than the insurance limit, the insurance will be limited to the value of the limit of liability in the EPC Contract (if the insurance contract is written on a claims made basis, as the vast majority are).

The relationship between liability under the EPC contract and the insurer's liability gives rise to significant levels of anxiety in contractors. There is a tendency for contractors to try and negotiate provisions which state that they will only be liable:

(a) if the insurance responds; and

(b) only to the extent of such response.

Implicit in such clauses is that the owner takes the risk of the solvency of the insurer. However, more importantly, much of the drafting which tries to achieve this outcome produces a Catch-22 along the following lines:

(c) the claims made insurance policy only responds where the EPC contractor is liable;

(d) the EPC contractor is not liable unless the insurance responds.

Such arrangements produce a mismatch between the EPC contract and the insurance contract which provide the insurer with a respectable argument that it can never be liable. This is because its liability is dependant upon the contractor being liable but the contractor is not liable until the insurer is liable. Accordingly, great care needs to be taken to ensure that liability will arise in the contractor which will satisfy the requirement for the insurer to be liable under the relevant claims made policy.

The amount of cover available to a contractor is (obviously) also dependant upon the wording of the relevant insurance policy. Not all professional indemnity policies are the same. A common exclusion under professional indemnity policies relates to liability assumed by a professional not being in excess of that which would have been imposed by the common law. Professionals (such as designers) are usually only liable at common law for a failure to exercise reasonable care.[1] However, many EPC contracts stipulate a contractual liability to perform the work such that the design is "fit for its intended purpose". Such wording places a significantly higher level of liability upon the contractor than that imposed by the common law. Accordingly, if a claim is made pursuant to such a provision and the insurer has a standard exclusion in respect of liability in excess of that usually assumed, the insurer may decline liability or argue that the policy does not respond.

To avoid this outcome, it is good practice to obtain written confirmation from the insurer that it has seen the relevant EPC contract and that its policy extends to cover the liability stipulated.

Finally, on this issue it will be important for the owner to understand the terms of the contractor's insurance policy, particularly the exclusions of liability. Accordingly the owner should require the EPC contractor to provide copies of any insurance that it takes out from time to time (in accordance with the contract) and preferably the wording should be procured from the contractor prior to entering into the EPC contract.

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[1] *Voli v Inglewood Shire Council* (1963) 110 CLR 74; *Brickhill v Cooke* [1984] 3 NSWLR 396; *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.

Construction

Pursuant to the usual EPC terms, the contractor will assume responsibility for completing the works:

(a) to the standard specified (if any);

(b) using materials that are of merchantable quality and are otherwise fit for their intended purpose;

(c) in a proper and workmanlike manner.

In the process engineering area, EPC contractors will (by reference to general caps) seek to limit their liability in relation to this aspect of the work as well. Generally, insurance is not available for defective workmanship or materials (see discussion below in relation to works insurance).

However, the contractor does have a method of sharing the risk associated with defective materials and workmanship. Pursuant to most EPC contracts, the EPC contractor will enter into a myriad of:

(a) supply agreement; and

(b) subcontracts.

At this level of the contractual chain, there are many more competitors able to do components of the work. For example, the EPC contractor will usually enter into a subcontract with a civil engineering contractor to provide civil and structural engineering services. Limits of liability (particularly in relation to materials and workmanship) in this market are rare. Accordingly, such contractors are often willing to provide uncapped warranties in relation to construction.

However, as the subcontracts become more exotic and the number of available suppliers for the equipment in a question reduces, then there is usually a corresponding increase in the difficulty of securing complete warranties in relation to those contracts.

Accordingly, from a commercial point of view, it seems that an owner should try to either:

(a) secure a warranty from the EPC contractor that its liability in relation to the quality of construction be limited only to the extent that it is unable to pass that liability on to third party contractors; and

(b) at least in respect of the significant subcontractors, secure collateral contracts to take advantage of the benefit of the warranties which are provided.

Time for mechanical completion and liquidated damages

Pursuant to the usual EPC contract terms the contractor will accept responsibility to complete the works by a particular time, subject to an extension of time provision.

Obviously, the extent of the risk assumed by the contractor will be a function of the extension of time provision. It is usual to provide extensions of time for limited force majeure events (ie events

beyond the control of either the owner or the contractor) and for acts of prevention by the owner or those for whom the owner is responsible.

In relation to the second class of delay, delay arising as a consequence of acts or omissions of the owner, it is essential that the owner provide a proper mechanism for granting extensions of time to the contractor. Failure to do so is likely to render the time provisions in the contract unenforceable as a consequence of the prevention principle.[2] Pursuant to that principle if circumstances arise whereby:

(a) the owner or those for whom the owner is responsible (principally its agents and servants) cause a delay to the contractor; and

(b) Either:

(i) there is no mechanism in the contract for granting an extension of time for such delay; or

(ii) there is such a mechanism but it does not work in the circumstances;

then, at common law, the time provisions and associated liquidated damages clauses will be unenforceable.

It is also common in such contracts to provide that the contractor is liable to pay the owner liquidated damages in the event that the project is delayed. Such liquidated damages must be a genuine pre-estimate of the loss.[3]

A common mistake is to estimate the total revenue likely to be lost as a consequence of a delay in mechanical completion. If the process plant is processing a mineral reserve, a delay in mechanical completion merely causes a delay in the revenue. The revenue is <u>not</u> lost. It is therefore inappropriate to calculate the liquidated damages by reference to the anticipated lost income during the period of delay.

Assume that the mine has reserves of 30 years. The project is delayed by a year. No income is earned in the first year in which income was intended to be earned. That income has effectively been postponed to year 31. Therefore, the appropriate calculation of the anticipated loss is:

(total lost revenue during period of delay) minus (the net present value of that income in year 31)

Where contracts exclude liability for consequential loss, except to the extent of liquidated damages, it is prudent to provide that if the liquidated damages clause fails for any reason, then the

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2 *Peak Construction Limited v McKinney Foundations Pty Ltd* (1970) 1 BLR 111; *SMK Cabinets v Hill Modern Electrics Pty Ltd* [1984] VR 391; *Turner Corp Ltd (in liq) v Co-ordinated Industries Pty Ltd* (1995) 11 BCL 202; *MacMahon Constructions Pty Ltd v Crestwood Estates* [1971] WAR 162; *Turner Corporation Pty Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1994) 13 BCL 378.

3 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79; (1994) 34 BCL 378; *Esanda Finance Corp v Plessnig* (1989) 84 ALR 99; *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551; *AMEV UDC Finance Ltd v Austin* (1986) 162 CLR 170.

owner will be entitled to general damages for consequential loss to the limit stipulated by the liquidated damages clause. Otherwise, the owner can find itself in the invidious position of not being able to enforce the liquidated damages provision and not being able to recover general damages as a consequence of an independent consequential loss limitation.

It is extremely common in EPC forms of contract for there to be a significant limit on the amount of liquidated damages available, perhaps 10% of the contract sum or less. This is particularly important for the providers of debt who are anticipating that they will be paid interest and capital from the income flow of the project.

Extended liquidated damages insurance

In the last 5 or 6 years some projects have had the benefit of insurance which is designed to pick up the risk after the contractor's liability has been exhausted. Such insurance has been available pursuant to a line slip through Adam Brothers of New York. The extent to which such is insurance currently available, post 11 September 2001, is uncertain.

However, these policies mirror the construction contract provisions in relation to time and put the insurer on risk after the date for mechanical completion (as extended pursuant to the EPC contract) and contain an excess which is usually equal to the extent of the liquidated damages which the contractor has agreed to pay for delay.

These policies are relatively unusual and bespoke. The insurers will (increasingly) engage in an exercise of due diligence. They will:

(a) be particularly interested to understand the quality of the contractor and its previous performance. Therefore, insurance is more likely to be obtained if the contractor is an international organisation of repute;

(b) be particularly interested to understand the extent to which the contractor has accepted liability for the losses due to the delay (therefore if the liability is modest, the insurer will be more uncomfortable, because they will want to ensure that somebody in control of the risk has a legitimate interest in ensuring that the risk does not occur);

(c) want to do a due diligence (at the insured's expense) in relation to the design. Any bankability studies by independent engineers are of assistance, but the insurers will usually engage engineers to do a further review;

(d) be keen to establish that there is no novel or experimental engineering associated with the project. They will seek disclosure in proposal forms relating to this issue. They will also seek to make it a warranty (entitling recision of the policy if breached) to the effect that the project does not contain any such novel or experimental technology. If the insurance is governed by English law (not unusual given its bespoke nature), the insured may (notwithstanding a contrary legislative intent) not have the benefit of the Australian *Insurance Contracts Act* 1984 ("**the Act**") and will run a high risk of the policy being

avoided if there is a non-disclosure or breach in respect of these issues, even if the novel and experimental technology does not adversely affect the project or cause the delay[4].

A large claim has been made by (and paid to) Anaconda Operations Pty Ltd (the joint venture vehicle for the Murrin Murrin Nickel Mine) against such a policy in 2000. The settlement sum (after international arbitration in London) was A$113m. Accordingly it can be expected that any other process engineering projects in Australia will attract significant premiums, which may adversely affect the commerce of taking out such insurance.

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[4] Insurers are likely in the future to insist that the insurance policy be subject to English law. If they are successful then the insured will not be able to avail itself of the protection provided by the Act. The draftsmen of the Act anticipated such a policy and provided for it in section 8, which reads:

> "8. **Application of Act**
>
> (1) Subject to section 9, the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.
>
> (2) For the purposes of subsection (1), where the proper law of a contract or proposed contract would, but for an express provision to the contrary included or to be included in the contract or in some other contract, be the law of a State of or a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory."

However, if proceedings are instituted in England (for example) first, then a judge or arbitrator will apply English conflicts rules. The Act (including section 8) will be irrelevant unless and until the Court or arbitrator determines that Australian law applies. This will not occur where there is an express provision in the policy that English law applies because such clauses are determinative pursuant to English law. Under the Contracts (Applicable Law) Act 1990, the provisions of the EEC Convention on the Law Applicable to Contractual Obligations are incorporated into the law of the United Kingdom. Article 3, paragraph 1 of this Convention provides that, in relation to contractual obligations in any situation [other than those expressly excluded] involving a choice between the laws of different countries, a contract will be governed by the domestic system of law chosen by the parties.

Accordingly, for the Australian Act to become relevant the entity wishing to rely upon section 8 of the Act probably needs to:

- commence proceedings in Australia; and
- seek an anti-suit injunction preventing the commencement of proceedings outside Australia,

to avoid the outcome in *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 where proceedings were simultaneously conducted in Australia and England (see also *Akai Pty Ltd v People's Insurance Co* [1988] 1 Lloyd's Rep 90). Even where an Australian Court has the sole conduct of the proceedings the application of the Australian conflicts rules may result in a law other than Australian applying. The relevant Australian conflicts rule requires a consideration (absent a proper law clause in the contract) of the systems of law with which the transactions has its closest and most real connection (*Bonython v Commonwealth* (1950) 81 CLR 486; [1951] AC 201 at 219. See also *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 217; *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* [1981] 1 NSWLR 366; *KA & C Smith Pty Ltd v Ward* [1988] 45 NSWLR 702 at 720-1 per Austin J.

Commissioning and ramp up

Each process plant is unique. Accordingly, it is always anticipated that it will take some time from mechanical completion to commission the plant and ramp it up to full production.

At this stage of the project, the owner invariably wants to be in control of the plant. However, particularly with inexperienced owners, there is significant risk that it will not have the technical or other expertise to effectively ramp up the plant to full production or educate its operators as to how to operate the plant.

For these reasons, where:

(a) there are inexperienced owners; or

(b) the project is financed on a limited recourse basis

the owners will sometimes enter into an agreement whereby the EPC contractor or perhaps the process provider, provides commissioning and ramp up assistance.
Such contracts often stipulate a ramp up curve and liquidated damages for failure to achieve production levels anticipated at the time of contract.

Usually, the liquidated damages stipulated are a cap on the contractor's liability.

Again, the prevention principle (discussed above) is very important. If the production levels set are not achieved as a consequence of an act or omission of the owner then, pursuant to the prevention principle, it is highly arguable that the liquidated damages payable pursuant to such a ramp up agreement will be unenforceable. When coupled with an exclusion of all consequential loss liability the owner will arguably be left with no remedy.

This outcome is a distinct possibility in circumstances where the owner has taken over responsibility for the operation of the plant (as is the usual case). Accordingly it is recommended that there be a mechanism, similar to an extension of time provision under a conventional construction contract, whereby the thresholds stipulated in the contract can either be adjusted or the period in which performance is to be achieved can be changed to take account of acts or omissions of the owner.

Again, it is also important to ensure that the liquidated damages clause is not a penalty and is a genuine pre-estimate of the loss.

Works insurance

Works insurance or Construction All Risk (CAR) insurance is a fundamental component of risk mitigation in process engineering projects for both the owner and the EPC contractor. However it should be noted that this type of insurance has significant limitations. In addition there is a marked difference between the risk that is covered by policies that cover projects occurring off-shore and those occurring on-shore.

The primary purpose of CAR insurance is to insure the physical works or facilities being constructed against loss or damage arising from an "occurrence". In other words this type of

insurance is an event based insurance where the insurance will trigger if an "occurrence" happens which causes physical loss or damage to the works. "Occurrence" will be defined by the policy wording but in general it will include events such as fire, natural disaster as well as the negligence of or mistake made by one of the parties. Both the owner and the EPC contractor are named as insured and it is common for either the owner or the EPC contractor to take out the insurance.
With such policies care should be taken, where a party to the construction contract give indemnities to the other party which are also given by an insurer, to:

(a) avoid creating coordinate liabilities between the indemnifying party and the insurer which would give the insurer the right to seek contribution from the indemnifying party;

(b) ensure that the policy of insurance taken out in the joint names of the parties has a waiver of subrogation clause, to avoid the insurer subrogating to the non-indemnifying party's right and seeking to recover from the indemnifying party[5]

Finally, exclusions of liability can become problematic. The extent and nature of the exclusions will have a significant impact on the risk allocation that will be agreed as between contractor and owner. In this regard there is a major difference between the likely approach for an on-shore project and an off-shore project given that the nature of exclusions in off-shore CAR policies has undergone significant recent change.

Onshore projects

In the on-shore scenario defective design or workmanship is usually excluded. This type of exclusion generally contains a carve out for consequential physical loss or damage caused by a defective part or defective workmanship.

For example, if the foundations to a vessel in a process plant are defective and as a result the foundations fail causing consequent damage to the vessel and associated pipe, the cost of:

(a) rectifying the foundations would not be covered;

(b) rectifying the vessel and associated pipework would be.

As a consequence it is common for the EPC contractor to indemnify the owner for any physical loss or damage caused to the work. Accordingly the EPC contractor will usually accept risk for:

(a) defective work not insured;

(b) physical loss or damage caused to the work as a consequence of defective work -insured; and

(c) any economic losses which flow (i.e. liquidated damages if the completion date is delayed as a consequence of performing reinstatement) – not insured.

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[5] See *Caledonia North Sea Ltd v London Bridge Engineering* [2000] Lloyds Rep IR249; *Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291 and the very useful discussion by Mark Williams "House of Lords Final Chapter in Elf saga" (2002) 17(5) ILB 33.

The only carve out would be the "excepted risks" which include things such as war and nuclear risk (almost invariably excluded from CAR cover).
Accordingly:

(a) the CAR insurer would ultimately accept risk for the physical loss or damage (ie the cost of reinstatement) but not the defective work or the economic losses;

(b) the EPC contractor accepts (usually and subject to exclusions and limits of liability) the risk of defective work; and

(c) The owner accepts the risk of the limited "excepted risks" and any risk in excess of the exclusions or limitations in respect of which the EPC contractor and the owner have agreed will rest with the owner.

Off-shore projects

The situation for off-shore process engineering projects has been similar in the past although in the last few years there has been a significant change in risks which the insurance market is prepared to accept, which in turn has had a profound impact on risk allocation as between owner and EPC contractor. Clearly events like the sinking of Petrobras P36 platform (one of the World's largest floating platforms at the time) have influenced underwriters.

There is a very limited pool of insurance for off-shore construction risk operating out of London (which is one of the only markets that will insure this type of risk). The Wellington syndicate is the lead underwriter and has effectively set the market precedent by preparing a "standard" policy wording for off-shore construction risk. The latest wording (called Welcar 2020) has formalised some significant changes which have been driven by the underwriter's concerns that they were shouldering too much responsibility for owner's and EPC contractor's mistakes. Welcar 2020 has the same exclusion for defective parts as discussed in the context of on-shore risk. However it differs significantly in the sense that:

(a) there are differing tiers of insured namely "principal assured" (generally the owner) and "other assured" (generally the EPC contractor and possibly sub-contractors);

(b) there is an exclusion for losses arising out of any failure to comply with the "principal assured's" QA/QC requirements (which must be written into the EPC contract). Arguably this type of exclusion has been introduced because (in the words of the CEO of Petrobras prior to P36 sinking), "onerous quality requirements and outdated concepts of inspection and client control" had been stripped away in order to deliver the project more quickly and cheaply;

(c) the CAR insurer has a right of subrogation as against the "other assured" where loss arises as a consequence of the failure to comply with QA/QC requirements, although the "principal assured" remains insured.

The long-term effect of these changes is hard to judge. However, the following is immediately apparent:

(a) the market is unsure about what might constitute a failure to comply with QA/QC requirements. There is a general lack of confidence in the insurance as a consequence;

(b) this lack of confidence has manifested itself in EPC contractors no longer being willing to accept risk for loss of or damage to the works at all or for only the level of the deductible under the policy.;

(c) many EPC contractors are demanding that the owner indemnify them for loss or damage caused above a particular limit (again, commonly the level of the deductible). The indemnity is to avoid, from the contractor's point of view, the operation of the insurer's right of subrogation against the "other assured".

This leaves an owner in the uncomfortable situation of taking the risk for loss of or damage to the work caused by the contractor's failure to comply with QA/QC requirements even when the loss or damage is caused by the contractor. Understandably this has created a level of uncertainty as to how these risks should be balanced.

ENGINEERING PROCUREMENT CONSTRUCTION MANAGEMENT

Pursuant to this form of contract the contractor is responsible for:

(a) design;

(b) procurement of necessary materials and equipment;

(c) management of the construction.

The important difference between the EPCM and EPC form of contract is that the contractor is not a principal in relation to:

(a) procurement of plant and materials;

(b) construction.

Rather, the EPCM contractor acts as the owner's agent and creates contractual relationships with suppliers and trade contractors. Each trade contract is a head contract directly between the owner and the trade contractor.

Accordingly, the principal liabilities of the EPCM contractor relate to:

(a) negligence in the performance of the design work; and

(b) negligence in managing the procurement and construction work.

Advantages/disadvantages of EPCM and EPC contracts

Obviously the advantage of an EPC contract is that the owner defines the work usually by reference to a performance specification. The contractor takes responsibility on a single point basis (except perhaps in relation to process engineering) in respect of the following:

(a) cost of completion (subject to limited adjustments);

(b) the time for completion (subject to extensions of time);

(c) the quality of the design and work (subject to any exclusions).

However, the major disadvantage of the EPC contract is that the detailed design is the contractor's prerogative. Accordingly, great care needs to be taken in defining the design parameters so that the owner obtains a project of the required standard. This usually requires more than simply stipulating performance criteria in relation to the output of the plant.

Particularly, in a lump sum environment, the commerce of the transaction will result in the contractor wanting to deliver the project at the lowest possible cost. One of the ways in which the contractor can lower costs is, where it has a design discretion, choosing the cheapest possible design outcome consistent with the design criteria.

It is therefore important to ensure the design criteria deal with all aspects which will be important to an owner including:

(a) performance;

(b) whole of life costs;

(c) operability (including maintenance);

(d) mechanical availability (insofar as this is not covered by a performance criteria expressed in terms of output).

Even where these things are stipulated, the usual provisions in an EPC contract require the contractor to provide copies of the designs to the owner. The EPC contract, if properly drawn, will have 2 provisions which are relevant to this exchange being:

(a) a provision entitling the owner to reject the design **if it does not comply with the design criteria**; and

(b) a variations clause.

Many disputes arise in this form of contract where the owner has rejected designs on the basis that they do not comply with the design specification (as the owner understands it). Often the contractor will argue that its design did comply and that the owner's rejection of its design is based upon engineering preference (often driven by important issues such as whole of life costs, operability and maintenance).

In these circumstances the contractor will argue that the directions rejecting the design (which the contractor contends complies with the specification) are instructions to vary. This will leave the owner exposed to unintended claims for variations.

It is for this reason that experienced project managers of EPC contracts avoid commenting on the design produced by the EPC contractor during the course of construction. They, the owners and debt ultimately rely on the warranties by the contractor that it will produce a plant which meets the design criteria. Such reliance, where the contractor fails to meet the design criteria, can cause significant delay either in mechanical completion or commissioning and ramp up phases.

This is obviously problematic, but more so where there are significant limitations on liability. For example, if there is an overall limit of liability of 20% of the contract sum and there is a significant failure of design and construction which requires rectification costs of 50% of the original contract sum, then the owner will be left with 60% of the risk associated with the failure of the contractor to achieve the contractual objectives. In addition the consequential losses will be limited by any cap on liquidated damages. While these figures seem to be extraordinary, and are probably unlikely to regularly occur, litigation is currently on foot (the subject of an arbitration) where the owner contends that the defects in the plant exceed 50% of the value of the original contract price. Accordingly, if the cost of an EPC contract includes significant limitations on liability, the owner should consider whether EPCM is a more appropriate method of project delivery because it gives the owner superior control to avoid things going wrong.

Because the EPCM contractor is the agent of the owner and does not take responsibility for the final cost of construction or the time for completion (except to the extent of its management role), the owner can interfere extensively during the course of design and construction to ensure that it achieves what it requires. This would appear to be an appropriate course where the owner has significant technical resources who will be able to control the design process.

How risk is allocated under an EPCM contract

It should be understood that this does not mean that the owner is left assuming all of the risk associated with:

(a) cost;

(b) time;

(c) process design;

(d) other design.

Under conventional EPCM contracts those risks are dealt with as discussed below.

Cost

Primarily the EPCM contractor will be responsible for developing budgets and managing the cost in accordance with those budgets. The EPCM contractor will not be liable to the owner simply because the cost of construction exceeds the budget. However, it does have an obligation to

exercise reasonable care from a financial point of view. This is a relatively low duty and cost blowouts will not generally be the responsibility of the EPCM contractor.

However, as design proceeds, packages of work will be developed and let to trade contractors (usually) on a lump sum basis with a conventional risk allocation allowing increases in cost due to specified events only.

By the time all of those contracts are let the owner will have to recast its budget to a sum equal to the aggregate of those contracts plus an allowance for contingencies. At this point, there is reasonable certainty as to the price outcome, but the risk profile is still less attractive than under a conventional EPC contract. This is because the owner will generally take the co-ordination risk as between the trade contractors. Therefore, if:

(a) trade contractor A delays trade contractor B (because for example trade contractor A must complete its work before trade contractor B can start its); or

(b) trade contractor A damages trade contractor B's work; or

(c) trade contractor A causes the owner to be in breach for any other reason of trade contractor B's contract,

then the owner may (depending upon the drafting of the trade contract) be liable to trade contractor B and may (again depending upon the wording of the trade contracts) have a cause of action against trade contractor A.

In a clear-cut case where the facts are well understood and/or do not depend upon disputed engineering opinion, the owner should be able to effectively transfer this risk to trade contractor A (preferably by way of setoff or having access to any security provided pursuant to the trade contract). However, in less clear circumstances a situation often develops where each trade contractor holds the other responsible for some loss or damage. This heightens the potential for litigation arising out of the project which, apart from its distraction, can be very expensive.

Time

Again, the EPCM contractor is responsible for managing the co-ordination of the various trade contractors in an attempt to ensure that the program is met. The EPCM contractor will not be liable for breaches of contract by the trade contractor, unless induced as a consequence of some negligence by the trade contractor.

Each trade contractor takes responsibility to complete its package of work by the date stipulated within the program.

However, it will be difficult for the owner to transfer the risk of co-ordination or delay induced to a particular trade contractor by another trade contractor. In those circumstances the owner will, probably, be subjected to claims by trade contractors for non-performance of other trade contractors and will have to seek contribution from those other trade contractors.

A further disadvantage of the EPCM method of project delivery is that the amount of liquidated damages available is likely to be less. Each trade contractor is likely to seek a limit of liability

based on its contract price. As each contract price under the trade contract will be significantly less than that which would have prevailed under an EPC arrangement, the total liquidated damages available are likely to be significantly less, because, delay is likely to be caused by a small number of the contractors.

Design

Design liability in these circumstances is similar to that under an EPC arrangement (discussed above). However, under an EPCM arrangement an owner, with appropriate in-house resources, will be able to supervise and check the design so as to catch any defects at any early stage. The tendency under EPC contracts, for the reasons discussed above, is to refrain from comment, to avoid claims for variations.

Construction

Through the trade contracts the owner should be able to allocate the risk associated with the proper construction of the works (ie use of material of merchantable quality, fit for its intended purpose and proper workmanship) to the various trade contractors. Further, at this level of the market, many of the trade contractors are prepared to accept significant risk of the quality of their own work (as opposed to the design).

CONCLUSION

1. The EPC form of contract provides an attractive risk allocation in relation to most aspects of the construction of the project including:

   Costs;

   (a) Time for mechanical completion;

   (b) Quality of the design;

   (c) Quality of the construction.

2. However, such arrangements will not usually relate to the process design. The supplier of the process technology has a good bargaining position. It will therefore be difficult to negotiate a contract in which the process provider assumes extensive liability. The process supplier will be more likely to accept liability if there is insurance available to cover that liability. Great care is required to ensure that the insurance will be available if the process design fails.

3. Most EPC contracts currently being negotiated have significant caps on liability (some as low as 20%). As a result the owner is effectively taking the risk beyond the 20% cap. Accordingly, it is necessary to consider whether the advantages associated with the EPC form of contract are out weighed as a consequence of the:

   (a) limitation on the owner's capacity to interfere with the EPC contractor's work for good commercial reasons; and

(b) the cap on liability.

4. The answer to the previous question will depend on a number of matters, including commercial issues, such as the likelihood of the 20% cap being exceeded.

5. If the EPC is unattractive for these reasons then risk can be managed by use of an EPCM contract by:

(a) Ensuring that the owner has sufficient in-house or other resources available to it to monitor and check the performance of the EPCM contractor during the design phase, to ensure that the owner is getting exactly what it wants in terms of performance, operability, maintenance and whole of life costs;

(b) Passing as much of the risk in relation to the cost of construction, time for completion and quality of the construction work to the trade contractors by effective trade contracts.

6. The project can be enhanced significantly by appropriate:

(a) Professional indemnity insurance (in respect of the design risk);

(b) Effective works insurance, although particularly in respect of off-shore projects, the scope of cover is reducing as a consequence of the general tightening of the insurance market and recent failures;

(c) Extended liquidated damages insurance of the type written by Adams Brothers of New York (although availability in the current market is questionable);

(d) Risk allocation by way of exotic insurance such as Bermuda bonds which provide either standby credit or standby equity upon the happening of specified events.

THE MURRAY-DARLING BASIN: DIVIDED POWER, CO-OPERATIVE SOLUTIONS?

Sandford D Clark*

This article traces the legal and institutional difficulties of devising an appropriate regime for conserving and managing water and inter-dependant resources in the Murray-Darling Basin. Drawing on the history of interjurisdictional arrangements since 1902, it critically examines some current proposals for change and suggests a number of legislative techniques to strengthen the Murray-Darling Basin Agreement.

An earlier version of this article was prepared at the invitation of the Murray-Darling Basin Commission, to celebrate the centenary of the first public expression of the need to establish a cooperative regime to manage the resources of the River Murray.[1] This happened at a conference at Corowa in March 1902. The conference was convened because of community frustration with politicians and the Governments they controlled. For years there had been shrill arguments between New South Wales, Victoria and South Australia about their respective rights to water in the Murray-Darling system. Those arguments delayed federation and occupied more debating time in the Federal Conventions than any other issue.[2] When the Commonwealth Government finally came into being, many looked to the new Parliament and the new Constitution to impose a solution. But it didn't happen.

One of the enduring mysteries of our federal system is why, after 100 years, we still can't be confident that our Governments, politicians and bureaucrats have developed effective legal and institutional techniques to manage and share the resources of the Murray-Darling Basin in a sustainable way.

1. Constitutional failures

At the time of federation, both New South Wales and Victoria had started to develop promising irrigation settlements on the Murray and its tributaries. They had even done a deal to share the water in the Murray upstream of South Australia equally between them for irrigation. South Australia was, of course, outraged, because it had enjoyed a profitable river trade for some 40 years. It thus wanted to maintain navigability in the system and, if possible, place some controls on railways snaking out from Melbourne and Sydney to the Darling and the Murray, which had begun to syphon off river trade with vicious preferential tariffs.

This conflict is directly reflected in the Constitution. Following the United States' model, the new Constitution gave the Commonwealth Parliament power to make laws about trade and commerce.

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1 See Connell, D (ed) *Uncharted Waters*, Murray-Darling Basin Commission (2002). The editor acknowledges the generosity of the Commission in permitting re-publication of this article.

2 The main legal arguments, with references to the Convention Debates, are summarised in Clark, S.D., "The River Murray Question-Colonial Days" (1971) 8 *Melbourne University Law Review* 11, 30-36.

The comparable power in the Unites States' Constitution had already been interpreted by the United States Courts.[3] They had decided that their trade and commerce power gave the Federal Government the right to make all sorts of laws about any interstate river which was navigable for any part of its length.

To guarantee a similar result in Australia, South Australia fought to insert section 98. This declared that the Commonwealth's power to pass legislation about trade and commerce extended both to navigation and to State railways. In return, New South Wales and Victoria insisted on a balancing provision. Section 100 thus declares that Commonwealth legislation about trade and commerce cannot "abridge the right of a State or the residents therein to the reasonable use of water for conservation and irrigation".

The new Constitution provided three institutional initiatives which might have resolved the dispute between the three States. None ultimately proved equal to the task.

First, the Commonwealth chose not to use its legislative power to resolve disputes over the River Murray. At first, it argued that pressure of other business prevented it from acting to solve the problem. In retrospect, it seems more likely that, in the delicate early days of Federation, the Commonwealth Government was feeling its way cautiously. It was reluctant to incur the inevitable consequences of trying to step between the warring States![4]

This failure by the Commonwealth Government to step in led to the Corowa Conference of 1902. It called on both Commonwealth and State Governments "to co-operate in preparing and carrying out a comprehensive scheme for the utilisation of the waters of the River Murray",[5] which would cater both for navigation and potential consumptive uses. As a result, the States appointed an Interstate Royal Commission on the River Murray in 1902. It proposed that "a Permanent Commission be appointed to control and modify diversions of natural waters within the Murray Basin."[6] It also proposed certain jointly funded works. Predictably, however, the Commissioner appointed by South Australia disagreed with the New South Wales and Victorian Commissioners about the level of flows that should be maintained for navigation.

When the States continued to bicker, Prime Minister Watson offered to use the Commonwealth's legislative power in 1904, but only if the States agreed that it should legislate.[7] The offer fell on deaf ears and was never renewed.

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3 Gibbons v Ogden (1824) 9 Wheat 1; The Daniel Ball (1870) 10 Watt 557; United States v Rio Grande Dam and Irrigation Co (1899) 174 U.S. 690.

4 Ironically, Josiah Symons and Isaac Isaacs both held retainers from the South Australian Government on the River Murray question while they held the office of Attorney-General of the Commonwealth. A joint opinion by Symons and P.M. Glynn dated 6 March 1906 and a separate opinion by Isaacs dated 22 March 1906 were tabled in the South Australian House of Assembly in July 1906.

5 The text of the four resolutions passed at the Corowa Conference are set out in Interstate Royal Commission on the River Murray, *Report* (1902) 5-6.

6 Interstate Royal Commission on the River Murray, Report (1902), 57, Recommendation 3.

7 See Clark, S.D., "The River Murray Question: Part II – Federation, Agreement and Future Alternatives" (1971) 8 *Melbourne University Law Review* 215, 223.

When the High Court was established in 1903, South Australia closely examined its chances of bringing an action to have its right to Murray water declared. The Supreme Court of the United had already shown that it was willing to make arbitrative awards between States in such disputes.[8] But the High Court of Australia took the view that it could only apply principles of English common law, which had no rules for deciding disputes between colonies or former colonies.[9] For the High Court of Australia to apply principles of international law, comity and equity to resolve disputes, like the United States Supreme Court did, was "outside the pale of sober thought."[10]

Both the Commonwealth Legislature and Judiciary had thus left the field. The one remaining hope was the Interstate Commission, provided for by section 101 of the Constitution. When it was finally established in 1912, it was expressly given power to investigate:

- diversions and works on any rivers and their possible effect on navigation for trade and commerce;
- the maintenance and improvement of such navigability;
- any Commonwealth law which might abridge the rights of any State or its residents to the reasonable use of waters for conservation or irrigation.[11]

It was declared to be a court and given power to grant relief on just terms, award damages and grant injunctions. To all intents and purposes, it had ample investigatory, arbitrative and judicial powers to solve the Murray dispute. But it didn't get the chance. In 1915 the High Court held[12] that, because section 103(2) of the Constitution only allowed Commissioners to be appointed for 7 years, rather than for as long as they behaved themselves, the Commission was not truly independent of Government. It could thus not exercise judicial power under the Constitution. The Inter-State Commission, as established, was thus declared unconstitutional. Because it could not be revived without a successful referendum to change section 103(2) of the Constitution, the Inter-State Commission was allowed to lapse when its President's term expired.

2. River Murray Waters Agreement 1914

When it became clear that the River Murray question would not be promptly resolved under the new Constitution, the Premiers acted on the plea of the Corowa Conference for the State and Commonwealth Governments to devise a co-operative solution.

The River Murray Waters Agreement, signed in September 1914, did three things when it came into effect on 31 January 1917. First, it set out a series of structures – storages, locks and weirs – to be built by a Constructing Authority nominated by the State in which the work was located. They were to be funded almost equally by the four Governments. Later, the principle of sharing capital works equally between the parties was formally adopted. Since then, ongoing operation and maintenance costs have been shared equally by the three States.

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8 See, for example, *Kansas v Colorado* (1907) 206 U.S. 406.

9 *South Australia v Victoria* (1911) 12 CLR 667.

10 Ibid. 715, per Isaacs J.

11 Inter-State Commission Act 1912 (Cth), section 17.

12 *New South Wales v Commonwealth* (1915) 20 CLR 54 (the “Wheat Case”).

Second, it established water-sharing rules. They allowed New South Wales and Victoria to use any water in their respective tributaries and half of the River Murray flow measured near Albury, provided specified monthly volumes of compensation water were allowed to flow to South Australia.

Finally, the Agreement established a Commission, comprising one Commissioner appointed by each of the four Governments. It could approve the design of proposed structures and give directions to State Constructing Authorities about their construction and operation, in order to ensure that the deliveries to South Australia specified in the Agreement were made.

From today's perspective, however, the Agreement had important deficiencies. It was geographically confined to the main stem of the Murray. It took no account of tributary rivers, adjacent land use, water quality, flooding or uses other than for irrigation, conservation and navigation. Commissioners had to agree unanimously on every decision. One by-product of that rule was that, for many years, the New South Wales Commissioner vetoed any discussion of salinity problems emerging in the system.

Another practical problem was that any change to the Agreement had to be agreed on by every Government. Further, a change only came into force when each Parliament ratified the change by legislation.

Despite this, the Agreement was revised from time to time. Amendments between 1948 and 1958 had the effect of making more water available for South Australia and improving its security of supply, when it made a credible threat to have the Commonwealth's Snowy Mountains Scheme declared unconstitutional. In 1970, provision was also made for flows to dilute salinity. But the process of change was usually painfully slow. Thus, amendments which came into effect in 1983 took eight years, or one-tenth of our Federal history, to develop and adopt!

When water quality emerged as a political issue in the 1970s, the States were still reluctant to allow the Commission to have any power over land use or development on tributaries. The most they would allow was for the Commission to study tributaries with a State's permission; to recommend water quality objectives to the parties; and to be informed of any proposed State developments which might affect the River Murray, in time to make representations to the relevant State authority before final development approval was given. Even this modest attempt to allow the Commission to pre-empt the moral plane was undermined. By innocently changing one word at a signing ceremony for the Amending Agreement in October 1982, the Premier of New South Wales ensured that proposals need only be referred to the Commission when a State wanted to do so.[13] Although no Government has subsequently chosen to take advantage of the loop-hole, the incident neatly shows how jealousy about the sovereignty of the parties to the Agreement has prevented the Commission from obtaining truly independent powers. From time to time, this has impeded its development and operation.

Doubt about the Commission's independence causes difficulties for Commissioners in deciding whether their first allegiance lies with the national interest, as represented by the Commission, or the Government that appoints them. Sometimes, their actions can have grave consequences.

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[13] The incident is recorded in Clark, S.D., "The River Murray Waters Agreement: Peace in our time?" (1983) 9 *Adelaide Law Review* 108, 135.

When the South Australian Commissioner, in the interests of the system as a whole, supported the building of Dartmouth Dam in Victoria, in preference to Chowilla Dam in South Australia, the Speaker in the South Australian Lower House of Parliament crossed the floor of the House and the Government fell.

3. Murray-Darling Basin Agreement 1987

In 1987, there just happened to be Labor Governments in all States in the Murray-Darling Basin except Queensland, which was then not a party to the Agreement. The Commonwealth Government, too, was Labor. None of them owed their existence or survival to riverine electorates. This provided a unique opportunity for statesmanship, rather than politics and the parties made major changes both to the Agreement, the Commission's role and to the management structure of the Agreement.

The new Agreement[14] was not confined to water flowing in the main stem of the Murray. Instead, it dealt with the whole of the Murray-Darling Basin and sought to promote effective planning and management for the equitable, efficient and sustainable use of the water, land and other environmental resources of the whole Basin. While this new Agreement acknowledged the interdependence of all natural systems within the Basin, it also expanded the Commission's potential mission enormously. Opportunities for conflict between priorities within and between States, and regional parochialism, grew exponentially.

In an attempt to meet this challenge, a new Ministerial Council, comprising the Ministers with responsibility for water, land and the environment in each Government, was created. Its function eventually became to:

- consider and determine major policy issues of common interest to the Governments about; and
- develop, consider and authorise measures for,

the equitable, efficient and sustainable use of the water, land and other environmental resources of the Basin.

The new Agreement of 1987 also doubled the membership of the Commission. Each Government can now appoint two Commissioners who, between them, represent water, land and environmental resource management interests. In addition to tasks set out in the Agreement, the Commission is now required to advise, assist and give effect to decisions of, and implement measures approved by, the Ministerial Council.

This new Agreement and management structure paved the way for several notable achievements. They were notable, precisely because they surmounted parochial State preferences in the interest of managing the waters of the Basin as a whole. The first achievement was to adopt and successfully implement a Salinity Strategy to reduce levels of river-borne salinity to tolerable levels at Mannum in South Australia. New South Wales and Victoria voluntarily accepted targets

[14] Executed on 30 October 1987.

to reduce their saline drainage into the system. The States agreed jointly to fund a number of salinity mitigation works at strategic locations.

The Strategy also created incentives for a State to fund further salinity mitigation works, either in its own territory or in another State. A State could thereby earn "salinity credits" to offset saline drainage within that State.

The decision of the Ministerial Council to impose a cap on diversions[15] was another bold supra-jurisdictional initiative. The Ministerial Council acted, knowing the inevitable hardships the cap would create and the strident parochial criticism it would provoke. Remarkably, most States have voluntarily embraced the cap. They have earnestly attempted to adjust consumptive uses and save water within their respective jurisdictions, in order to comply with it.

Indeed, throughout the history of the Agreement the States have honoured its water-sharing principles, often in very trying domestic circumstances and presumably at considerable political cost. But this was precisely what the original Agreement sought to achieve. Despite its critics, the Agreement has thus met its most fundamental objective admirably.

4. Some stumbling blocks

This does not mean that everything has always run smoothly.

One consequence of expanding the issues to be dealt with under the Agreement was to increase matters about which Governments would have conflicting priorities. The changes coincided with developing "manageralism" in the upper echelons of the public service in each jurisdiction. As a result, many of those charged with making and implementing policy decisions for the Basin lacked any race-memory or background about the Agreement and how it had operated previously. Ministerial members of the Council changed often and unpredictably and senior managers of departments became Commissioners. They, too, changed comparatively frequently. As a result, members of the Ministerial Council and Commissioners lacked a shared history or corporate aspirations. This led to two notable casualties. The principle of comity was forgotten and the ogre of sovereignty unleashed once more.

4.1 The principle of comity among Governments

In earlier times, Commissioners and their Governments took seriously the promises:

- in clause 7 of the Agreement to provide for and to secure the execution and enforcement of the Agreement in their respective jurisdictions; and
- in clause 56 to "grant all powers, licences or permission with respect to its territory" for public authorities or other Governments to implement things required to be done under the Agreement.[16]

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[15] A cap was initially adopted for trial implementation during the 1998/99 irrigation season and a revised version adopted by the Ministerial Council on 25 August 2000.

[16] References are to the numbers of the relevant clauses as set out in the Murray-Darling Basin Agreement executed on 17 July 1992.

They also took the statement in each implementing Act, that the Commission has power to do anything it is authorised to do under the Agreement in that jurisdiction, to mean what it said.[17] They thus applied the notion of "comity", or the courteous and friendly understanding by which each sovereign jurisdiction respects the laws and usages of neighbouring jurisdictions.

In the context of compacts between different governments, comity implies negotiating with good will, good faith and a desire to reach mutually beneficial solutions. Sometimes comity requires positive administrative or legislative action by one jurisdiction to implement mutual aspirations. On other occasions, comity requires restraint by one jurisdiction to promote the mutual purpose. A good example of the latter is Victoria's decision not to apply the requirements of the *Water Act* 1989 to Dartmouth Dam on the Mitta-Mitta River in Victoria. Neither Victoria's Constructing Authority nor the Commission itself has been required to apply for or to hold the mandatory licence to operate a dam, required by section 67 of the *Water Act* 1989. Victoria has also not required either of them, or the relevant authorities representing Victoria and New South Wales, to apply for and obtain bulk entitlements to water held in Dartmouth Reservoir, under sections 36 – 43 of the *Water Act* 1989.

Since the changes made to the Agreement in 1987, however, Governments have perceptibly altered their approaches. Clause 47 of the Agreement requires the Commission to examine and take into account any environmental effects that its activities may have on water, land or other environmental resources of the Basin. Provided the Commission does this responsibly, principles of comity would require each jurisdiction to facilitate any examination by the Commission and to procure any authorisations which may be necessary under its own legislation if the Commission or Ministerial Council decides, after due examination, that the activities should proceed. In stark contrast, action taken by the New South Wales Director-General of National Parks, triggered by Aboriginal burial sites and relics discovered at Lake Victoria, required the Commission to obtain a permit containing more than 75 conditions – some of which purport to control downstream environmental issues, rather than preserve Aboriginal cultural heritage at Lake Victoria. This assault on principles of comity is even more remarkable because Lake Victoria, although within the territory of New South Wales, is actually the property of South Australia!

Again, from June 1997, the Ministerial Council permanently capped all diversions within the Basin at 1993/94 levels of development. Three States have changed the administration of consumptive use and striven for more efficient water distribution systems within their jurisdictions, in order to comply with the cap on diversions, as a matter of comity rather than of statutory obligation. Queensland, however, has repeatedly postponed declaring baselines against which its compliance with the cap on diversions can be measured.

4.2 The ogre of sovereignty

The United States President's Water Policy Commission of 1969 identified two critical and apparently universal characteristics of inter-governmental water compacts. It pointed out that, although each jurisdiction may acknowledge that a supra-jurisdictional body is necessary to solve problems which it cannot solve alone, ironically jurisdictions invariably:

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[17] See, for example, Murray-Darling Basin Act 1993 (Vic), section 12. The Act of each other jurisdiction has a comparable provision.

- are so "niggardly" in granting the body sufficient independent powers to do the job; and
- hedge any powers about with such negatively conceived controls,

that the body they create cannot get on and do the job the compact gives it to do! The result is to accentuate State and local parochialism at the expense of regional and national goals.[18]

This paradox accurately describes the historic predicament of the Murray-Darling Basin Commission. One small example is the repeated refusal of the parties to clarify the legal personality of the Commission. They have refused to declare that either the Commission, or River Murray Water – created by the Ministerial Council to implement COAG reforms in the water sector – is a corporate body. Although the Commission is probably now a common law corporation because of the powers it enjoys, no one is prepared to admit it or to say so in legislation.

This reluctance is primarily attributable to the ogre of sovereignty. First, there is a fear that, if the Commission is a body corporate, the Commonwealth may be able to use its legislative power with respect to certain corporations, without consulting the States. In the past, the States have vigorously repelled any initiatives which might give the Commonwealth a greater or more powerful role under the Agreement than the States.

Second, if the Commission is a body corporate, Commissioners might have to observe the common law duties of directors always to act in the best interests of the corporation – rather than observe the parochial political priorities dictated by their respective appointing Governments. A director of a corporation also has an obligation to be thoroughly informed about each matter to be determined by the Board of Directors and to act independently when making decisions.

There are other manifestations of the ogre of sovereignty and negatively conceived controls. The requirement that Commission decisions be unanimous is one. In institutions informed by democratic principles, rather than jealous self interest, it is more usual to decide matters by a majority.

Again, any amendments to an inter-jurisdictional agreement must usually be submitted to each contracting Government for approval and then to its Parliament for legislative ratification. The process is often painfully slow and may also be politically treacherous, for Parliaments are usually bastions of parochial interests and unmoved by notions of comity among Governments.

This process is not effective when dynamic environmental systems must be managed in sensitive and adaptive ways. Amendments to the Agreement executed in July 1992 thus took note of the fact that the Ministerial Council contains up to three Ministers from each jurisdiction and has a remit to determine important policy issues of common interest. On the assumption that three responsible Ministerial advocates would carry the day in their respective Cabinets, the parties allowed the Ministerial Council, by resolution, to adopt or amend Schedules to the Agreement, which then simply had to be laid on the table in each House of Parliament to come into effect.

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[18] Muys, JC, *Interstate Water Comparts. The Interstate Compact and Federal-Interstate Compact*, Arlington, Virginia 1971, 364; Leach RA and Sugg, RS, *The Administration of Interstate Compacts*, Louisiana State University, 1959, 43.

This simple solution may not be effective to meet the complex and difficult problems which now confront the Commission. Instead of simply making minor amendments to existing Schedules, the Commission has had to develop rules about the cap on diversions and water trading between jurisdictions, which incidentally affect the fundamental water-sharing provisions of the Agreement. The better view is that constitutional propriety, if not hard rules of law, require measures which alter basic provisions of such an Agreement to be approved by each Parliament. If this is so, the delay and political hazards involved may make it impossible for the Commission to implement measures to manage dynamic natural systems adaptively, responsibly and sustainably under the present Agreement.

The opposite pulls of sovereignty and comity are likely to become more acute in the immediate future. To meet the requirements of the cap on diversions, States may have to terminate some existing consumptive uses or acquire them, with or without compensation. Reduced consumption will certainly be necessary if decisions are made markedly to increase environmental flows throughout the Basin. It will be very difficult to decide how this can be done equitably between the States and whether retired consumptive rights should attract compensation or be acquired in the market.

The hazards of negotiating a solution in the face of contending State interests have led some, particularly in South Australia, again to propose that the matter be resolved by the Commonwealth. They envisage more than the Commonwealth merely taking a leading role in co-ordinating the development of a National Water Policy and using its spending power to provide resources for the States and the Commission to implement it. Proponents for more Commonwealth action suggest that the task of retrieving and managing environmental flows should be taken away from the States and the Commission and given to the Commonwealth. Is this a realistic option?

5. The Commonwealth's role

Those who advocate Commonwealth intervention believe either that:

- all riparian States will agree to refer legislative power to the Commonwealth to resolve the issues; or
- the High Court's generous interpretation of Commonwealth legislative power in recent years means that the Commonwealth could act unilaterally, if it chose to.

It seems unlikely that the Queensland, New South Wales or Victorian Parliaments would join a South Australian initiative to refer legislative power to the Commonwealth to resolve part or all of the problem. Without them all agreeing, the power could not be successfully referred. Once a legislative power is referred, the States lose control of how it is exercised. Even if the scope of possible Commonwealth legislation is negotiated before a reference is made, the Commonwealth Parliament cannot be bound to enact, or to refrain from amending, the agreed version of draft legislation.

If the High Court continues to take a benign view of Commonwealth power, the State's legislative and administrative control over other natural resources dependent on the hydrological cycle may also be at risk. The ogre of State sovereignty will surely block this path.

Could the Commonwealth act unilaterally?

A Senate Select Committee on Water Pollution in 1969 concluded that, on the evidence it had received, the Commonwealth had sufficient legislative power to create a National Water Commission, which would formulate a national policy on water resources and be "the administering authority for waters within the Commonwealth's jurisdiction."[19] It would comprise seven members, six of whom would be appointed by the Commonwealth from a panel of nominations made by the States.[20]

The then Australian Water Resources Council - a Council of Ministers representing each jurisdiction - dismissed the proposal out of hand. The idea progressed no further.

Less grandiose possibilities still exist. One avenue for Commonwealth legislative action is to use its external affairs power. The Commonwealth Parliament has recently demonstrated the potential scope of this power by passing the *Environment Protection and Biodiversity Conservation Act* 1999. This implements the Commonwealth's treaty obligations in relation to world heritage properties, wetlands of international importance, threatened species and communities and migratory species. These provisions could certainly affect the environmental flow regime in the Murray-Darling Basin, if they are used to require environmental impacts to be assessed under Commonwealth rules. If this happens, ultimately it would be a Commonwealth Minister, rather than the Ministerial Council or the Commission, who would decide whether measures approved under the Agreement can proceed. The Commonwealth could also require management plans to be developed to meet its requirements for areas where its treaty obligations are relevant.

It remains to be seen how effective the regime established by the *Environment Protection and Biodiversity Conservation Act* 1999 will be and whether it provokes co-operative or obstructive action by the States. It is certainly proving difficult to negotiate the bilateral agreements about environmental assessment that the Act contemplates will be made between the States and the Commonwealth.

It is probable that appropriate environmental flows to ensure sustainability throughout the Basin will need to exceed those which might be secured in order to meet the international obligations upon which the *Environment Protection and Biodiversity Conservation Act* 1999 depends. If so, in the absence of other relevant treaties or conventions, the external affairs power would not support Commonwealth legislation to retire sufficient existing consumptive entitlements to provide the necessary environmental flows.

Could the Commonwealth retire the necessary volume of consumptive uses in other ways?

It might not be able to do so compulsorily, even if it were prepared to meet the constitutional obligation to pay just compensation when it acquires property in this way. Such action may raise

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[19] Commonwealth of Australia, Senate Select Committee, *Report: Water Pollution in Australia* (1970), xv, 188.

[20] Several contemporary arguments about the Senate Select Committee's proposals are set out in Clark SD, "The River Murray Question: Part II – Federation, Agreement and Future Alternatives" (1971) 8 *Melbourne University Law Review* 215, 246-251. Perceptions about the scope of Commonwealth legislative power have changed dramatically since that time.

constitutional problems and would certainly provoke undesirable and expensive litigation. Section 100 of the Constitution may prove insurmountable. Legislation which effectively prevents farmers from producing and selling irrigated crops, might well be characterised as a law with respect to trade and commerce, whatever head of power is recited in the Act's preamble. Such legislation is prohibited from abridging the rights of a State or its residents to the "reasonable use of water for conservation and irrigation". Because the prohibition applies to each individual's personal rights, rather than the cumulative effect of exercising such rights, protracted and repetitive litigation is likely.

Further, if the impact of such legislation, for example, disadvantages upstream interests in favour of downstream uses, it may also run foul of section 99 of the Constitution. This prohibits the Commonwealth from giving preference to one State, or any part thereof, over another State, or part thereof, by any law or regulation of trade, commerce or revenue.

The Commonwealth probably has wider and better opportunities to retire existing consumptive uses by deploying its spending power. It could possibly arrange to retire existing consumptive uses by finding a way to participate in the market for transfers of water entitlements.

This market depends on statutory arrangements in each State for transferring water entitlements created by the legislation of each State. Both the right to use water represented by an entitlement and the means of transferring that entitlement, depend entirely on the legislation of each State. State legislation does not presently provide for transfers to be made to the Commonwealth Government. Further, Victorian legislation only allows irrigation water rights to be transferred to another owner or occupier of land.

If the Commonwealth Government wished to buy up water rights through the existing market, each State would have to pass legislation to allow this to happen. Manifestly, this would require co-operative action by the States and Commonwealth, rather than unilateral Commonwealth action.

In this context it is important to note that, throughout the long history of both the River Murray Waters Agreement and the Murray-Darling Basin Agreement, the parties have carefully avoided any statements about who owns, or has territorial sovereignty over, water subject to the Agreements. The Agreements simply acknowledge that the various States (but not the Commonwealth) have the right to use water in the Basin in agreed ways and amounts. This reluctance to attribute either ownership or sovereignty over water to any Government has been deliberate. None of the parties has wanted to do anything which might revive the unproductive wrangling between the States which preceded federation. This value should be respected in devising any new arrangements for the Basin.

Such arrangements must also recognise that all private entitlements to use water, and rights to transfer entitlements to water, depend on State, not Commonwealth, legislation. In view of this, a good way of avoiding controversy might be for all Governments to agree to pass parallel State legislation which would allow existing consumptive rights to water to be retired for environmental purposes (rather than acquired or transferred to someone else) by payments made through the existing market for transfer of water rights. The necessary retirement payments might be made directly by the Commonwealth, or through the States, or through a body like the Murray-Darling Basin Commission, with funds made available by one or more of the contracting Governments.

Once sufficient consumptive entitlements have been retired for environmental purposes, the next issue would be how to manage the environmental flows which become available. To optimise their use, an appropriate program to manage releases would need to be modelled and implemented throughout the whole Basin. This program would need to be compatible with consumptive use requirements in different parts of the Basin at different times. To implement the program, storages belonging to the States and others controlled by the Murray-Darling Basin Ministerial Council and Commission would have to be operated in compatible ways.

Effective co-operation between the Governments thus seems essential to implement any program successfully. On the other hand, States are unlikely to cooperate with any Commonwealth legislation which seeks to override existing regimes devised by the States or operated under the Murray-Darling Basin Agreement. Over-riding unilateral Commonwealth legislation is thus likely to be unproductive. It must, at best, also be unlikely, unless the Commonwealth's zeal outruns its reason.

6. A co-operative solution?

In practical terms, the existing and looming threats to sustainable and equitable sharing of land, water and other environmental resources in the Basin will only be met by serious co-operation between all Governments. For this to happen, there will need to be some supra-jurisdictional policy and decision-making forum and a complementary supra-jurisdictional executive body, capable of requiring and getting complementary action from State Parliaments and Governments.

Thirty years of controversy before and after federation and a subsequent 90 years' experience of a supra-jurisdictional River Murray Commission and Murray-Darling Basin Commission have not provided a solution. Nevertheless, experience has taught us a number of things to avoid and other techniques which would greatly increase the likelihood of success.

Enduring, productive and effective co-operation is unlikely, unless all Governments return to the values underlying the principles of comity. Experience shows that corporate race-memory and education within relevant Government agencies is no longer sufficient to ensure that there is a continuing tradition of effective, if reluctant, restraint and active co-operation in order to implement policies determined by the Ministerial Council or decisions of the Commission. If we are to ensure that the Murray-Darling Basin is, in future, managed sustainably in the best interests of all, we must devise new means to prevent those policies and decisions being undermined by short-term self-interest and bureaucratic or legislative inertia.

This may require new legislation in each jurisdiction. It might direct bureaucrats to administer and apply existing legislation, such as State water management, planning and environmental legislation, in a manner consistent with the Agreement and in ways which implement any resolutions of the Ministerial Council or decisions of the Commission.

These legislative directions may need to be made enforceable obligations. For many years, Acts implementing the Agreement in each jurisdiction allowed Commission decisions to be made a rule or order of the relevant Supreme Court or of the High Court. No one quite understood this provision. But it is apparent that, from the beginning, Governments meant Commission decisions to be enforceable in each jurisdiction. New legislation, consistent with modern principles of

administrative law, could honour and implement this intent. Such laws might, for example, allow the Commission to obtain orders to enforce decisions of the Ministerial Council or of the Commission against Ministers, administrators and citizens in each jurisdiction.

A further technique might be to provide a power for the Governor-in-Council in each jurisdiction to adopt model regulations, prepared on the Commission's instructions, to implement policies and decisions of the Ministerial Council and Commission. Such regulations should not have to comply with local procedural requirements, such as regulatory impact statements. They should also not be subject to legislative disallowance in each jurisdiction.

Provisions of this type, of course, do impose on the sovereignty of each jurisdiction. On the other hand, the values underlying comity will often require Governments to restrain their urge to parade their sovereignty. Adaptive management to ensure sustainability in the Basin will require an ability to change management practices rapidly and with confidence. Among other things, this will require some way to overcome the need to refer substantive changes in the Agreement back to Governments, to obtain their consent and ratifying legislation. History has shown the present requirement to be both too perilous and too slow even to meet simpler challenges than those we now confront.

Bearing in mind justifiable constitutional misgivings, there still must be some way of devising an internal mechanism for amending or adding to the Agreement when the Ministerial Council resolves that a change must be made. There is no question that, as a matter of law, the implementing Act in each jurisdiction could expressly give the Ministerial Council the necessary authority to change the Agreement, without compromising constitutional principles. Ironically, to do so would actually be a supreme assertion of Parliamentary sovereignty, rather than detracting from it!

Two other important changes would also have implications for sovereignty. While the Agreement should express a desire that both the Ministerial Council and the Commission should reach their decisions by consensus, ultimately it should be possible to by-pass entrenched parochialism in order to achieve wider goals. The present principle of unanimity should thus be abolished in favour of decisions by a majority of Ministers or Commissioners voting on any issue.

Further, legislation in each jurisdiction should require that any person appointed as a Commissioner or Deputy Commissioner must have such skills, experience and background relevant to the business of the Commission as will allow that person to understand and participate effectively in making decisions upon issues determined by the Commission.

Ultimately, the challenge will be to ensure that the Ministerial Council and the Commission, or their successors, have a clear mandate and sufficient independent power to achieve it. Complementary implementing legislation must be re-drawn to ensure that independent powers can be exercised effectively in each jurisdiction and that, when they are, that exercise binds all Government authorities and citizens. The difficulty will be to find ways of ensuring that the Ministerial Council and Commission are also sufficiently responsive and accountable to participating Governments, to satisfy their politicians and bureaucrats.

A supra-jurisdictional regime could certainly be created, which operates effectively, provided there is a shared political will to make this happen. The trick will be to inspire that political will, before

it is too late. That is precisely what the Corowa Conference tried to do in 1902. Perhaps we now need to remind our politicians of the words of Patrick McMahon Glynn, a tireless campaigner for South Australia's rights, in evidence before the Interstate Royal Commission on the River Murray in 1902:

> ″All the States apparently desire to treat the rivers from a Federal point of view: unfortunately, however, with politicians, other considerations take weight – we, perhaps, play too much to the galleries at times".[21]

[21] Interstate Royal Commission on the River Murray, *Minutes of Evidence* (1902), 8.

CASE NOTES

THE NATIONAL THIRD PARTY ACCESS CODE FOR NATURAL GAS PIPELINE SYSTEMS: A BALANCING ACT

RE DR KEN MICHAEL AM; EX PARTE EPIC ENERGY (WA) NOMINEES PTY LTD & ANOR

This decision is the first judicial interpretation of the National Third Party Access Code for Natural Gas Pipelines by a superior court. It deals with the way in which an Access Arrangement is to be assessed by a Regulator, and, principally, the determination of Reference Tariffs.

Lewis McDonald*

BACKGROUND

On 25 March 1998, Epic Energy (WA) Nominees Pty Ltd (**Epic**) paid $2.407 billion to the Western Australian Government for the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**). It is widely thought that Epic paid a full price for the DBNGP, especially given that its replacement value is estimated at around $1.25 Billion. However, Epic's ability to recover its purchase price for the DBNGP depends principally on two factors: the price it is able to charge customers for access to the DBNGP; and the volume of gas it can transport through the pipeline. Both of these factors are largely out of Epic's control.

The DBNGP is the longest natural gas pipeline in Australia, and the only pipeline for the transmission of gas from the North West Shelf to Perth and the South West. It is a natural monopoly and is therefore covered by the National Third Party Access Code for Natural Gas Pipeline Systems (**Code**).[1] The tariffs Epic can charge for third party access to the DBNGP are determined by the Western Australian Independent Gas Pipelines Access Regulator (**Regulator**) applying the Code. Unlike most other pipelines in Australia, the tariffs set by the Regulator also apply to Epic's existing customers using the DBNGP.[2]

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1 The Code applies as a law of Western Australia by virtue of the *Gas Pipelines Access (Western Australia) Act 1998 (WA)* (**Gas Pipelines Act**) and, together with the Gas Pipelines Act, is a certified access regime for the purposes of Part IIIA of the *Trade Practices Act 1974 (Cth)*.

2 See section 20 *Dampier to Bunbury Pipeline Act 1997 (WA)* and reg 35 of the *Dampier to Bunbury Pipeline Regulations 1998 (WA)*.

Under the Code, Epic is obliged to submit an "Access Arrangement" for the DBNGP. An Access Arrangement sets the terms and conditions for access to the DBNGP including the price charged (the "**Reference Tariff**") for all services sought by a significant portion of the market (the "**Reference Services**"). Put simply, a Reference Tariff is calculated by establishing a "Capital Base" for a pipeline system, applying a reasonable rate of return on that Capital Base and then determining a tariff that will allow that Capital Base and rate of return to be recovered over the economic life of the pipeline. The magnitude of the Capital Base drives the tariff and the revenue that Epic can earn from the DBNGP. The initial Capital Base for a Covered Pipeline is established through the out-workings of a complicated (and arguably conflicting) array of sections.

Epic submitted its proposed Access Arrangement to the Regulator on 15 December 1999. The initial Capital Base put forward by Epic was $2.57 billion, based on Epic's purchase price and subsequent capital additions made to the DBNGP. It also included a Reference Tariff of $1/GJ for a Reference Service from Dampier to Perth. This Reference Tariff was based on Epic's expectations of what it could charge for access to the DBNGP arising from the process by which the DBNGP was sold by the Government. On the basis of Epic's volume assumptions, this Reference Tariff would allow Epic an opportunity to recover its initial Capital Base and a reasonable rate of return (but no more) over the economic life of the DBNGP. The proposed Access Arrangement also featured a commitment from Epic that this initial Capital Base and Reference Tariff would not be increased despite proposed future expansions of the DBNGP in the order of $875 million.

On 21 June 2001, the Regulator issued its Draft Decision not to approve Epic's proposed Access Arrangement unless a number of significant amendments were made. The most significant amendment required by the Regulator was that the initial Capital Base should be reduced to the depreciated optimised replacement cost of the DBNGP which the Regulator estimated at $1.234 billion. This produced a Reference Tariff for Epic's Reference Service of around $0.74/GJ which Epic claimed could potentially threaten the viability of its operations.[3]

Epic applied to the Full Court of Western Australia to quash the Draft Decision on the basis that the Regulator misconstrued the Code in several respects, failed to take into account relevant considerations and took into account irrelevant considerations.[4] AlintaGas[5] and the Regulator opposed Epic's application.

DECISION

A 3-0 majority of the Full Court declared, inter alia, that the Regulator erred in his construction of the sections of the Code under which the Capital Base is established and the Reference Tariff is determined.[6] Parker J delivered the leading judgment with Malcolm CJ and Anderson J agreeing in every respect without adding anything further.

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3 See *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [12].

4 Ibid at [10].

5 A reference to AlintaGas is a reference to AlintaGas Limited and AlintaGas Sales Pty Ltd.

6 Although the court found that the Draft Decision was so affected by errors of law so as to warrant the grant of prerogative relief of certiorari, prohibition and mandamus, in the circumstances, the Full Court

Based on his reasons, Parker J set out preliminary declarations[7] and granted leave to the parties to apply to the court for the final form of these declarations as well as orders as to costs. Supplementary reasons were handed down on 20 December 2002 and the preliminary declarations were largely unchanged.[8] The only costs order made was that AlintaGas must pay 2/3 of Epic's taxed costs from the date of their involvement in the case.[9]

REASONING

The arguments put by the parties and the Full Court's decision focussed principally on the construction of sections 2.24, 3.3, 3.4, 8.1, 8.10 and 8.11. It is the construction of, and the interplay between, these sections that determines the way in which the initial Capital Base for a Covered Pipeline is established.

FACTORS TO BE TAKEN INTO ACCOUNT IN ASSESSING AN ACCESS ARRANGEMENT

Section 2.24 deals with the process of assessment of an Access Arrangement by the Regulator. It specifies that an Access Arrangement must contain the elements specified at sections 3.1 - 3.20 (**section 3 elements**), that it must not be refused solely because it does not contain a matter not specified in sections 3.1 - 3.20 and that the factors specified at section 2.24(a) - (g) (**section 2.24 factors**) "must be taken into account" in assessing a proposed Access Arrangement. According to Parker J, the phrase "must take into account" means that the Regulator has to take the section 2.24 factors into account and give weight to them as fundamental elements in assessing a proposed Access Arrangement with a view to reaching a decision whether or not to approve it.[10]

Significantly for Epic, section 2.24(a) obliges the Regulator to take into account Epic's "legitimate business interests and investment in the pipeline". AlintaGas and the Regulator argued that Epic's only legitimate business interest was to recover an "economically efficient price" [11] (ie, a price based on the lowest cost of providing the service).[12] Parker J rejected this view and said that, for the purposes of section 2.24(a), Epic's investment in the pipeline was the full purchase price of $2.407B and that Epic's "legitimate business interests" might properly extend to the recovery of

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considered that prerogative relief would be unnecessary and that Epic's interests would be sufficiently protected by declaratory relief.

7 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [223].

8 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231(S) at [29].

9 Ibid at [25] and [30].

10 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [55].

11 Ibid at [130].

12 Ibid at [141].

this purchase price over the expected life of the pipeline (ie, 70 years) together with an appropriate return on investment.[13]

AlintaGas argued that section 2.24 operates in two phases: the Regulator determines if each of the section 3 elements are present in a proposed Access Arrangement and comply with the Code, and then assesses the proposed Access Arrangement (as a whole) against the section 2.24 factors.[14] In this sense, the section 2.24 factors cannot be used to construe the individual section 3 elements. Parker J rejected this view and held that where the Regulator exercises a discretion in considering the section 3 elements in a proposed Access Arrangement, the Regulator must look to the section 2.24 factors for policy guidance. The precise nature of the elements at section 3.1 to 3.20 determine whether there is a discretion to be exercised and therefore, whether there is scope for the application of the section 2.24 factors.[15]

APPLICATION OF SECTION 2.24 TO ESTABLISHMENT OF INITIAL CAPITAL BASE AND DETERMINATION OF REFERENCE TARIFFS

Section 3.3 requires that a Reference Tariff be included in a proposed Access Arrangement. Section 3.4 requires that a Reference Tariff included in a proposed Access Arrangement must comply with the Reference Tariff Principles described in section 8. Section 8.1 contains a list of general principles for designing a Reference Tariff (**section 8.1 principles**). Sections 8.2 to 8.4 set down a number of methods for determining a Reference Tariff. Each of these methods is principally driven by the magnitude of the initial Capital Base. The initial Capital Base is established by considering a range of valuation methodologies and other considerations listed at sections 8.10(a) - (j) and 8.11.

Parker J said that the factors listed in section 8.10 call for consideration of a number of issues which may well tend in different directions and that there is a discretionary evaluation of the weight to be attached to each of the section 8.10 factors in the ultimate establishment of the initial Capital Base.[16] After considering a range of factors, Parker J adopted the view that the discretions in section 8.10 are to be designed with a view to achieving the section 8.1 principles and that, as such, the section 8.1 principles (rather than the section 2.24 factors) should guide the Regulator in exercising its discretions under sections 8.10 and 8.11. The section 2.24 factors still have a role to play by virtue of the second sentence of section 8.1 which indicates that, to the extent that the section 8.1 principles conflict, the Regulator may determine the manner in which they are to be reconciled or which should prevail. According to Parker J, the section 2.24 factors are to be used to guide the Regulator in the exercise of this determination.[17]

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[13] Ibid at [130]. Indeed he went on to say that there is no reason for Epic's interest in recovering its purchase price as being anything other than a legitimate business interest.

[14] See *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [57].

[15] Ibid at [62].

[16] Ibid at [74].

[17] Ibid at [85].

INTERPRETATION OF SECTION 8.1 PRINCIPLES

Given that the section 8.1 principles guide the exercise of discretion in section 8.10 (which determines the Capital Base), Parker J's interpretation of the section 8.1 principles is significant.

Section 8.1(a) - "Reference tariff should be designed with a view to allowing a service provider with the opportunity to recover the efficient costs of delivering the Reference Service"

AlintaGas and the Regulator argued that:

(a) "efficient costs" means the lowest cost of providing the Reference Service, and that, as such, only capital costs calculated on a "forward-looking" basis without regard to past actual investment (including a purchase price) may be considered in determining efficient costs for the purposes of section 8.1(a);[18]

(b) section 8.1(a) fixes a ceiling on the revenue stream that may be earned;[19] and

(c) the requirement to base a Reference Tariff on the "efficient costs" of delivering the Reference Service in section 8.1(a) was an "overarching requirement" in determining a Reference Tariff.[20]

Parker J rejected these arguments and said that "efficient costs" was not a term of art at the time the Code was enacted, but was merely a construct of the relevant economic concept of "efficient"[21], together with the ordinary notion of "costs".[22] Parker J recognised that, formulated in this way, "efficient" costs is not capable of precise definition and can only be approximated.[23]

Section 8.1(b) - "Reference tariff should be designed with a view to replicating the outcome of a competitive market"

Parker J understood "competitive market" as a reference to a workably competitive market in the field of gas transportation (ie, a gas transportation market in which no firm has a substantial degree of market power).[24] He suggests that sections 8.1(a) and 8.1(b) are linked, in that a workably

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18 Ibid at [141].

19 Ibid at [142].

20 AlintaGas and the Regulator sought to support this argument by reference to the overview to section 8 (see ibid at [157] - [162]). However, according to Parker J, the overview is of no assistance in construing section 8.1(a) (see ibid at [159]).

21 On the basis of the economic evidence presented, Parker J understood "efficient" to mean "economically efficient", that is, productive, allocative and dynamic efficiency (see *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [114] and [115]).

22 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [139].

23 Ibid at [143]. In this sense, "efficient" costs are those that create the greatest benefit to society as a whole.

24 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [122] - [126].

competitive market will tend to lead to economic efficiency and vice versa. He recognised that, like "efficient" costs, the concept of a workably competitive market was incapable of precise definition.[25]

Parker J explained that the determination of "efficient" costs and the outcome of a workably competitive market are matters of economic theory which require the resolution of competing considerations (ie, the interests of consumers in obtaining low prices and the interests of service providers in obtaining higher prices).[26] These competing considerations were unresolved at the time the Code came into force. Parker J did not offer the Regulator any guidance as to how to resolve these considerations or how to apply sections 8.1(a) and (b) in determining how to establish an initial Capital Base under s 8.10.

Section 8.1(d) - "Reference Tariff should be designed so as to not distort investment decisions in pipeline transportation systems"

AlintaGas and the Regulator argued that the objective of designing a Reference Tariff so as to not distort investment decisions was sufficiently protected by allowing the recovery of no more than the replacement cost of the pipeline over its economic life.[27]

Parker J rejected this view as it paid no regard to the unrecovered capital investment in the pipeline and could potentially undermine the viability of an earlier investment decision.[28] Instead, the public interest requires that both existing and potential investors in significant infrastructure have confidence that their very substantial and long-term investment decision, which was commercially sound at the time the investment decision was exercised is not rendered loss-making, or do not result in liquidation of the investor, by virtue of future government intervention.[29] In this sense, section 8.1(d) reflects a public interest which is broader than economic theory by taking into account wider political and social considerations and allows past investment decisions to be taken into account in the design of a Reference Tariff.[30]

Therefore, section 8.10(d) protects service providers by allowing them to recover their "reasonable" investment and also protects the long-term public interest by encouraging future investment in significant infrastructure. It is consistent with the objects of the Code for the Regulator to accept or take into account a "reasonable" purchase price when establishing the initial Capital Base.[31]

SECTION 8.10 FACTORS

In establishing the initial Capital Base for a Covered Pipeline, section 8.10 requires the consideration of "well-recognised valuation methodologies" such as depreciated actual cost

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25 Ibid at [143].

26 Ibid at [143] - [145].

27 See ibid at [148].

28 Ibid at [149].

29 Ibid at [149].

30 Ibid at [153].

31 Ibid at [154].

(DAC)[32], depreciated optimised replacement cost (DORC)[33] and the consideration of other factors set out in section 8.10(c) - (k).[34] According to Parker J, the consideration of these additional factors may potentially push the initial Capital Base above or below the range of DAC or DORC;[35] their presence precluding the view that the Code is only concerned with forward-looking considerations in respect of the establishment of the initial Capital Base.[36]

Section 8.10(j) requires consideration of the price paid for any asset recently purchased by the Service Provider and the circumstances of that purchase. Parker J held that Epic's purchase of the DBNGP fell within this category and that, as such, the Regulator is obliged to consider the price paid by Epic for the DBNGP and the circumstances of that purchase. This allows the Regulator to examine the reasonableness of the price paid by Epic for the DBNGP, the extent to which this price was influenced by an expectation of monopoly profits and the tender process by which the DBNGP was sold by the State.[37] It is up to Epic to demonstrate to the Regulator that its purchase price was reasonable in the context of the circumstances existing at the time of the sale and Epic's reasonable expectations arising from these circumstances.[38]

Parker J briefly considered Epic's argument to the Regulator that it had a reasonable expectation from the circumstances of the purchase (ie the Government's sale process) that it would be able to charge a tariff of $1/GJ from Dampier to Perth. He concluded that the material before the Regulator at the time of the Draft Decision appeared to fall short of establishing the proposition that the State and Epic contracted on this basis or expectation.[39] However, importantly, Parker J found that the Regulator erred in failing to recognise that Epic's proposed initial Capital Base factored in future expansion costs of $875 million without any increase to the initial Capital Base or Reference Tariff.[40] The inclusion of these proposed expansion costs in the Regulator's consideration of Epic's proposed initial Capital Base can only enhance the reasonableness of Epic's proposed initial Capital Base and Reference Tariff.

SECTION 8.11 - INITIAL CAPITAL BASE NORMALLY BETWEEN DAC AND DORC

Section 8.11 states that in the case of an existing pipeline, the initial Capital Base should normally be between DAC and DORC. Parker J accepted that this principle was consistent with the expert

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32 Section 8.10(a) of the Code.

33 Section 8.10(b) of the Code.

34 These factors include the basis upon which tariffs were set in the past, reasonable expectations of persons under the prior regulatory regime and other factors.

35 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [169].

36 Ibid at [169].

37 The circumstances of the purchase could also be considered under section 8.10(c) on the basis of a "puchase price valuation" (see ibid at [173]).

38 *Re Dr Ken Michael AM; Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [188] - [189].

39 See ibid at [188] - [200].

40 Ibid at [208] - [211].

economic evidence. However, he suggested that the circumstances by which the DBNGP was sold may take it outside of what is considered "normal" within the meaning of section 8.11.[41]

CONCLUSION

Prior to the Full Court's decision, the Code was viewed as an economic prescription allowing pipeline owners to recover the replacement cost of a pipeline, but no more. Parker J's decision is a powerful rejection of this view.

The Full Court's decision established that the determination of Reference Tariffs under the Code is not solely based on "forward-looking" costs and events and does not require past events and investment decisions to be disregarded. Further, there is no suggestion that the replacement cost of a pipeline is the maximum amount that a pipeline owner can recover. The Code requires the Regulator to balance:

(a) the interests of a purchaser of a Covered Pipeline in recovering its investment (which legitimately can include any "reasonable" purchase price and an appropriate rate of return);

(b) the interests of users of Covered Pipelines in paying low prices; and

(c) the public interest.

Following the Full Court's decision, the Regulator's task in assessing an Access Arrangement is undoubtedly more complex.

The Regulator is now considering his Final Decision in the light of further submissions received from interested parties and the Full Court's reasons and declaratory orders. It is expected that a Final Decision will issue shortly as the Regulator is endeavouring to meet an end of March time frame.

HOT TO TROT – THE BENEFITS OF HOLDING ON

Alex Sceales*

The saga of Hot Holdings Pty Ltd v Creasy recently unveiled its latest chapter with the handing down of the High Court's decision on 14 November 2002, on appeal by Hot Holdings Pty Ltd from a decision of the Full Court of the Supreme Court of Western Australia. It is timely then to review the various decisions of the Courts leading up to the latest instalment and consider their implications for decisions generally under the *Mining Act* 1978 (WA).

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41 Ibid at [178].

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THE FACTS

The background to the Hot Holdings saga is probably worthy of a Grisham novel. Generally, it concerns an area south of the Bronzewing Gold Mine near Leonora in Western Australia, thought by some to be rich in gold deposits and worth several hundred million dollars. The protagonists include several well known, successful and colourful participants in the gold mining industry in Western Australia. Perhaps such a potent mix was always likely to produce a jurisprudential epic of its present proportions – at least, that has certainly been the case.

Essentially, several applications for an exploration licence under the *Mining Act* 1978 (WA) ("**Act**") and two applications for a mining lease were lodged within one minute following 8:30 AM on 15 October 1992. Each related to substantially the same area. Hot Holdings Pty Ltd ("**Hot Holdings**") applied for an exploration licence, Mr M G Creasy applied five times for exploration licences while others (including Arimco Mining Pty Ltd, Oresearch NL, Minerichie Investments Pty Ltd and Tromen Pty Ltd) applied for various exploration licences or mining leases.[1]

THE CHALLENGES

Following the applications, Warden PG Malone SM prepared a report concluding that the five applicants complied with the initial requirement at the same time and it was therefore appropriate to conduct a ballot to determine priority for the purposes of section 105A of the Act. Despite section 151 of the Act under which certain decisions of the Warden and Minister are stated could not be subject to appeal to any Court, Creasy, Hot Holdings and others applied to the Supreme Court seeking prerogative relief.

The Full Court of the Supreme Court found in favour of the respondents to that action, denying the prerogative relief sought.[2]

Hot Holdings and Creasy then appealed from that decision to the High Court. It held certiorari did lie to challenge the Warden's decision to conduct a ballot to determine the party entitled to priority under section 105A. Despite being a preliminary decision which did not directly determine the rights of an applicant, such a decision was one bearing on a condition precedent to an exercise of power by the Minister which would affect legal rights and thus attract certiorari (see below for a fuller discussion).[3] The High Court thus remitted the matter to the Full Court to consider whether certiorari should issue.

On 27 September 1996, the Full Court disallowed the inclusion of Arimco Mining Pty Ltd and Oresearch NL in the ballot to be conducted by the Warden but otherwise discharged the orders nisi originally ordered in so far as they challenged the Warden's decision to hold the ballot.[4] The High Court refused special leave to appeal from this decision.

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1 A fuller description of the facts is provided elsewhere and is not the focus of this article. In particular, see: A Murray "Hot Holdings Pty Ltd v Creasy" [1996] *AMPLA Yearbook* 544, JJ Hockley "Too Hot to Hold" (1996) 23 *Brief* (No.6) 32.

2 *Ex parte Hot Holdings Pty Ltd*, unreported, FCt SC of WA, Library No. 940576, 21 October 1994.

3 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

4 *Ex parte Hot Holdings Pty Ltd: Hot Holdings Pty Ltd v Creasy* (1996) 16 WAR 428.

The Warden actually held the ballot on 15 December 1997. First drawn was Hot Holdings' application, followed by that of Mr M G Creasy (also for an exploration licence) and then that of Mr RW Creasy, for a mining lease. The Warden next reported to the Minister for Mines recommending the application of Hot Holdings be granted in priority to the others.

On 10 August 1998 the Minister informed interested parties that he had decided to grant that application. Creasy, Arimco Mining Pty Ltd and Oresearch NL then applied to the Supreme Court, seeking a writ of prohibition prohibiting the Minister from proceeding with his decision to grant an exploration licence to Hot Holdings and mandamus requiring the Minister to consider their applications according to law. At first instance, Heenan J granted an order nisi returnable before the Full Court for prohibition, mandamus and certiorari. Part of the application for the order nisi was on the grounds of bias or apprehension of bias. This was dismissed by Heenan J.[5]

Creasy, Arimco Mining and Oresearch appealed from this aspect of Heenan J's decision to the Full Court of the Supreme Court (the hearing including the return of the orders nisi). It unanimously upheld the appeal and held the orders nisi for certiorari and prohibition should made absolute, on the basis there was a reasonable apprehension or suspicion that the Minister's decision was not impartial.[6]

In turn, Hot Holdings appealed from this decision to the High Court. On 14 November 2002 it allowed the appeal, setting aside the orders of the Full Court and discharging the orders nisi granted by Heenan J.[7] This decision is discussed in more detail below.

THE FIRST HIGH COURT DECISION – REVIEWABILITY

The question facing the High Court on the first occasion was whether certiorari lies to challenge a decision by a Warden to conduct a ballot to determine which of several applicants for a mining tenement is to receive the priority right spoken of in section 105A of the Act.[8] The majority (Brennan CJ, Gaudron and Gummow JJ) in allowing the appeal stated the resolution of this issue involves a consideration of the proper scope of certiorari and raises questions of statutory construction of the Act and the scheme it establishes for handling mining tenements applications.[9]

As noted, the appeal was made notwithstanding section 147 and 151 of the Act. Section 147 confers a right of appeal from a Warden's Court to the Supreme Court. However, this is expressed to be subject to section 151, under which there is no right of appeal in respect of any decision, order or recommendation of the Warden or of the Minister. Thus, prerogative relief must be sought.

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5 *Creasy v Hot Holdings Pty Ltd and another* [1999] WASC 69.

6 *Creasy v Hot Holdings Pty Ltd* [2000] WASCA 206.

7 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51.

8 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 153.

9 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 158.

A discussion of the scope of certiorari is beyond this paper.[10] For present purposes, it is sufficient to note that for certiorari to issue, it must be possible to identify a decision which has a discernible or apparent legal effect upon rights. It is that legal effect which may be removed for quashing.[11] As the majority noted, there are typically two situations in which the requirement of legal effect will be in issue:

1. **WHERE THE DECISION UNDER CHALLENGE IS THE ULTIMATE DECISION IN THE DECISION-MAKING PROCESS AND THE QUESTION IS WHETHER IT SUFFICIENTLY AFFECTS RIGHTS IN A LEGAL SENSE; AND**

2. **WHERE THE ULTIMATE DECISION TO BE MADE UNDOUBTEDLY AFFECTS LEGAL RIGHTS BUT THE QUESTION IS WHETHER A DECISION MADE AT A PRELIMINARY OR RECOMMENDATORY STAGE SUFFICIENTLY DETERMINES OR IS CONNECTED WITH THAT ULTIMATE DECISION.[12]**

The second of these was relevant in this case – no issue was taken with the proposition that the granting or refusal of a mining tenement by the Minister would affect legal rights in the sense required. Rather, the question was whether the Warden's decision would effectively operate as a precondition or a bar to a course of action or as a step in the process capable of altering rights, interests or liabilities.[13] The High Court resolved this issue by reviewing the various decision-making schemes created under the Act for the different forms of mining tenements.

Generally, the scheme is that upon application, the Warden collects evidence or considers objections, makes recommendations, gives reasons and transmits all of this to the Minister who then has discretion to either grant or refuse the application.

The decision-making process in respect of exploration licenses is set out in sections 58, 59 and 57 of the Act. Section 58 deals with fundamental requirements. Section 59 sets out the Warden's function once an application under section 58 has been lodged. The Minister's decision then arises under section 57 and is discretionary and preconditioned upon the receipt of the Warden's recommendation (or that of the mining registrar). At the time the High Court considered section 59, subsection 59(4) (as it then was, now subsection 59(5)) did not refer to the Warden transmitting to the Minister the report recommending the granting or refusal of the exploration licence applied for.

A similar process applies in respect of mining leases. Sections 74 and 75 deal with the fundamental requirements and the Warden's function, as well as setting out the scope of the Minister's discretion. Section 71 provides the Minister's power to grant – not section 75.[14]

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[10] It is discussed elsewhere: Murray, as above No.1; A Sceales "Certiorari and the Minister's Discretion Under the Mining Act" (1999) 26 *Brief* (7) 5.

[11] *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159.

[12] Ibid.

[13] *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 162; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580.

[14] *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 167.

Section 105A is also relevant. That deals with the issue of priority as between applications received at the same time. In *obiter* the High Court considered whether or not the right in priority created under section 105A is a right to have the Minister deal with an application without regard to competing applications or if it is no more than a right to grant if there are competing applications and all other things are equal.[15] The majority expressed a preference for the latter view, while not deciding the issue. However, it noted that on either view of the right, the Minister is not bound to grant the application of the first in time or the winner of the ballot.[16]

The majority also made some significant comments in respect of the scope of the Minister's discretion to grant exploration licenses or mining leases under these sections, noting:

> "*While it may be true that the content of the Warden's report and recommendation does not bind the Minister, this does not mean that the report and recommendation ... is not something to which the Minister is bound to have regard in exercising his discretion.*"[17]

The majority in the Full Court of the Supreme Court had thought the Warden's report or the outcome of any ballot he conducts are not matters which the Minister would be *bound* to take into account, but rather *may* take into account in reaching his decision. This, the majority of the High Court noted, was certainly not the case. Courts do not readily classify as absolute or unfettered a statutory discretion the exercise of which will affect rights, unless by a plain expression of its intent the legislature intends otherwise.[18]

Having decided the Minister's discretion under section 57 or 71 is limited, the majority went on to consider what factors under the Act the Minister would be bound to consider. What emerges from that discussion is the Minister is required to, at least, consider the Warden's report, recommendations and accompanying documents provided to him under sections 59 and 75.[19] That is not to say the Minister is bound by the recommendation of the Warden, as subsections 59(6) and 75(6) make clear. These provisions are "but a statutory indication that the weight of those considerations need not be decisive. They do not go to show that the consideration is other than one which the Minister is bound to consider."[20]

It is thus clear certain decisions of the Warden (in addition to that of the Minister) under the Act will be amenable to judicial review and, potentially, the grant of prerogative relief. Further implications of the High Court's decision are discussed below.

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15 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 168-169.

16 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 170. It should be noted this issue was somewhat besides the point – the point being whether the decision as to initial compliance at the same time, which led to an order for a ballot to be held, had an apparent or discernible legal effect upon the Minister's final decision.

17 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 170.

18 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 171; *FAI Insurances Limited v Winneke* (1982) 151 CLR 342 at 368.

19 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 173.

20 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 174-175.

THE SECOND HIGH COURT DECISION – BIAS

Quite a different issue presented itself for the High Court to consider on the second (and most recent) occasion the parties had to appear before it.[21] This time, the issue the High Court was asked to consider was to what extent a decision of the Minister would be affected by bias or give rise to a reasonable apprehension of bias in circumstances where a public servant who was involved in the preparation of a minute for the Minister's consideration in making his decision had a pecuniary interest which might be affected by the Minister's decision.

The factual background to this appeal was as follows. The Warden held the ballot following the decision of the Full Court on remitter from the High Court. Hot Holdings was drawn first and so determined to have priority. After the ballot was held but before the Minister decided which application should be granted, all of the applicants for mining tenements were invited to make submissions to the Minister, which they did. Officers of the Minister's Department prepared the minute for the chief executive officer of the Department (the Director General) to place before the Minister. The minute reviewed the events that had occurred, including the litigation that had taken place and the submissions received. The minute submitted to the Minister recommended he give notice to the parties of his intention to grant the application made by Hot Holdings and to grant the application by Creasy for a mining tenement relating to a small area not the subject of application by Hot Holdings or others. The Minister ultimately approved the recommendations made in the minute.[22]

As will be seen, the level of involvement of the officers who prepared the minutes was critical to the majority's[23] decision. That involvement had two primary aspects.

First, a Mr Miasi, manager of the Tenure Branch of the Department owned some 40,000 shares in AuDAX Resources NL, a company which had entered an option agreement to buy an 80% interest in the exploration licence which Hot Holdings' application would yield if successful. Mr Miasi's involvement extended to writing a draft of the minute to reflect a position reached by the General Manager, Policy and Legislation in the mineral titles division of the Department (a Mr Burton). Mr Miasi was present when Mr Burton and a Mr Phillips, Director, mineral titles division, discussed the matter. Mr Burton swore at trial that Mr Miasi did not influence their decision to recommend the Minister grant Hot Holdings' application. The involvement of Mr Miasi was thus peripheral and limited.[24]

Second, Mr Phillips had a son who owned shares in AuDAX during a period before and leading up to the time the minute was prepared and forwarded to the Minister. In the two months before the minute was submitted, Mr Phillips asked his son whether or not he still held those shares and was told that he did. Mr Phillips himself did not have any pecuniary interest in the outcome of the

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21 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51.

22 A detailed discussion of the background is set out in *Creasy v Hot Holdings Pty Ltd* [2000] WASCA 206.

23 The majority comprised Gleeson CJ, Gaudron, Gummow and Hayne JJ and McHugh J (in three separate judgments in that order). Kirby J was in dissent, arguing forcefully for the imposition of high minimum disclosure standards.

24 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [24], [44], [71].

Minister's decision. At no stage was the Minister advised of the interests of Mr Miasi or Mr Phillip's son.

This, as it turned out, was significant for the majority. Gaudron, Gummow and Hayne JJ noted: "*A decision-maker's ignorance of the existence of an interest held by another in the outcome of a decision that was to be made cannot, standing alone, support a conclusion that the decision-maker has or may have sought to further that interest.*"[25]

Their Honours therefore considered the holding of shares by Mr Phillip's son should be put to one side.

An issue which had been argued in the courts below was that the Minister was alleged to have adopted the Warden's recommendation without independently considering the question for his decision or the various matters to which reference was made as affecting that question in the minute. That submission – that the Minister effectively "rubber stamped" the departmental recommendation – failed at trial and on appeal to the Full Court. It was not pursued in the High Court.[26] Accordingly, the majority did not comment further upon this issue, but it may serve as a timely reminder to decision-makers that they themselves must make the requisite decision.

The approach the Full Court had taken to assessing whether or the Minister's decision was subject to bias was strict in the sense that it considered his decision was "ineffective, even though he acted unwittingly on … tainted advice"[27], such that his decision could not be considered impartial. However, the majority in the High Court considered the relevant question as whether or not the Minister's decision as opposed to the Minister himself was biased. As the majority noted, in effect, such an approach seeks to apply to the decision itself rules which focus upon decision-makers but which are acknowledged to have no operation in relation to the decision-maker in question. This assumes the decision could have a personal characteristic of bias inherent in the information given to the decision-maker and the person who provided it.[28]

The following statement of Gaudron, Gummow and Hayne JJ is pertinent:

> "*Those who place information before decision-makers will often have an interest in the outcome and it will not always be the case that the nature or extent of that interest will be fully revealed to the decision-maker. It would be wrong to say, as a general rule, that in every such case the decision must be considered to be legally infirm. ... There may be cases in which a decision-maker, especially a Minister, may probably have regard to a wide range of considerations of which some may be seen as bearing upon such matters and the political fortunes of the Government of which the Minister is a member and, thus, affect the Minister's continuance in office. It has been said that "the whole object" of a statutory provision placing a power into the hands of the Minister "is that he may exercise this according to Government policy". It would be wrong to assume that in every case a decision-maker can act only if he or she has the same level of independence*

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25 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [40].

26 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [45].

27 *Creasy v Hot Holdings Pty Ltd* [2000] WASCA 206 at [93].

28 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [49].

and security as a judge and, in that sense, has nothing to gain or lose from the decision made."[29]

Evidently, therefore, no requirement of absolute purity (in a sense of being entirely free from any potential suggestion of bias) would be generally imposed by the majority. Their Honours appear to thereby recognise some of the practicalities facing decision-makers under the Act, at least.

Gleeson CJ made some significant remarks regarding the statement of the Full Court that "… the Minister acting on or taking account for such advice which he believed was impartial but which it could fairly be suspected was not had himself for this reason not acted impartially".[30] His Honour considered such an approach appeared to attribute a form of vicarious partiality to the Minister, which could have far reaching implications. Decision-makers, whether administrative or judicial, often act on or take into account information or advice that comes to them from sources that are not impartial.[31] Notably, it was not argued before the High Court that the Minister took into account an irrelevant consideration or failed to take account of a relevant consideration, which sometimes might be a consequence of receiving partial advice but was not the case in this matter.

Accordingly, Gleeson CJ considered that if the respondents had a case for setting aside the Minister's decision, it would be on the ground that the making of the decision involved procedural unfairness.[32] One of the incidents of that duty was the absence of the actuality or the appearance of disqualifying bias.[33] His Honour noted that circumstances where the form of unfairness alleged is the actuality or the appearance of disqualifying bias which said to result from the conduct or circumstances of a person other than the decision-maker, then the part played by that other person in relation to the decision will be important.[34] Since the role played by Mr Miasi was not significant, the Minister's decision was unaffected.

The majority did not consider whether or not the bases for certiorari do or should extend to cases where a person other than the decision-maker has engaged in some conduct which is conduct for the purposes of making a decision (but not itself a decision) and who has some interest in the outcome which, if an interest held by the decision-maker, would engage the rules about apprehension of bias. There was no sufficient factual basis in this matter for needing to go that far.[35]

By contrast, Kirby J spoke forcefully in dissent in favour of the imposition of a high standard of personal integrity and financial probity upon Ministers and departmental officials. Generally, his Honour considered it is always desirable to see a case in its legal and social context. In the case of a Minister in the Government of Western Australia, one could not overlook the concerns about the conduct of public and corporate officers during the 1980s and 1990s which produced demands for

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29 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [50].

30 *Creasy v Hot Holdings Pty Ltd* [2000] WASCA 206 at [91].

31 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [14].

32 It was clear a duty to accord procedural fairness applied since the Minister was exercising a statutory power that affected rights and interests: *Kioa v West* (1985) 159 CLR 550 at 563 and 584.

33 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367.

34 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [22].

35 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [52].

higher standards to be imposed upon Ministers, including in respect of financial probity and the avoidance of conflicts and interest and duty.[36] At the heart of this lies the principle of accountability, whether it be to official superiors and peers, agencies such as an Auditor General or Ombudsman or to the public directly. In this context, administrative law remedies are particularly important and from which, ultimately, spring principles to ensure that the exercise of public power is lawful and within grant. In respect of bias, not only is the legality of the exercise of power lost when actual bias is shown on the part of the repository of the power but also where there is a reasonable appearance or apprehension of bias – that is, when such an observer might reasonably apprehend the possibility that the impugned decision may have been influenced by extraneous considerations.[37]

Significantly, the relevant officers were subject to the Western Australian Public Sector Code of Ethics (in effect from 1 July 1996) and the Code of Conduct for the Department of Minerals and Energy (in effect from 28 July 1998). Those Codes made it clear that public officers employed in the Department should disclose any potential conflict of interest and, in the case of the Code of Conduct, divest themselves of any shares in mining and petroleum companies operating in WA.[38] Evidently, this guideline had not been followed. Although ample evidence was adduced (in the form of affidavits by Mr Philips and Mr Burton) to the effect that Mr Miasi and Mr Philips did not affect or seek to alter the recommendations made to the Minister in any way, Kirby J noted[39] the comments of the Full Court to the effect that regardless of whether or not there was any effect, the potential for a reasonable apprehension of bias was significant enough so as to require them to be disqualified from the decision making process.

In short, his Honour considered the decision of the Full Court could not be impugned (as submitted by the applicant) on any of the bases that:

- it reflected the view that there is a separate rule of disqualification with respect to public decision makers where their decisions are affected by pecuniary interest;[40]
- it reflected an erroneous application to administrative decision making by the Minister and his department of more stringent legal rules on bias devised and expressed for the disqualification of judicial and such like decision makers (in which case they would effectively be exempt from those principles);[41] or
- the Full Court had erred in attributing to the Minister any flaws which existed in the processes within of the Department before the recommendation was tendered to him.[42]

Thus, whatever the exact content of the law governing disqualification for imputed bias, on the facts the Minister's decision was or should be invalidated due to there being a reasonable apprehension of bias.[43]

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36 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [91].

37 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [96].

38 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [97]-[100].

39 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [104]-[107].

40 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [118].

41 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [133].

42 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [138]-[139].

43 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [143].

Fundamentally, Kirby J considered the nature of the administrative decision involved in this case and the circumstances surrounding it which gave rise to the possible appearance of bias were significant and properly taken into account. His Honour noted such decisions involve the creation of valuable assets "virtually out of nothing" and, in the context of the exercise of such powers, pecuniary interests take on a special relevance. A lack of disclosure in such cases raises a high level of suspicion and therefore necessitates a "prophylactic" application of the rules of apprehended bias.[44] For his Honour, not only is the avoidance of actual bias required but also (and perhaps more significantly) the avoidance of any appearance of bias.

IMPLICATIONS FOR DECISION-MAKERS

Dealing first with the second decision of the High Court, perhaps the most obvious implication for decision-making under the Act is, in respect of the potential for bias, a person who has a central role in the decision-making process with interests which would be affected by the decision made may well taint the decision in the way discussed by the Full Court of the Supreme Court. Accordingly, such persons should be disqualified from the decision-making process.

However, on the majority view, persons with a peripheral role such as that of Mr Miasi may continue to be involved to a limited extent. The principle might be stated as: the duty to act fairly and in a manner which does not give rise to a reasonable apprehension of bias applies to all persons who play a significant role in the making of decisions, whether they are subordinate officers or they actually make the relevant decision – the subordinate person plays an important part in the process and may thereby taint the decision itself.[45] Of course, if such a person is to be involved, then risk management strategies should be implemented clearly to delimit the extent of his or her involvement.

Further, apparently, having regard to Government policy in the decision-making process will not by itself cause a decision made in accordance with such policy to be biased merely by reason that the decision-maker may stand to benefit in a sense of ensuring continuance in office by acting in accordance with policy.[46] Generally, the Minister for Mines (and other Ministers engaged in similar statutory decision-making processes, for that matter) would therefore need not be overly concerned about making decisions in accordance with published Government policy objectives.

Such an approach would have to be substantially tempered under Kirby J's position. Interestingly, it would seem his Honour would rule out all persons who hold shares in relevant entities (or otherwise have some potentially affected pecuniary interest) regardless of whether or not those are

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44 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [147].

45 Drawing on the comments of Gleeson J, *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [23] and following.

46 No doubt this statement should be read in conjunction with decisions on the application of Government policy without regard to the matter at hand, such as *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 (while policy may be relevant, it need not be exhaustive of all other potentially relevant considerations); and *Bropho v Western Australia* (1990) 21 ALD 730 (giving undue importance to policy statements without regard to significant facts may amount to a failure to take into account other relevant considerations).

declared.[47] While this may appear strict, it is hard to fault his Honour's views given the existence of the Code of Conduct. There is also at least some attraction in his Honour's views considering, as his Honour did,[48] the sensitivities surrounding the decision required of the Minister in this particular case. However, it remains to be seen whether the majority's decision may be distinguished as applying only to the Act or suchlike and Kirby J's view preferred.

Second, with regard to the first High Court decision, it is clear a decision made by and required of the Minister under the Act (such as those under sections 57, 70B, 71, 86, 96 and 111A among others) will be amenable to judicial review. Arguably, a decision of the mining registrar or the Warden which is final in itself (such as under sections 40 and 91) or prefatory to the Minister's decision (including those provisions noted above requiring a report by the Warden and section 102, among others) will also be amenable to judicial review if it is a decision to which regard must be paid by the Minister (or other final decision-maker).[49] The significance of this lies mainly in the stages leading up to the making of the final decision of the Minister or Warden in each case. At those stages, a recognition of the potential for review requires that close attention should be paid to ensuring due procedural fairness to affected persons and to the use of a structured decision-making process, among other things.

More generally, it is interesting to reflect upon the path this matter has beaten and how the protagonists have enforced their rights. It took some 10 years and 1 month since the applications were first received for the successful applicant – Hot Holdings – to be in any position to commence works. Naturally, it is entirely proper and appropriate that each of the protagonists that sought to pursue its rights (or what it considered to be its rights), arising from the decision-making process established under the Act, was able to do so (in a legal as opposed to a financial sense). However, the experience gained from this matter may suggest there is a place for statutory time limits to be imposed under the Act within which decisions are to be made. Doing so may expedite the grants process and avoid situations where the economic climate may change between the time an application is made and when it is granted, thereby increasing the Act's efficiency generally (in both an economic and popular sense).

As it turns out, any such change may not have had much of an impact upon the Hot Holdings saga due to court procedures consuming much of the total time taken. However, there may have been a reduction in the time taken by the Warden to assess the applications and decide to hold a ballot. Nevertheless, a strong case in favour of such an amendment could be made on the basis of the major investment and potentially substantial returns that exploitation of mining tenement resources frequently involve.

Whatever happens and whatever the lessons may be that can be drawn from the saga, it seems clear that a would-be miner would do well to ensure it has substantial capital backing before engaging in any contest for hot mining tenements. If not, then it could end up beaten by the wayside with little left if it is not prepared for the kind of battle which Hot Holdings has demonstrated can ensue.

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47 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [150].

48 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51 at [147].

49 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 165.

CONTINUITY SINCE SOVEREIGNTY AN ESSENTIAL ELEMENT OF NATIVE TITLE

Members of the Yorta Yorta Aboriginal Community v State of Victoria **[2002] HCA 58**

Native title; section 223 *Native Title Act* 1993 (Cth); traditional laws and customs; continuity of laws and customs since sovereignty; continuity of Aboriginal society since sovereignty

Stephen Wright*

BACKGROUND

On 12 December 2002, the High Court handed down its much anticipated decision on the appeal by the Yorta Yorta Aboriginal People against the decision of the Full Federal Court (Branson and Katz JJ; Black CJ dissenting) in *Members of the Yorta Yorta Aboriginal Community v Victoria*[1] (which had dismissed an appeal against the decision of Olney J at first instance that the Yorta Yorta People did not hold native title). The High Court dismissed the appeal from the Full Federal Court, thereby confirming that native title does not exist in the Yorta Yorta claim area.

The decision is significant because it confirms that the fundamental principle underpinning the High Court's 1992 *Mabo (No.2)* decision[2], namely that native title may exist as a burden on the radical title of the Crown only if an Aboriginal society has maintained a continuous connection with its traditional country since the acquisition of British sovereignty, applies under the *Native Title Act* 1993 (Cth) ("NTA"). However the reasoning of the High Court in reaching that conclusion is somewhat unexpected, and the decision highlights the significant burden which Australia's Aborigines and Torres Strait Islanders face in successfully making out a claim to hold native title.

FACTS

The case involved an application on behalf of the Yorta Yorta Aboriginal Community for a determination of native title under the NTA in respect of public land and water, mainly State forests and reserves, in northern Victoria and southern New South Wales, including the Murray and Goulburn Rivers, and other waterways and lakes. The claim was for exclusive possession, occupation, use and enjoyment of the land, waters and natural resources therein.

The application was lodged in February 1994 (the NTA having commenced operation on 1 January 1994) and was the first claim under the NTA to come on for trial. The trial, conducted before Olney J in the Federal Court, occupied 114 days over an approximately 2 year period, and involved oral evidence from 201 witnesses as well as a substantial volume of documentary evidence.

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1 (2001) 110 FCR 244.

2 *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

At first instance, Olney J found that some but not all of the claimants were descended from persons who, in 1788, were indigenous inhabitants of some of the claim area. He found, however, that the evidence did not demonstrate that the descendents of the original inhabitants of the claim area had occupied the land in "the relevant sense" since 1788, and did not demonstrate that they had continued to acknowledged and observe, throughout that period, the traditional laws and customs of the original inhabitants of the claim area[3].

To the contrary, Olney J found that by the late 19th century, the lives of those Aboriginal ancestors through whom the claimants sought to establish their native title had been so altered and disrupted by the effects of European settlement, that they were no longer in possession of the tribal lands and had ceased to observe relevant laws and customs which might otherwise have provided a basis for the claim. Olney J applied the dictum of Brennan J in *Mabo (No. 2)* and found that the "tide of history" had washed away any real acknowledgment of traditional laws and any real observance of traditional customs, such that the foundation of native title had disappeared. Although his Honour found that members of the claimant group had made genuine efforts to revive the lost culture of their ancestors, he held that native title rights and interests once lost were not capable of revival[4].

ARGUMENTS

In the appeal to the Full Federal Court, the Yorta Yorta claimants argued that Olney J fell into error by applying a "frozen in time approach" i.e. in not permitting any change in the laws and customs as they existed in 1788 and in not permitting any interruption in the acknowledgment and observance of those laws and customs at any time after sovereignty.

The argument before the High Court was presented somewhat differently[5]. The Yorta Yorta there argued that the courts below erred in requiring proof of a continuous connection by an Aboriginal society to the claim area from sovereignty to the present. They argued that section 223 NTA (which defines "native title" for the purposes of that Act[6]) requires only:

- that native title rights and interests exist under traditional laws presently acknowledged and traditional customs presently observed, where "traditional" means merely handed down from previous generations; and
- a present connection with the claim area.

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3 See [2002] HCA 58 at [22].

4 Cited in the judgment of Callinan J at [2002] HCA 58 paras [160]-[161].

5 A fact commented on in the High Court's judgment, although not disapprovingly given the novel questions of law involved: see [2002] HCA 58 at [29]-[30].

6 Section 223 defines "native title" as "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law."

Thus, it was argued, the Commonwealth Parliament, in enacting the NTA, had replaced the common law test for establishing native title as stated in the decision of the High Court in *Mabo (No.2)* with a new statutory form of native title which focussed only on the present.

The Yorta Yorta also argued that Olney J, and the Full Federal Court, had fallen into error in relying upon certain historical documentary evidence in preference to the oral evidence from the claimants.

DECISION

The decision of the High Court in *Yorta Yorta* comprises four separate judgments. Gleeson CJ, Gummow and Hayne JJ delivered a joint judgment dismissing the Yorta Yorta Peoples' appeal ("the joint judgment"). Their Honours concluded that while Olney J and the Full Federal Court erred in their construction of s.223 NTA, given the essential finding of fact that the Yorta Yorta had not continued to *acknowledge and observe* traditional laws and customs, the claim must fail[7].

In a short separate judgment, McHugh J appeared to adopt the reasoning of the joint judgment (albeit only because he felt bound to do so by precedent) and expressly supported the joint judgment's finding that Olney J's essential findings of fact had not been affected by any error of law[8]. Accordingly he also dismissed the appeal. Callinan J also dismissed the appeal, although his reasons, in some respects, went further than those of Gleeson CJ, Gummow, Hayne and McHugh JJ in rejecting the arguments of the claimants.

Gaudron and Kirby JJ (in dissent) would have allowed the appeal, although they were in agreement with the approach taken in the joint judgment in relation to some questions of construction of section 223 NTA.

In the result, the joint judgment can be regarded as the leading judgment, given it is supported in all material respects by McHugh J and is consistent with the judgment of Callinan J. Unless otherwise stated, this case note focuses on the reasoning contained in the joint judgment.

REASONS

Construction of s.223 NTA

Yorta Yorta confirms that, in making an approved determination of native title under the NTA, the Federal Court must apply the statutory criteria in s.223 NTA and not the common law as stated in *Mabo (No.2)*[9].

In particular, the reference in s.223(1)(c) NTA to rights and interests which are recognised by the common law does not incorporate the common law elements of proof of native title into the NTA[10]. Rather, s.223(1)(c) NTA incorporates two features:

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7 [2002] HCA 58 at [94]-[96].

8 At [135].

9 At [76].

10 At [76]-[77].

- rights and interests which are *antithetical to fundamental tenets of the common law* may not be recognised as native title rights and interests under the NTA; and
- *only those rights and interests which existed at sovereignty*, and which have survived to the present, and which can be enforced and protected by the common law, are "recognised" by s.223(1)(c) NTA.

Requirement of a normative system

Upon acquisition of sovereignty, the Crown acquired a radical title to the land, but native title rights and interests survived that acquisition of radical title where they owed their origin to a normative system other than the legal system of the new sovereign. That normative system was the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned[11].

The laws and customs that are claimed to give rise to native title rights and interests must, therefore, derive from a body of norms or a normative system that existed before sovereignty[12]. It is unnecessary to distinguish between "laws" and "customs", however without traditional laws and customs that have normative content, there may be *observable patterns of behaviour*, but not rights and interests in relation to land or waters[13].

Upon the Crown acquiring sovereignty, this normative system could not thereafter create new rights and interests. To hold otherwise would be to deny the acquisition of sovereignty. If follows that only rights and interests which find their origin in pre-sovereignty laws and customs can be recognised as native title rights and interests[14].

The meaning of "traditional" in s.223(1)(a) NTA

It also follows from the above that only laws and customs that have their origin in pre-sovereignty normative rules can be "traditional" laws and customs under the NTA[15].

"Traditional" under s.223(1)(a) therefore has three elements[16]:

- It refers to traditional law or custom which has passed from generation to generation, usually by word of mouth or common practice.
- The origins of the laws and customs are to be found in the normative rules of the indigenous society existing pre-sovereignty.
- The reference to rights and interests being *possessed* under traditional laws acknowledged and traditional customs observed requires that the normative system under which the

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11 At [37].

12 At [38].

13 At [42].

14 At [44].

15 At [46].

16 At [46]-[47], [86]-[88].

rights and interests are possessed has had a *continuous existence and vitality* since sovereignty. If not, the rights and interests will cease to exist.

The link between the society and its laws and customs

According to the joint judgment, laws and customs, and the "society" which acknowledges and observes them, are inextricably linked[17]. Their Honours used the word "society" as meaning "a body of persons united in and by its acknowledgment and observance of a body of law and custom", and explained that "we choose the word 'society' rather than 'community' to emphasis this close relationship between the identification of the group and the identification of the laws and customs of that group"[18].

This "inextricable link" can be viewed from two perspectives - where the traditional laws and customs exist but not the society, and where the society exists but not the traditional laws and customs. As to the first, the content of the laws and customs may be *known*, but if there is **no society** which *acknowledges and observes* them, they cannot be the source of native title rights and interests. If the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, then those laws and customs cease to have *continued existence and vitality*[19].

As to the second perspective, if the society **ceases to acknowledge and observe** the traditional laws and customs, the society ceases to exist[20]. When the society ceases to exist in this sense, the rights and interests in land to which the laws and customs gave rise cease to exist[21].

In respect of both of these two perspectives, there must be continuity. It may be that the **content of the laws and customs** is passed on from individual to individual, despite the dispersal of the society, and that the descendents of those who used to acknowledge and observe them have taken them up again. In such a case, there will have been *knowledge*, but not *acknowledgement and observance*. The laws and customs will have been adopted by a *new* society. They will not be rooted in pre-sovereignty traditional law and custom, and will not be "traditional" for the purposes of s.223 NTA[22].

Hence **acknowledgement and observance** of the laws and customs must have continued *substantially uninterrupted* since sovereignty, otherwise they would not be "traditional". That is to say, they would not have been transmitted from generation to generation of the society for which they constituted a normative system that gave rise to the body of law and custom which defined the relevant rights and interests[23].

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17 At [55].

18 At [50] and footnote 31 to the joint judgment.

19 At [50].

20 At [52].

21 At [53], [95].

22 At [51]-[53].

23 At [87].

According to the joint judgment, the qualification "substantially" is important because it recognises the difficulties of proof of continuous acknowledgment and observance of oral traditions. Nevertheless, it must be shown that the **society**, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist since sovereignty *as a body united* by it *acknowledgement and observance* of the traditional laws and customs[24]. The inquiry about continuity does not require consideration of why, if acknowledgment and observance stopped, that happened[25].

In their dissenting judgment, Gaudron and Kirby JJ accepted that proposition saying that "[c]ontinuity, including continuity of community, is a matter that bears directly on the question whether present day belief and practices can be said to constitute acknowledgment of traditional laws and customs"[26].

It follows from this requirement of continuity that notions of *abandonment* or *expiry* of native title are to be found in ss.223(1)(a) and (b) NTA, rather than s.223(1)(c)[27].

Adaptation and change to laws and customs

The joint judgment makes clear that "demonstrating some change to, or adaptation of, traditional law and custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim" (emphasis in the judgment[28]). Account may have to be taken of developments, at least of a kind contemplated by that traditional law and custom[29].

However the High Court has not offered any simple test for deciding what changes or adaptations to the pre-sovereignty laws and customs will be permissible for the purposes of s.223 NTA. The key question is whether the laws and customs can still be seen to be *traditional* laws and customs; or put another way, is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional law acknowledged and the traditional customs observed by the relevant people (where "traditional" is to be understood in the manner referred to above)[30]. The joint judgment warns that it would be wrong to attempt to reformulate the statutory language when it is the words of s.223 NTA to which effect must be given.

Demonstrating the content of traditional laws and customs may present problems of proof for claimants. Claimants will generally have to lead evidence from which the court can infer the content of the pre-sovereignty laws and customs[31]. The majority of the High Court did not discern any error in Olney J's reliance upon some written evidence as being more useful than some oral

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24 At [89].

25 At [90].

26 At [111].

27 At [92].

28 At [83].

29 At [44].

30 At [82]-[83].

31 At [80], [82].

evidence[32]. The majority of the High Court also considered that Olney J and the Full Court did appropriately allow for adaptation and change in pre-sovereignty laws and customs in response to European settlement in concluding that the Yorta Yorta had ceased to acknowledge and observe traditional laws and customs[33].

The requirement of connection in s.223(1)(b) NTA

Section 223(1)(b) NTA is directed to the existence of a relevant *connection* to the land and waters in question[34]. The connection which must be shown is a *present* connection with the land and waters *in accordance with* the traditional laws and customs acknowledged and observed *by the ancestors at sovereignty*[35]. Hence it is wrong to confine the inquiry for connection between claimants and the land and waters concerned, to an inquiry about the connection demonstrated by the laws and customs *now* acknowledged and observed. Rather, the inquiry concerns the *relationship* between the laws and customs now acknowledged and observed, and those acknowledged and observed before sovereignty[36].

Exercise of rights

The joint judgment in *Yorta Yorta*, similarly to the High Court's earlier decision in *Western Australia v Ward*, says that evidence that some people have *exercised* the claimed rights and interests does not answer the statutory questions in s.223 NTA. Those questions are directed to *possession* of the rights and interests, not their exercise, and the existence of a relevant connection. Evidence that at some time, since sovereignty, "some of those who now assert that they have that native title have not exercised those rights, or evidence that some of those through whom those now claiming native title rights or interests contend to be entitled to them have not exercised those rights or interests (sic), *does not inevitably* answer the relevant statutory questions" (emphasis added). Nevertheless, the joint judgment acknowledges that "the exercise of native title rights and interests may constitute powerful evidence of both the existence of those rights and their content"[37].

CONCLUSION

Some respondents to the Yorta Yorta appeal argued that s.223 NTA was intended to do no more than adopt the common law test in *Mabo (No.2)* for establishing native title[38]. This belief was fostered, in particular, because of the express reference to the common law in s.223(1)(c). However the trend in High Court decisions since the NTA was enacted has been increasingly to focus on the Act as having supplanted *Mabo (No.2*). The Yorta Yorta appeal threatened to bring to a head this potential conflict between *Mabo (No.2)* and the NTA. There was the potential for a political backlash similar to that which followed *Wik*, if the High Court effectively overturned

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32 At [63].

33 At [63].

34 At [84].

35 At [86].

36 At [56].

37 At [84].

38 An argument that obviously found favour with McHugh J (see [129]-[133]).

Mabo (No.2) in favour of a less stringent test for establishing native title. In the result, the High Court appears to have interpreted the words of s.223 NTA in a manner essentially consistent with *Mabo (No.2*).

If anything, *Yorta Yorta* has come as a surprise because, contrary to many people's expectations, the High Court has arguably allowed little scope for Aboriginal societies and their laws and customs to change and adapt in response to the pressures and influences of European settlement over the past 200 or so years. The effect of the High Court's decision may be that the general assessment of native title following *Mabo (No.2)*, namely that native title is unlikely to be found to exist in most of the settled parts of Australia, will be realised.

From a legal practitioner's point of view, the High Court's decision in *Yorta Yorta*, together with its other recent decisions in *Commonwealth v Yarmirr*, *Western Australia v Ward* and *Wilson v Anderson*, have brought some welcome clarification to the law of native title in Australia. I suggest that, following the High Court's *Yorta Yorta* decision and its earlier decisions, the analytical process for determining a claim to native title should now be approached along the following lines:

(1) identify, at sovereignty, in respect of the land and waters claimed:

(a) the laws and customs (i.e. "normative system" of rules) of the Aboriginal persons who had a connection to the land and waters ("**traditional laws and customs**"); and

(b) the body (or bodies) of persons who were united in and by their acknowledgment and observance of that body of law and custom ("**traditional society**"); and

(c) the rights and interests in relation to land and waters which existed under the traditional laws and customs and which are recognised by the common law (in the sense of not being *antithetical to fundamental tenets of the common law*) ("**traditional rights and interests**")[39];

(2) determine whether[40]:

(a) acknowledgment and observance of the traditional laws and customs has continued *substantially uninterrupted* from sovereignty to the present; and

(b) the traditional society has substantially maintained its identity from generation to generation, in accordance with those traditional laws and customs, through to the present claimants; and

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[39] This step is necessary to ensure that the native title rights and interests which presently exist are consistent with the rights and interests which existed at sovereignty, since new rights and interests cannot be recognised post-sovereignty: see [2002] HCA 58 at [43], [55].

[40] Although in practice, this step is in many cases likely to be satisfied through inferences drawn from evidence of the laws and customs and the society which possessed them at various points in history, and from the evidence of the present-day claimants.

(c) throughout the period from sovereignty to the present the traditional society and its future generations have maintained a connection with the land and waters, and have transmitted rights and interests in relation to those land and waters, in accordance with the traditional laws and customs; and

(3) identify, at present, in respect of the land and waters claimed:

(a) the laws acknowledged and customs observed by the claimants (i.e. "normative system" of rules, as opposed to the existence of activities or "observable patterns of behaviour") ("**present laws and customs**"); and

(b) the constitution of the claimants as a society or group ("**present society**");

(4) determine:

(a) those present laws and customs (if any) ("**relevant laws and customs**") which are the same as the traditional laws and customs (or if not the same, are such that the change or adaptation of the present laws and customs is not of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws and customs); and

(b) whether the present society is substantially the same as the traditional society; and

(c) whether the present society has, by the relevant laws and customs, a connection with the land or waters claimed;

(5) if (4) above is satisfied, determine those sovereignty rights and interests which still exist under the relevant laws and customs; and

(6) determine whether any of those rights and interests have been extinguished by inconsistent legislative or executive acts of the Crown.

THE PETROTIMOR CASE – CHALLENGE TO AUSTRALIAN CLAIMS IN THE TIMOR SEA*

A third Court challenge to Australia's continental shelf claims in the Timor Sea has been dismissed by the a Full Court of the Federal Court (Black CJ and Beaumont and Hill JJ). Its decision of 3 February 2003 struck out the submissions made in this regard by the Applicants, who were a Portuguese company named *Petrotimor Companhia de Petroleos S.A.R.L.* and an American company named *Oceanic Exploration Company*. The Respondents were the *Commonwealth of Australia, the Joint Authority Established Pursuant to the Treaty of 11 December 1989 between Australia and Indonesia, Conocophillips (91-12) Pty Limited, Conocophillips JPDA Pty Limited and Phillips Petrotimor Sea Pty Limited*.

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The two earlier challenges were made respectively in the High Court (*Horta v Commonwealth of Australia* (1994) 181 CLR 183) and in the International Court of Justice (*Portugal v Australia* (1995) ICJ Reports 903).

The only success of the Applicants in the Federal Court was in relation to claimed misuse by the Respondents of confidential information belonging to the Applicants, and even this was limited in nature. Questions were raised as to whether there was jurisdiction to entertain these claims, especially as the other claims had been struck out. The Applicants were required to file and serve brief written submissions dealing with their questions within 21 days of the delivery of the decision on 3 February 2003.

Commonwealth submissions

Counsel for the Commonwealth submitted in the Federal Court that the issues raised by the Applicants in their pleading were non-justiciable (or alternatively, the Court had no jurisdiction to hear the proceedings), because in respect of each cause of action whether specifically, or if not specifically then as a necessary ingredient of it, it was necessary either that the Court make an adjudication on an act of State of a foreign government (the grant of concessions by Portugal to the Applicants in the proceedings), or alternatively to adjudicate upon the validity, meaning and effect of transactions of foreign States or both. In consequence, it was submitted, there was no justiciable issue for the Court to decide and additionally or alternatively there was no "matter" within the jurisdiction of the Court.

It was submitted that this came about as a result of the application of one or more perhaps overlapping principles, on each of which the Commonwealth relied, these being:

- The Court has no jurisdiction to determine or will not adjudicate upon claims which depend upon the exercise by the Executive of the prerogative in relation to foreign affairs and, particularly in the present context, involving the territorial boundaries of Australia's claim to the continental shelf between Australia and East Timor. If, contrary to the submission, the Court may adjudicate on matters involving the territorial boundaries of the Commonwealth then it would be bound by a certificate from the Executive stating what those boundaries are.
- The Court will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that Sovereign's own territory, cf *Potter v The Broken Hill Proprietary Company Ltd* (1906) 3 CLR 479. It was submitted that each of the claims made by the Applicants in the proceeding required the Court to adjudicate upon the validity of acts and transactions of Portugal or Indonesia as the case may be. Allied to this principle is the general principle that domestic Courts will not enforce foreign public law, cf *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 41 (the *Spycatcher Case*).
- Alternatively, the Court should not, as a matter of judicial restraint, adjudicate upon the claims of the Applicants involving matters affecting Australia's international relations having regard to the principles in *Buttes Gas and Oil Co v Hammer* [1982] AC 888.
- Alternatively, because the Court exercising the judicial power of the Commonwealth may only decide "matters", that is to say, justiciable controversies, it lacks jurisdiction to determine the Applicants' claims because the issues inherent in the Applicants' pleaded case are not justiciable, that is to say, matters which are capable of judicial determination.

Petrotimor submissions

For the Applicants it was submitted that these principles have no application to the present case because by the *Seas and Submerged Lands Act 1973* (Cth) ("the SSL Act") Parliament defined the boundaries of the area in respect of which Australian sovereign rights were to be exercised over the continental shelf and that exercise of sovereignty thereafter excluded any exercise by the Executive of the prerogative to define Australia's boundaries except as provided for in that Act. It was the Applicants' case that the SSL Act, which defined the continental shelf over which Australia had sovereignty by reference to the definition contained in the 1958 United Nations Convention on the Continental Shelf, properly construed, placed the boundary between Australia and the then Portuguese Timor along the median line between their coasts, so that the areas over which the Applicants were granted concessions were outside the area over which Australia exercised sovereign rights under that Act. Accordingly, it was submitted, there was no barrier to the Applicants' concession rights being recognised by Australian courts. The Timor Gap Treaty between Australia and Indonesia operated to extinguish the rights of the Applicants (and thereby leading to a right in the Applicants to compensation) or alternatively had no effect upon them, either as a matter of interpretation or because the Treaty was of no effect, its ratification being beyond the executive power of the Commonwealth. The subsequent legislation to give effect to the Treaty was likewise of no effect or, if it was, it gave rise to an entitlement of the Applicants to compensation or alternatively to the result that their rights had not been extinguished.

The arguments

Shortly put, the Commonwealth said that it was for the Executive to define the territorial boundaries of Australia, including the territorial sea and continental shelf. Hence, if an essential ingredient of an Applicants' case involved the Court in defining territorial boundaries, the Courts would not enter upon an adjudication of that. This principle might be seen as a corollary to the other principle relied upon by the Commonwealth, namely, that the domestic courts would not adjudicate upon the effectiveness of acts of state of foreign governments.

Thorough examination of issues

A notable feature of the Federal Court proceedings is the thorough examination made by Counsel and Judges, of the major and complex issues that were involved. These included the following as dealt with in the joint judgment of Black CJ and Hill J:

- There was consideration of the general principle discussed by the High Court In *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479, namely that the domestic courts will not explore rights granted by a foreign sovereign. O'Connor J (at 510) based his judgment on what he referred to as principles of international law which recognise that the Courts of a country would not, except subject to well known exceptions, inquire into the validity of the acts of a foreign state (paras 37 and 38 of joint judgment).
- The joint judgment held the Applicants' claim could not accurately be characterised as merely claims to test the validity of actions of the Australian Government under Australian law affecting the Applicants as the holders of the Portuguese concessions. It was an essential ingredient of most of the Applicants' claims that they did hold a valuable concession (para 43).

- Reference was made (para 47) to the overlapping principle in *Buttes Gas and Oil Co v Hammer* (1982) AC 888 that it was of the very nature of the judicial process that municipal courts would not adjudicate on the transactions of foreign states. Lord Wilberforce (at 938) was quoted:

> "there are … no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign state were involved, which they had brought to a precarious settlement, after diplomacy and the use of force and to say that a least part of these were 'unlawful' under international law.
>
> *... this counterclaim cannot succeed without bringing to trial non-judiciable issues."*

- It was clear that there would be considerable embarrassment in the Court deciding what had been a most contentious issue between Portugal and Australia and which was still a subject of delicacy between Australia and the newly created East Timor (para 52).
- The Applicants relied upon the recent decision of *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 WLR 135 either as authority for a submission that *Buttes* should not be applied in Australia or should be distinguished. However, the *Kuwait case* was said by the joint judgment to concern a breach of international law that had been determined by the Security Council acting under the UN Charter (para 60), and it was distinguishable (para 63).
- As to whether there was a "matter" in which a Court might adjudicate, in *Re Ditfort* (1988) 19 FCR 347 Gummow J did not cast doubt upon the general principle, which His Honour accepted, that the question whether there was a breach of international obligations was not a justiciable issue and was not a "matter" in the constitutional sense. The general principle could be said to be, at least in part, to be an element of the separation of powers between the functions of the executive government and the Courts on the other hand (para 65).

The separate judgment of Beaumont J is also commended, and reference is made in particular to the following points contained in para 149 thereof:

- It may be accepted that the 1958 Continental Shelf Convention is part of the *Seas and Submerged Lands Act*; and that the Convention's definition of "continental shelf" is incorporated into the Act. Yet the question remains whether, **otherwise**, the Act made the provisions of the 1958 Convention, especially those directed at the process of locating a boundary, part of Australian domestic law. In my opinion, as a majority of Justices held in the *Seas and Submerged Lands Case*, it did not (see also, in analogous contexts *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Immigration and Ethic Affairs v Teoh* (1995) 183 CLR 273; *Minogue v Williams* (2000) 60 ALD 366 at 372 – 373; D. Pearce and R. Geddes *Statutory Interpretation in Australia* 5th ed (2001) at 34).
- The contention that, on its proper construction, the 1958 Convention, consistently with the P(SL) Act, placed the boundary between Australia and Portuguese Timor along the "median" line between their coasts cannot be accepted. It is one thing to say that the Act incorporated the 1958 Convention's meaning of "continental shelf"; it is quite another to

say that by virtue of the operation of the Convention and the Act, the relevant boundary was located along a particular line.

- As James Crawford ("Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 AJIL 820 at 856) has noted, there are certain transactions which public international law, as an autonomous system of law, (ordinarily) purports to govern as between the parties. In that sense, in those cases, international law is "the proper law" of the transaction; so that questions of the validity or termination of a treaty, or **the location of an international boundary**, are matters that international law "integrally governs". These ("self-executing") contexts can be contrasted with the ("non self-executing") cases where (ordinarily) international law merely sets standards of (minimum) performance for municipal law systems, eg: in areas of human rights, where international law "operates not integrally but at one remove".

North Sea Continental Shelf Case

Finally on the judgments, reference is made to comments made in Beaumont J's judgment as one of his points in para 93. He refers to the comments in the Ministerial Statement made by the Australian Minister for External Affairs in the House of Representatives on 30 October 1970 on the grant of petroleum permits in the North Sea and observed:

> "The Minister was referring to the *North Sea Continental Shelf Cases* ([1969] ICJ reports 3). Germany was a party to the proceedings, but was not bound by the 1958 Convention. It was held, in essence, that the "equidistance" method of determining boundaries was not a rule of general or customary international law; and that, in the course of negotiations, one of the factors to be taken into account was, so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the shelf area."

Will there be an appeal to the High Court?

An application for leave to appeal to the High Court has already been mooted. While leave would normally be expected to be granted having regard to the issues involved, this may be one of those cases where it is withheld.

BOOK REVIEW

PROJECT FINANCE IN ASIA PACIFIC: PRACTICAL CASE STUDIES

by Richard Tinsley*

(Euromoney Books, London, 2002)

The author of this volume is well known to many members of AMPLA. Tinsley's group, International Advisory & Finance, was most recently ranked fourth among 24 listed Asia Pacific project finance advisors by *Project Finance International*.

The book comprehensively details 16 recent Asia Pacific project financings, across a wide range of sectors:

- US$907 million Santa Rita 1,000 MW combined-cycle power plant in the Philippines
- US$259 million GVK Industries 216 MW combined-cycle power plant in Andhra Pradesh, India
- US$225 million Hero Asia twin 125 MW coal fired power plants in Shanghai, China
- US$1.09 billion Southern Cross Cable Network linking Australia, New Zealand, Fiji, Hawaii and the continental United States
- US$68.5 million Laem Chabang Port in Thailand
- US$181 million West Coast Port bulk-liquid chemical terminal in Gujarat, India
- Rs 3.07 billion (US$73 million) million Noida toll bridge in Delhi, India
- RM677 million (US178 million) mainland-to-island Penang, Malaysia bridge refinancing
- A$233 million Brisbane Airtrain airport-to-city rail link
- A$600 million Australian Railroad Group acquisition project financing
- US$800 million Hong Kong to Guangzhou Superhighway tollroad financing
- US$107 million Chengdu water treatment plant in Sichuan, China
- US$3.27 billion Ras Laffan LNG project in Qatar
- US$960 million Murrin Murrin nickel cobalt project in Western Australia
- US$424 million Korea Zinc refinery in Townsville
- US$1.91 billion Batu Hijau copper-gold mine, between Bali and Timor in Indonesia

The financings for the Chengdu water treatment plant and the Southern Cross Cable Network have received accolades from *Project Finance International, Financial Intelligence Agency (Hong Kong), International Financial Law Review, Finance Asia* and *Global Finance*.

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* Reviewed by Neil Cole, N H Cole and Associates Pty Ltd.

Some of the cases presented are cutting-edge, state-of-the-art examples of innovative financial engineering. For all but two of the cases, there is a comprehensive deal structure diagram, the complexity of which in some cases calls for a three dimensional viewpoint.

There is a wealth of detail included, even to the extent where any student of this text can become a five minute expert in numerous obscure fields, for example the annual storage charges for five different types of hydrocarbons in the Port of Mumbai.

AMPLA members will be interested to view the moves in recent years in the league table of legal advisors to Asia Pacific project financings, with the growing dominance of English law firms.

Risk analysis

For each of the 16 projects, the aspect of risk analysis, long a strong theme in Tinsley's approach to project financings in the resources sector, is particularly well covered.

For the Korea Zinc smelter in Townsville, the project risk factors, each reviewed in detailed, cover operating-technology, operating-cost, operating-management, completion, political, market, supply/reserve, infrastructure, participant, environmental, FX, engineering, syndication, funding/interest and legal.

For the Qatar LNG project, very similar risk factors are analysed, with the addition of *force majeure* risk.

20:20 Vision: History not hindsight

A number of AMPLA readers – some with first-hand involvement - will smile, with the perfection of hindsight, at parts of the coverage of the Murrin Murrin project funding. How good is 20:20 vision for those who always knew better about this project?

A student of seven earlier failed nickel project financings would recognize the recorded history, with examples from three of these cited:

- Botswana: the Selebi-Pikwe underground sulphide operation, developed in 1974, had a 100 per cent completion cost overrun.

- The Philippines: the Marinduque project, which started in 1975, was twice bankrupted.

- Australia: Queensland's Greenvale Nickel, near Townsville, defaulted on its US$326 million project financing. The main lenders were CIBC, KfW and ANZ (its first project financing lead).

Notwithstanding this background of nickel project financing disasters, the Murrin Murrin project bond and other raisings for subsidiaries of both Anaconda Nickel Limited and Glencore International AG were all successfully concluded, and the project was built. The more recent history puts a different slant on that success.

Problems encountered and lessons learned

The descriptions of problems encountered and lessons learned for each project financing are educational, with the following selected examples:

- "Cooperation with the ADB led to a consultative process, resulting in a pragmatic but not perfect solution."

- "As India's first BOOT bridge, the innovative credit enhancements sprang the requisite funds on a back-ended principal repayment basis that is well suited to infrastructure project finance."

- "Local currency debt was very wise as the currency has been progressively devalued against the US dollar since the time of the financings."

- "This well-structured project financing shows how readily any project financing deal becomes a 'living' arrangement that responds dynamically to changing conditions."

- "The surplus of completion funding was neatly used to underpin FX hedging unforeseen when the deal was first underwritten."

- "A greater amount of legal due diligence was required as a result of complications in novation of the cross-border leases."

- "A light-handed approach to regulation made it difficult to assess the extent of the inherent regulatory risk due to the absence of a regulator or any clear direction on the regulatory framework at the time."

Islamic project funding

The mobilisation of Islamic capital is governed under Shariah (canon) law, drawn from five separate principles. The book describes the seven different types of Islamic funding, where the concept of interest is illegal, with the lender requiring a return via a participation in either the capital or the profits of the enterprise.

The depth of the Islamic capital market in Malaysia allows for project financings greater than US$1 billion. By contrast, the book reports that neighbouring Indonesia, the world's largest Islamic nation, has been unable to put any Islamic project financing into effect.

The US$178 million Penang Bridge was funded in Al-Bai Bithaman Ajil Islamic project finance bonds. With this method which is sometimes known as "cost-plus" or "mark-up" financing, the bank purchases an asset, up to 90 per cent of the total value of the project. Repayments are in deferred payments for a specific period, or by instalments. The repayment amount is the sum of the purchase cost plus a margin of profit to the bank. There are no commitment fees. There are no late-payment penalties.

This book is well researched, topical and well presented. There are many references for most of the project chapters. The extensive array of acronyms – such as ECA, PRI, NEXI, BOO/BOT, KfW, PLR, IPP, NNCF and LLR - and other technical terms are well covered in a useful glossary.

The book was completed not long before the recent Argentine government infrastructure financing default. It will be interesting to watch for a future edition's coverage of the implications arising therefrom for future major project financings.

Project Finance in Asia Pacific: Practical Case Studies is a solid new essential work for professional advisors to project finance structuring and transactions.

278 + xiv pp. US$215 or GBP120. Order via www.euromoneybooks.com at Project Finance, which also shows the complete list of contents.