Case Study Project 1.3

Regulation of Mine Closure Planning and Pilbara Agreements Case Study

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STATEMENT OF ACADEMIC INDEPENDENCE

The members of Steering Committee for Project 1.3 are named in the principal report, *Mapping the Regulatory Framework of Mine Closure*, May 2022. All members of the Steering Committee have had the opportunity to provide comment on drafts of this case study. The author appreciates and acknowledges the contribution of industry, government, and independent stakeholder representatives who donated their time and expertise to discuss, answer questions, and provide feedback, for this case study. The author thanks Meredith Gibbs and Alex Gardner for their insightful suggestions and comments in their peer review.

The authors appreciate the assistance of Steering Committee members, research contacts and consultants, and their recognition of our academic independence. The views in the Case Study are the author's, as are any errors.

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Executive Summary

The purpose of this case study is to describe the current State Government regime for regulating mine closure in Western Australia (**WA**) and determine if, and how, the regime applies to Pilbara iron ore mines authorised by state agreements (**Pilbara agreements**). The mines authorised by the Pilbara agreements (**Pilbara agreement mines**) are subject to mine closure planning requirements because either the Environmental Protection Authority (**EPA**) has recommended and the Environment Minister has imposed an implementation condition (**implementation condition**) under Part IV of the *Environmental Protection Act 1986* (WA) (**EP Act** or **EP Act 1986**), or the proponent has developed mine closure plans pursuant to an agreement obligation. If neither of those legal requirements apply, the proponent may choose to develop mine closure plans as an exercise of their social licence.

The Pilbara agreement case study (**case study**) contrasts the *Mining Act 1978* (WA) mine closure regime with the EP Act Part IV system to identify whether, Pilbara agreement mines are, or will be, subject to mine closure planning imposed by implementation conditions. If the Pilbara agreement mines have not engaged Part IV, then mine closure planning is voluntary, unless the agreement itself imposes a relevant obligation. The aim of the case study is to objectively flesh out the legal parameters, anomalies, and differences between the two regimes. It is not within the scope of the research to comment on whether one system of mine closure planning is superior to the other.

The case study examines the public availability of mine closure plans in order to facilitate transparency of mining practices and stakeholders' access to mine closure planning information under the two systems. While the focus is on the Pilbara agreement mines, the same propositions apply to all mines authorised by State agreements in WA.

There are other layers of regulation that apply to State agreement mines that may encompass aspects of mine closure planning, such as the *Native Title Act 1993* (Cth) (**NTA**) consultation procedures and Indigenous Land Use Agreements, EP Act Pt V licensing that controls clearing of native vegetation and water or waste discharge, heritage Acts and the Pilbara agreement terms that may impose conditions relevant to mine closure.[1] These requirements are not within the scope of this case study. Some aspects of remediation, such as acid rock drainage, are regulated by the *Contaminated Sites Act 2003* (WA).[2] However, that Act does not require a mine closure plan. This case study is unable to comment on mine closure planning imposed by a State agreement term and managed by the department responsible for State agreements (currently the Department of Jobs, Tourism, Science and Innovation) as information from this department is not publicly accessible due to the commercial confidentiality of development proposals and related documents.[3]

Section 7 provides glossary of abbreviations and defined terms used in this case study.

Key Words: Pilbara, iron ore mining, State agreements, mine closure planning, regulation

[1] See for example, rehabilitation requirements in *Iron Ore (Mount Newman) Agreement Act 1964* (WA) sch 4 cl 3(8) inserts cl 9A(3)(k), 12(a) – (b).

[2] *Contaminated Sites Act 2003* (WA) s 27. Note the regulations under this Act were imposed in 2006. *Contaminated Sites Regulations 2006* (WA).

[3] Email from Eliza Ryan, Project Manager Project Facilitation, Department of Jobs, Tourism, Science and Innovation (25 May 2022). The author contacted the Department of Jobs, Tourism, Science and Innovation (**JTSI**) via email on 29 October 2021, follow-up 27 November 2021 and 24 May 2022. JTSI confirmed this is the Department's position.

1 Introduction

Inconsistent regulation of mine closure planning occurs in the Pilbara iron ore mining industry because successive State governments have used an evolving model of State agreements to facilitate mining projects from the 1960s to the present time. Western Australia (**WA**) is the largest iron ore supplier in the world.[4] The State agreement regimes regulate 98% of iron ore mining in the Pilbara, a region which accounts for 93% of Australia's iron ore production.[5] The common effect of the State agreements that authorise Pilbara iron ore mining (**Pilbara agreement**)is that the current statutes capable of imposing mandatory mine closure planning apply inconsistently, or do not apply at all, to Pilbara iron ore mines authorised by State agreements (**Pilbara mines**). In particular, the Pilbara mines developed in the 1960s, such as Mount Whaleback (the largest open pit iron ore mine in the world),[6] are not subject to mine closure planning under the *Mining Act 1978* (WA) (**Mining Act** or **Mining Act 1978**) or the *Environmental Protection Act 1986* (WA) (**EP Act** or **EP Act 1986**). In addition, Pilbara mines that ceased operating prior to 1986 are also not subject to the EP Act because that Act applies prospectively. In these instances, the State relies on the proponent company exercising their social license to operate to achieve mine closure planning; that is, devising their own mine closure plans in accordance with state guidelines and international standards. Presumably, these plans are submitted to the department responsible for State agreements (the Department of Jobs, Tourism, Science and Innovation (**JTSI**)) and the proponent receives assistance from other relevant government departments.[7]

In contrast, a mine that is not developed under a Pilbara agreement is subject to mandatory mine closure planning under the Mining Act 1978, and contributions to a mining rehabilitation fund to safeguard the State against liability for rehabilitation failures under the *Mining Rehabilitation Fund Act 2012* (WA) (**Mining Fund Act**).[8] The Mining Act requires mine closure plans in accordance with the Department of Mines, Industry, Regulation and Safety (**DMIRS**) most recent mine closure planning guidelines (**DMIRS closure guidelines**) for new and existing mines situated on all mining leases—that is, the requirement includes operating and closed mines located on the tenement.[9] In comparison, the type of closure plan requirements imposed by an EP Act Part IV implementation condition recommended by the Environmental Protection Authority (**EPA**) and imposed by the Environment Minister (**implementation condition**) on a Pilbara mine will depend on the interaction of the Pilbara agreement terms' with the EP Act and the time the mine commenced.

An important distinction between the direct application of the Mining Act regime to non-State agreement mines and the indirect application of that regime to Pilbara agreement mines via an EP Act Part IV implementation condition is that the Mining Act regime applies to mines existing on the tenement whether operating or not. In contrast, the Environment Minister's authority to impose an implementation condition under the Part IV regime is triggered by the proponent's submission of a proposal. Pilbara mines that are not operating or closed will not submit a proposal—so these mines will not enliven the Minster's authority to

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4 Department of Jobs, Tourism, Science and Innovation (WA) *Iron Ore Industry Profile* (July 2020).

5 Department of State Development (WA), *Western Australia Iron Ore Industry Profile* (September 2016) 3 – 4. Note, 95% of production equates to 98% of exports see Bureau of Resources and Energy Economics (Cth), *Australian bulk commodity exports and infrastructure – outlook to 2025* (July 2012) Figure 7.6, 85 – 86.

6 BHP, *Mt Whaleback mine (Newman West)*, accessed 5 December 2021 <https://www.bhp.com/what-we-do/global-locations/australia/western-australia/mt-whaleback>.

7 As noted above, this case study does not comment on the policy, Pilbara agreement obligations, or administrative arrangements between the proponent and JTSI because this information is not publicly available, see above n 3.

8 *Mining Rehabilitation Fund Act 2012* (WA).

9 *Mining Act 1978* (WA) ss 82(1)(ga), 84AA. See explanation of the operation below at Heading [4.1]. DMIRS has confirmed this application in response to the author's email enquiry, Emily Safe, Senior Policy Officer, DMIRS Resource and Environmental Compliance Division (29 October 2021).

impose an implementation condition that requires the mine to comply with the DMIRS closure guidelines. Operating mines that have not submitted a new proposal after 2010, which was when the Environment Minister began imposing implementation conditions requiring compliance with the DMIRS closure guidelines as a standard practice, will be subject to various conditions reflecting the standard practice of that time. For example, a mine approved in 2009 is likely to have more extensive contemporary closure planning requirements than a mine that received approval in 2000. Regardless of the sufficiency of the various implementation conditions, the system is inconsistent and ad-hoc. Some mines are required to comply with the DMIRS closure guidelines, while others are required to comply with individual implementation conditions, and mines that have not engaged the Part IV review at all, are managed by JTSI. In those cases, the parties may agree that the Pilbara agreement imposes an obligation, or the proponent may voluntarily develop a closure plan (social licence).

In addition, a further inconsistency between the two regimes, is that Pilbara agreement proponents (or other State agreement mine proponents) are not required to make financial contributions under the Mining Fund Act for past, present or future mines.[10]

A facet of this inconsistent system is a paucity of publicly available mine closure plans or information. For example, if the closure plan for the Whaleback mine (a mine that is not subject to mine closure planning under the Mining Act or EP Act regimes) were submitted to JTSI that information is highly unlikely to be publicly available because JTSI does not, and is not required to, publicly release information about State agreement mines. Further, even when a mine has undergone a Part IV review, the mine closure plan is only available online for a relatively short time because that information is archived after the approval process is complete.[11] The limited public access to mine closure plan information reduces the stakeholders' continued engagement and may also impede proponents achieving progressive post mining outcomes, particularly in relation to managing cumulative impacts and developing compatible closure plans that promote best practice regional outcomes, such as repurposed land use.[12] Further, commercial confidentiality and the *Competition and Consumer Act 2010* (Cth) limit the proponents' capacity to data-share,[13] which, in turn, inhibits collaborative planning between proponents for cumulative impacts or repurposing land on a regional scale. For example, in some areas closure plans of mines owned by different companies may overlap in the management of affected groundwater resources. In these areas knowledge sharing could facilitate best practice for water management and land use after mining.[14] This information could also be of importance to Traditional Owners (depending on the terms of their *Native Title Act 1993* (Cth) (**NTA**) Indigenous Land Use Agreement) to achieve their objectives for their land post mining.

To understand the complexity of mine closure regulation under the Pilbara agreements, this case study:

- explains the operation of State agreements, generally, and their interaction with the mining and environmental legislation;
- the Mining Act 1978 mine closure regulations and the Mining Fund Act 2012 rehabilitation fund;
- analyses the Pilbara agreements chronologically, identifying three categories of agreements that have similar terms that affect mine closure planning, depending on when the agreement was enacted and when the mine commenced: the 1960s, the 1970s, or after the EP Act 1986;

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10 *Mining Rehabilitation Fund Act 2012* (WA) s 4(2).

11 See below, Heading [5.3].

12 For an explanation of repurposing see, this Report, CRC TiME, Project 1.3, 'Mapping the Regulatory Framework of Mine Closure' (**P1.3 RMR**) [1.2.5] see also [5.4] and [7] – [8]. For an example, see below Heading [5.4].

13 *Competition and Consumer Act 2010* (Cth) s 44ZZRD.

14 For example, the Rio Yandi and Hope Downs and the BHP Yandi mines are all in the Weeli Wolli/Marillana Creek area and relatively close to FMG's Chichester Hub operating on the Fortescue Marsh border.

- the effect of the two regimes on legacy mines;
- the availability of mine closure information and data; and
- the EP Act Part III policy provisions and alternative models for regional plans and, examples of integrated/aggregated knowledge data-bases and/or data-sharing systems.

2 What are State agreements?

Pilbara agreements facilitate the region's iron ore industry by modifying other State legislation that would normally regulate the proponent company's mining operation. State agreements are used for all types of State projects, but have been most commonly used to facilitate the major mining projects by modifying restrictions imposed by legislation that regulates mining, or the development of infrastructure, such as water, roads, railways, ports or mining towns.

In short, State agreements are contracts between the State and mining company that are ratified by an Act of Parliament. Commonly, the ratifying Act states that the agreement terms operate and take effect 'despite any other Act or written laws'.[15] The capacity of State agreements to modify other State laws is further recognised and enforced by the *Government Agreements Act 1979* (WA) (**Government Agreement Act**), which provides that the agreement provisions 'shall operate and take effect so as to modify that other Act or law' for the purposes of the agreement. Further, the Government Agreement Act clarifies that the proponent's development proposals are part of the State agreement, by broadly defining State agreements to include 'a document or instrument', or 'any other thing made, executed issued, or obtained' for the purposes of the agreement or its implementation, despite these documents not being scheduled to the ratifying Act.[16] The Parliament's ratification of the contract, and the relevant minister's approval of the proposal, allows the terms and the proposal to modify legislation with which the proponent would otherwise have to comply.

2.1 Developing and approving a mine under a State agreement

State agreement negotiations start with the proponent's pre-feasibility studies, and preliminary discussions with the department responsible for administering State agreements (currently JTSI).[17] The department is responsible for scoping out the key issues relative to other State departments. After the study is complete the proponent and the State party (the Cabinet) finalise the negotiation and the Government introduces the Bill to Parliament,[18] which is the proposed Act that authorises the scheduled agreement. The Parliament cannot propose amendments to the agreement because the terms are the result of private commercial negotiations; likewise, the public cannot scrutinise the agreement negotiations.[19] After the Parliament enacts the State agreement, pursuant to the agreements proposal clause, the proponent may submit a development proposal that describes the project in detail for approval by the Minister for JTSI (**JTSI Minister**). The development proposal is an important instrument because it confirms and clarifies the rights

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15 See for example, the *Iron ore (Yandicoogina) Agreement Act 1996 (WA)* s 4(3).

16 *Government Agreements Act 1979 (WA)* s 2(c).

17 Previously the Department of State Development (among other titles). Colin Barnett, 'State Agreements' (1996) *Australian Mining and Petroleum Law Association Yearbook* 314, 324, app 1. Department of Jobs, Tourism, Science and Innovation (WA) *State Agreements* <https://www.wa.gov.au/organisation/department-of-jobs-tourism-science-and-innovation/state-agreements>.

18 Barnett, above n 17, 324, app 1.

19 Michael Keating, 'Review of Project Development Approvals System' (Government of Western Australia Independent Review Committee, April 2002) 101 [5.6].

and obligations of the parties. The JTSI Minister's approval of the proposal finalises the agreement and obliges the parties to perform the contract.[20]

JTSI manages the development proposal process and, after approval, the project implementation. Compliance with the EP Act 1986 is commonly required as a precondition to the JTSI Minister's approval of the development proposal.[21] Under the current approvals procedure, the Part IV procedure acts as an umbrella for other departments to engage with the environmental review by advising the proponents and contributing to the EPA recommendations to the Environment Minister, for example, the Department of Planning, Lands and Heritage, or Department of Water and Environmental Regulation (**DWER**).[22] As a result, the Environment Minister may impose implementation conditions on the advice of multiple departments, and may require the proponent to comply with the DMIRS closure guidelines.[23]

2.2 Additional proposals and supplementary agreements

A proponent can expand an existing mine or develop a new mine under a Pilbara agreement by submitting an additional proposal or negotiating a supplementary agreement. An additional proposal clause in a State agreement allows the proponent to submit a proposal to make changes to the approved development proposal or to initiate a new project under the same agreement. The agreement's development proposal clause will apply to an additional proposal submission *mutatis mutandis*. This means that the JTSI Minister cannot refuse the additional proposal, but the proposal must comply with the agreement terms.[24] Since the enactment of the *Iron Ore Agreements Legislation Amendment Act 2010 (No 2)* (WA) (the **Integration Act**), all Pilbara agreements have included an additional proposals clause.[25]

If a new mining project or proposed change to an existing mine falls outside the agreement terms the parties will need to negotiate a supplementary agreement.[26] In such a case, Parliament amends the ratifying Act and

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20 *Commissioner of State Revenue v Oz Minerals Ltd* (2013) 46 WAR 156 [183]. Consequently the authorising Act and the scheduled agreement commence at different times. See for example, *Cazaly Iron Ore Pty Ltd v Hamersley Resources Ltd* [2009] WAMW 9 [148] discussing the *Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972* (WA), the authorising Act commenced in June 1972 and the scheduled agreement commenced 11 October 1972.

21 See for example, the *Iron ore (Yandicoogina) Agreement Act 1996* (WA) s 7(1).

22 Government of Western Australia, *Lead Agency Framework* (24 August 2021) <https://www.wa.gov.au/government/publications/lead-agency-framework> See further references at n 164 of this case study. DWER was previously the Department of Water and Department of Environmental Conservation.

23 Ibid, note under the Lead Agency Framework DMIRS is a lead agency as opposed to a supporting agency such as the EPA. As such DMIRS is not under the Part IV umbrella, however the EPA and DMIRS consult on procedure and guidelines for mine closure.

24 *Mineralogy Pty Ltd v The State of Western Australia* [2005] WASCA 69 [67] – [69]; *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) sch 1, cl 8(1).

25 *Iron Ore Agreements Legislation Amendment Act (No. 2) 2010* (WA) (***Integration Act***); Western Australia, *Parliamentary Debates*, Legislative Council, 2 December 2010, p 9784b-9828a, 14 (Wendy Duncan). Only the 1972 *Rhodes Ridge* agreement was not amended, however, this agreement has equivalent provisions see sch 1 cl 7.01. For ease of reference the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) (***Hamersley Agreement Act***) and *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (***Newman Agreement Act***). The *Integration Act* amended agreements that did not previously have additional proposal clauses. *Iron Ore Agreements Legislation Amendment Act (No. 2) 2010* (WA) (No 61 of 2010) Part 2, s 6, inserts sch 12, cl 4(2) inserts cl 8A into the *Hamersley Agreement Act* principal agreement, Tom Price (sch 1); s 6 inserts sch 13, s 4(2) inserts cl 5A into the 1968 *Hamersley Agreement Act*, Paraburdoo (sch 3); Part 7, s 29, inserts sch 7, cl 4(3) inserts 7A into the *Newman Agreement Act*. The text of cll 5A and 7A are essentially the same as to cl 8A there are some distinctions, such as allowances for the Marandoo and Brockman 2 mine agreements (schs 10, 11, see allowance sch 12, cl 8A), and the *Newman* agreement allowances (sch 3, cll 6A, 9A, 9E, sch 7, cl 7A).

26 See for example, *Mineralogy Pty Ltd v The State of Western Australia* [2004] WASC 275, [20] – [22]; *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) sch 1, cl 32.

appends the supplementary agreement. For example, until 2010, the 1963 Hamersley principal agreement did not have an additional proposals clause so the parties needed to negotiate supplementary agreements to authorise projects such as the Paraburdoo mine in 1968 and, the Marandoo and Brockman 2 mines in the 1990s.[27] In 2010, the Integration Act inserted an additional proposal clause into the principal Hamersley agreement (that had authorised the Mount Tom Price mine) and its supplementary agreement (that had authorised the Paraburdoo mine).[28] As a result, it is likely the Western Turner Syncline mine (a development on the same lease as Mount Tom Price mine) did not require a supplementary agreement because the Minister could approve the project as an additional proposal.[29] The proponent's submission of a proposal (whether under the principal or a supplementary agreement, or the additional proposal clause) is important because it is the proposal submission that enlivens the EP Act 1986 Part IV environmental review that authorises the Environment Minister to impose implementation conditions.

2.3 State agreements and sovereign risk

In theory, the WA Parliament has the authority to ensure consistent mine closure planning in the Pilbara by passing an Act—for example, an Act that requires all mines operating or ceased authorised by State agreements to comply with the current or future DMIRS closure guidelines. The potential for this type of legislative action is commonly referred to as 'sovereign risk'. When a private party contracts with the State government the agreement is subject to sovereign risk; that is, the risk that the State Parliament may pass a subsequent Act that changes the contract terms without the proponent's consent. The ratification of the agreement cannot protect the contract from sovereign risk. Like all other legislation, the ratifying Act (and therefore the attached scheduled agreement) can be amended unilaterally by a subsequent Act of Parliament.

In order to promote WA as a safe place to invest, until very recently, WA governments from both sides of politics adhered to a 'sovereign risk policy', which provided that the government would not seek to amend State agreements without the proponents' consent. The WA government diverged from that policy in 2019, when Clive Palmer threatened to sue the State for billions of dollars pursuant to an arbitration decision that Palmer had received under the terms of the *Iron ore processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) (**Mineralogy agreement**).[30] The WA Parliament unilaterally amended the Mineralogy agreement by enacting the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) (also referred to as the Palmer Act) that comprehensively nullifies the rights of the Mineralogy agreement proponents (Palmer and Mineralogy Pty Ltd) to seek damages in relation to the arbitration decision. The High Court

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27 *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) sch 3 (Paraburdoo), schs 10, 11 (Brockman 2 and Marandoo).

28 *Iron Ore Agreements Legislation Amendment Act (No. 2) 2010* (WA) (No 61 of 2010) Part 2, s 6, inserts sch 12, cl 4(2) inserts cl 8A into the *Hamersley Agreement Act* principal agreement, Tom Price (sch 1); s 6 inserts sch 13, s 4(2) inserts cl 5A into the 1968 *Hamersley Agreement Act*, Paraburdoo (sch 3).

29 The Western Turner Syncline (**WTS**) is situated on the Tom Price mining lease (only 10km from the main pit). The first WTS environmental approval is 2009, a year before the cl 8A (additional proposal clause) amendment. Probably the proponent was anticipating the cl 8A amendment, or if the amendment did not eventuate, negotiating the project as a supplementary agreement. Environmental Protection Authority, Implementation Conditions, Western Turner Syncline, Section 10 Iron Ore Project, Shire of Ashburton (Statement 807, 17 September 2009); EPA, Implementation Conditions, Western Turner Syncline Stage 2 – B1 and Section 17 Deposits (Statement 946, 22 August 2013).

30 The Palmer Act abolishes the rights of particular companies and persons (the rights of Mineralogy Pty Ltd, International Minerals Pty Ltd and Clive Palmer as a director of Mineralogy) to seek damages for an alleged breach of a State Agreement term, namely, the State Development Minister's (Colin Barnett) 2012 failure to approve the Balmoral South Iron Ore Project development proposal. See further, Natalie Brown, 'Clive Palmer takes a sovereign risk challenging the authority of WA Parliament', AUSPUBLAW (9 September 2020) <https://auspublaw.org/2020/09/clive-palmer-takes-a-sovereign-risk-challenging-the-authority-of-wa-parliament>.

confirmed the validity of the Palmer Act and the State's sovereign rights when the Mineralogy agreement proponents challenged the Parliament's authority to enact the legislation.[31] However, unless faced with critical dilemmas such as the Mineralogy claim for damages, it is highly unlikely any WA government would seek to impose a uniform mine closure planning regime on State agreement mines without the consent of the proponents.

3 Pilbara agreements' interaction with other legislation

As explained above, State agreements can modify existing laws to give effect to the agreement but, equally, later legislation may expressly or impliedly prevail over earlier State agreement terms. Later Acts commonly preserve State agreement rights (or other laws and rights) by including application and savings provisions.[32] Application provisions typically provide that the later Act recognises and preserves the terms of a prior Act. For example, the Act's application provision states that the Act will only apply when consistent with the terms of State agreements,[33] or the Act may exclude State agreements from a definition to which a provision applies (for example, the Mining Fund Act defines the term 'authority' to exclude authorisations subject to the Government Agreement Act).[34] In addition, savings provisions protect pre-existing rights or accrued rights. These types of provisions generally reflect the statutory interpretation presumptions—first, that legislation operates prospectively and, secondly, that legislation does not intend to disturb existing rights,[35] except where there is a clear statement that the Act operates retrospectively.[36]

In summary, for our purposes, the application and saving provisions of the Mining Act 1978 and the EP Act 1986 and the interaction of those Acts with the Pilbara agreement terms determine whether the mine may be subject to an implementation condition that requires compliance with the DMIRS closure guidelines.

3.1 Pilbara agreements interaction with the mining legislation

The Mining Act 1978 provides for the grant of mining leases that authorise the extraction of minerals. If a project is not subject to a State agreement, then mine closure planning requirements are imposed by the

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31 *Palmer v Western Australia* [2021] HCA 31. See also High Court of Australia, *Palmer v The State of Western Australia*; *Mineralogy Pty Ltd & Anor v State of Western Australia* (B52/2020) <https://www.hcourt.gov.au/cases/case_b52-2020>.

32 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (8th ed, 2013) [4.38], [6.15].

33 For example see, *Biodiversity Conservation Act 2016* (WA) ss 7(1)(f); 7(2)(a)(i); *Environmental Protection Act 1971* (WA) s 7; *Environmental Protection Act 1986* (WA) (No 87 of 1986) as passed, s 5; *Mining Act 1978* (WA) s 5 ; *Rights in Water and Irrigation Act 1914* (WA) s 26K; *Wildlife Conservation Act 1950* (WA) s 9(3); *National Parks Authority Act 1976* (WA) s 5(3) (repealed).

34 See for example *Mining Rehabilitation Fund Act 2012* (WA) s 4 definition of 'authority' and the *Mining Act 1978* (WA) s 70O definition of 'proposal'.

35 Pearce and Geddes, above n 32, 402 [10.6]. For further discussion see, Pearce and Geddes, 414 – 416, and Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (2014) 187 – 192. See also, *Coleman v Shell Co of Australia* (1943) 45 SR (NSW) 27, 30-31, Jordan CJ citing *West v Gwynne* [1911] 2 Ch 1, 11 – 12, Buckley LJ; *Chang v Laidley Shire Council* (2007) 234 CLR 1 [113].

36 *Singh v the Commonwealth* [2004] 222 CLR 322 [19]; see also Pearce and Geddes, above n 32, 397. See for example, Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (2014), 193; 'the intention appears with reasonable certainty', *Maxwell v Murphy* (1957) 96 CLR 261, 267 Dixon J; and a 'necessary implication' *Rodway v the Queen* (1990) 169 CLR 515, 518, Mason CJ, Dawson, Toohey, Gaudron, McHugh JJ; *Interpretation Act 1984* (WA) s 3(1).

statutory covenants on the mining lease that must be addressed in the mining proposal submitted for approval by the Minister of DMIRS (**Mines Minister**).[37] A Pilbara agreement complies with a different proposal regime that is administered by JTSI and its Minister in accordance with the agreement terms. In short, when the JTSI Minister approves the proponent's development proposal under a Pilbara agreement that approval will require the Mines Minister to grant the proponent's mining lease 'as of right' subject to the terms and conditions of the agreement.

The Mining Act 1978 saving provision allows that nothing in that Act affects State agreements, which effectively protects the proponents past and future rights.[38] Pilbara agreements prior to 1982 (the commencement date of the Mining Act 1978) had their mining and occupation rights granted under the *Mining Act 1904* (WA),[39] and the Mining Act 1978 preserves these rights as though the 1904 Act remains in force.[40] Consequently, the DMIRS closure guidelines will not apply to Pilbara mines unless the agreement terms require compliance with the Mining Act 1978, or an EP Act 1986 Part IV implementation condition, specifically requires the proponent to do so.

3.2 Pilbara agreements interaction with the environmental legislation

Most Pilbara agreement mines, by their own terms and the provisions of the EP Act 1986, are required to comply with the EP Act 1986. This Act is often referred to as the 'paramount Act' because it prevails over the Mining Act and State agreement Acts.[41] However, anomalies arise because the Parliament passed some agreements prior to the enactment of the EP Act 1986 and its predecessor the *Environmental Protection Act 1971* (WA) (**EP Act 1971**). The prospective operation of the environmental legislation combined with the presumption that legislation does not intend to abrogate pre-existing rights, result in some mining projects not being subject to the EP Act 1986. The amendments to the Pilbara agreements in the 2010 Integration Act, addressed some, but not all, anomalies relating to project compliance with the EP Act. As a result, some Pilbara agreement mines have still not engaged the to the EP Act Part IV review and consequently, are not subject to implementation conditions.

The EP Act 1971, and its replacement the EP Act 1986, did not impose conditions on mines developed under pre-1972 Pilbara agreements until 2003. The 1971 Act had negligible effect on Pilbara agreements because it did not apply to State agreements.[42] Section 7(1) stated the Act prevailed over other inconsistent provisions in all other legislation; but, section 7(2) stated that section 7(1) had 'no application to Acts ratifying agreements to which the State is a party'. In any event, the 1971 Act did not impose environmental review procedures, and the role of the department administering the Act was merely advisory.[43]

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37 *Mining Act* s 70O(1) definition of 'closure plan', and 'mining proposal', which includes a 'closure plan' at (c). P1.3 RMR, above n 12, [2.3.1]. Most mining lease applications follow the 'deferred proposal' pathway that defers submitting a mining proposal and closure plan until after the mining lease is granted, see P1.3 RMR [5.2.1.1].

38 *Mining Act 1978* (WA) s 5(1).

39 See for example, *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) sch cll 1, 2(a), 9(1)(c); *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) cll 1, 3, 5.

40 *Mining Act 1978* (WA) s 5(2).

41 The *Mining Act 1978* (WA) s 6(1) defers to the *Environmental Protection Act 1986* (WA), that is, the Mining Act only applies consistently with the EP Act.

42 On this point, see the discussion below on the 1970s agreements environmental clause at Heading [5.1.2], this era of agreement also had terms requiring environmental management plans. For example, *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) sch 1 cll 7(2), 6(1)(i).

43 Natalie Brown, *Still Waters Run Deep, Pilbara Iron Ore State Agreements Rights to Mine Dewatering and Water Law Reform* (PhD thesis, 2018) 146 – 149 [3.2] <https://research-repository.uwa.edu.au/en/publications/still-waters-run-deep-pilbara-iron-ore-state-agreement-rights-to->.

The EP Act 1986 did impose environmental review under Part IV, however, the application provision in this Act also deferred to State agreements enacted before 1972 (the 1960s agreements).[44] In 2003, with the consent of State agreement proponents, Parliament amended the application provision. Section 5 now states that the EP Act 1986 and its statutory policies prevail over any inconsistent laws, including State agreements.[45] However, because the Act operates prospectively, Part IV review will not apply to mines that are continuing an operation previously authorised, unless the proponent decides to, or is required to, submit a new proposal for that mine.

The EP Act 1986 expressly confirms its prospective operation, and preservation of pre-existing rights in its savings provision (section 128), which exempts projects previously subject to the EP Act 1971 from Part IV review (in short, any project commenced prior to 1986). There is no Parliamentary discussion or guidance or judicial commentary on the operation section 128, however the *Land Administration Act 1997* (WA) has an equivalent general savings provision,[46] its purpose is to confirm that any act done or being done in accordance rights accrued under another or previous authority prior to the commencement of the Act, may continue without the need to comply with the new legislation.[47] This supports the view that section 128 really just confirms the prospective operation of the Act: the proponent may continue to do what the agreement has authorised it to do prior to the EP Act 1986. The mine will only engage environmental review under the EP Act Part IV if the agreement requires the proponent to submit a subsequent proposal for changes to that mine.

3.2.1 Operation of the EP Act Part IV

The submission of a development proposal enlivens the EP Act Part IV environmental review of a mining project.[48] The EP Act allows for JTSI or the proponent to notify the EPA of a proposed project.[49] The EPA may require the proponent to submit an Environmental Impact Statement (**EIS**),[50] which is subject to public review.[51] The EPA reviews the EIS and recommends the implementation conditions that the Environment Minister should impose on the project.[52] The Environment Minister has a broad discretion to allow or refuse the project, and/or impose implementation conditions (regardless of the EPA recommendation).[53] However, except in rare instances,[54] the Minister has imposed the implementation conditions as recommended by the EPA.

In general, all Pilbara mine proposals submitted after 2003, and a majority of proposals submitted after 1986, have been subject to Part IV environmental review. This is because the Pilbara agreements enacted post 1986 have terms that require compliance with the EP Act 1986 by providing that the approval of the Environment Minister is a condition precedent to the JTSI Minister's approval of the development proposal. Post 2010, as standard practice, implementation conditions require Pilbara agreement mine projects to comply with the DMIRS closure guidelines. However, mining proposals approved before 2010 have various

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44 *Environmental Protection Act 1986* (WA) (No 87 of 1986) as passed, s 5.

45 *Environmental Protection Amendment Act 2003* (WA) s 5 amended by No. 54 of 2003 ss 90, 123.

46 *Land Administration Act 1997* (WA) s 282.

47 Legislative Council, Clause and Committee Notes, Land Administration Bill 1997, 222.

48 *Environmental Protection Act 1986* (WA) ss 37B, 38(1) – (3). See also definition of proposal in s 3.

49 Ibid s 38.

50 An EIS is currently referred to on the EPA website as an Environmental Review, however to avoid confusion with the term Part IV environmental review, used in this case study to refer to the whole procedure, this case study uses the previous term, EIS.

51 *Environmental Protection Act 1986* (WA) ss 40 – 44.

52 Ibid s 44.

53 Ibid s 45.

54 Brown, above n 43, 240 – 243 [4.2] regarding Windarling Ridge EPA recommendations.

implementation conditions regarding closure, mitigation, or rehabilitation,[55] and early approvals may not include mine closure planning at all. In these instances, the development of best practice mine closure plans (i.e. plans that comply with the DMIRS closure guidelines and/or international standards) relies on the proponent exercising its social licence to operate, or other arrangement with JTSI.

3.2.2 Amending Part IV implementation conditions

Mining circumstances may change in ways that do not require the submission of a new development proposal but do require a change to the project's Part IV implementation conditions. The proponent can apply to the Environment Minister for review and amendment of implementation conditions, or the Minister can initiate the amendment of implementation conditions.[56] In theory, the Minister could ensure consistency by amending implementation conditions to require compliance with the DMIRS closure guidelines. However, to date the Environment Minister has not utilised their authority for this purpose.[57]

3.2.3 The effect of the the 2010 Integration Act amendments

Post the 2010 Integration Act, all of the Pilbara agreements have terms that require the proponents to comply with the EP Act 1986 (**EP Act clause**). However, as noted above, some Pilbara agreement mines, are not subject to Part IV review, despite the Integration Act amendments because they are not required to, or may not need to, submit a proposal, and so have not, and will not, initiate a Part IV review. In these instances, the proponent may choose to voluntarily develop a mine closure plan (social license), but is not required to do so by a Part IV implementation condition. Further, if the mine did engage Part IV prior to 2010, the implementation conditions did not impose the current standards.[58] However, the Integration Act amendment does bring all Pilbara agreement mines within the ambit of the EP Act policy provisions in Part III (**Part III policy**).

A Part III policy is a statutory instrument that has the force of law.[59] In contrast to a Part IV review, it does not require a proposal submission to initiate the process. A Part III policy can develop a regional plan that does not apply ad-hoc conditions to individual projects on a case-by-case basis.[60] The EPA may prepare a Part III policy for the Environment Minister's approval.[61] The proposed Part III policy is subject to the Environment Minister's refusal, approval, or amendments, and to Parliamentary disallowance.[62] As a result, during the Parliamentary approval process the policy is subject to broader economic and social policy considerations (such as State revenue and employment). Before approving the policy, the Environment

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55 ME Kragt, J Hawkins and C Lison, *Review of mine rehabilitation condition setting in Western Australia* (2019) The Western Australian Biodiversity Science Institute, 7 – 9, [3.1]. The percentage calculation is based on the figure 87 out of 277 reviewed projects.

56 *Environmental Protection Act 1986* (WA) ss 45C, 46.

57 In general, implementation conditions are amended on the request of the proponent. See, Brown above n 43, 189 see Brown at n 137 for the list of s 45C requests for amendments that supports this point.

58 Alternatively, as noted above, the proponent or the Environment Minister may initiate changes to the implementation conditions. *Environmental Protection Act 1986* (WA) ss 45C, 46.

59 Ibid, ss 5, 33(1).

60 Ibid, Part III ss 26, 35. See for example, Environmental Protection Authority, *Environmental Protection (Peel Inlet-Harvey Estuary) Policy 1992* <https://www.epa.wa.gov.au/policies-guidance/environmental-protection-peel-inlet-harvey-estuary-policy-1992> (current) *Environmental Protection (Gnangara Mound Crown Land) Policy Approval Order 1992* (Western Australian Government Gazette, 24 December 1992, 6287) cll 12-13 Environmental Protection Authority (WA), *Environmental Protection (Gnangara Mound Crown Land) Policy 1992* (revoked). See also, Advice of the Environmental Protection Authority to the Minister for Environment as required under s 33(2) of the *Environmental Protection Act 1986* (November 2015).

61 Environmental Protection Authority, *Framework for Environmental Protection Policies* (EPPs) *and Associated Regulations* <https://www.epa.wa.gov.au/environmental-protection-policies>.

62 *Environmental Protection Act 1986* (WA) ss 31(d), 34; *Interpretation Act 1984* (WA) s 42.

Minister must consult with other public authorities or persons who may be affected by the policy (unless the EPA has already done so),[63] for example, Pilbara agreement proponents and JTSI. The Environment Minister may also revoke the policy.[64]

A practical limitation is for introducing a Part III policy for the Pilbara region is the funding for the plans management,[65] and the constraints in the EP Act in relation to EPA's purview of 'environmental protection',[66] which may not allow the agency to consider economic and social outcomes or benefits. However, the Environment Minister is not constrained in this respect and can amend the policy.[67] Therefore, a Part III policy for mine closure in the Pilbara could include a broad range of objectives.

4 Mine closure regulation in Western Australia

The State regulates mine closure in two ways. First, mine closure planning under the Mining Act 1978 or the EP Act 1986, which requires the development of a mine closure plan. Secondly, since 2012, under the Mining Fund Act, the State requires contributions to the Mine Rehabilitation Fund (**Rehabilitation Fund**), which insulates the State from incurring the costs and liabilities if the proponent cannot, or does not sufficiently, remediate the mine site, or other unforeseen issues arise that were not dealt with during the mine closure. Mines authorised under the mining legislation (non-State agreement mines) are subject to mandatory contributions to the Rehabilitation Fund. In contrast, the Mining Fund Act does not apply to State agreements, with the result that Pilbara agreement proponents' are not required to make contributions the Rehabilitation Fund.

4.1 Mine closure planning requirements under the Mining Act 1978

In 2010, the Mining Act 1978 was amended to make formal closure planning compulsory.[68] For proponents operating under the Mining Act, all mining lease applications received after 30 June 2011 must include mine closure plans for approval and all existing mines authorised under that Act were required to submit closure plans by 30 June 2014.[69] The Mining Act, pursuant to the statutory covenants (conditions) imposed on the mining lease tenement, requires the mine development proposal to include a closure plan that is subject to review every three years.[70] The Mining Act covenants apply to all mining leases—all mining leases are 'deemed to be granted' subject to the prescribed conditions.[71] Effectively, all mines on the relevant mining lease, whether operating or not, are required to have a plan that satisfies the current DMIRS closure

63 *Environmental Protection Act 1986* (WA) ss 30(1), (3)(b).

64 Ibid, s 33(2).

65 Brown above n 43, 247 – 250.

66 *Environmental Protection Act 1986* (WA) ss 26, 35.

67 See further on this point below at Heading [5.4].

68 *Mining Act 1978* (WA) ss 70O, 82(1)(ga), 84A, 84AA; P1.3 RMR, above n 12, [2.3.1], [3.5.1]. See also, Western Australian Auditor General's Report, 'Ensuring Compliance with Conditions on Mining' (2011) 33 (**Auditor General's Report (2011)**).

69 Environmental Protection Authority (WA), *Guidelines for Preparing Mine Closure Plans* (June 2011) 7, [2.3]. See also Auditor General's Report (2011), above n 68, 33 regarding compliance of existing mines by 30 June 2014 and application to State agreement mines via Part IV conditions. See reference in the guidelines to the *Environmental Protection Act 1986* s 40 (current Environmental Review procedure).

70 *Mining Act 1978* (WA) s 82(ga), 84AA. Note, does not apply to State agreements, s 82(1b) because s 5(1) defers to State agreement terms.

[71] Ibid, s 82(1).

guidelines.[72] Therefore, the DMIRS closure guidelines apply to 'existing' as well as operating mines.[73] DMIRS has reviewed all mine sites subject to the Mining Act covenants to ensure closure plans complied the DMIRS closure guidelines.

DMIRS does not review Pilbara agreement mining proposals because these mining projects are negotiated, developed, managed and approved, by JTSI and its Minister.[74] A mining proposal approved by JTSI is deemed approved by DMIRS,[75] therefore, the Mining Act covenants do not apply to these proposals.[76] The covenants will only apply if the State agreement terms expressly require compliance with the Mining Act 1978.[77]

Compliance with the current DMIRS closure guidelines can be imposed on new proposals under either avenue of approval (the EP Act 1986 Part IV and Pilbara agreement (EPA and JTSI)) or the Mining Act (DMIRS)). In 2015, the EPA and DMIRS published joint guidelines,[78] which were revised and republished by DMIRS in 2020.[79] However, a key distinction is that under the Mining Act the closure plan requirements apply to operating and existing mines. In contrast, Pilbara mines that have ceased operation, or are not currently operating, and therefore will not submit a proposal that enlivens the Part IV review procedure and the possibility of implementation conditions, will not be subject to mandated closure plan requirements.[80]

4.2 Rehabilitation fund contributions

Mines authorised under the Mining Act 1978 are required to make mandatory contributions to the Mining Rehabilitation Fund under the Mining Fund Act (2012).[81] The purpose of the fund is to decrease the State's exposure to liability for mine rehabilitation.[82] The Mining Fund Act has required compulsory contributions

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72 Ibid, s 82(1)(ga) imposes the covenant and s 70O defines a mine closure plan as a plan that complies with the closure guidelines. For the purposes of the closure plan, a 'relevant mining proposal' is defined to include a previously approved proposal under s 82A(2)(b) which is reiterated in s 82(1)(ga)(i).

73 Auditor General's Report (2011), above n 68, 33.

74 Ibid, 17, 31.

75 *Mining Act 1978* (WA) s 82(1b) allows that s 82(1)(ca) that requires the Mines Minister to approve the mining lease work program or mining proposal before commencing, does not apply to an approved State agreement proposal, see definitions s 70O.

76 Auditor General's Report (2011), above n 68, 33.

77 Two Pilbara agreements require some compliance with the Mining Act, whether that encompasses the covenants would require further research which is not within the scope of this case study. See, for example, *Iron Ore FMG Chichester Agreement 2006* (WA) for example, sch 1, cl 12(6)(a). However, the agreement also modifies the Mining Act see sch 1 cll 4(4)(a); 12(3). See similar, in *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) sch 1 cll 9(2), (5), 10(1). NB the Mining Act covenant provision exempts State agreements from s 82(1)(ca) regarding the use of ground disturbing equipment but does not otherwise limit the operation s 82(1), 82(1)(ga) requiring a mine closure plan as defined by s 70O.

78 Joint Guidelines for Preparing Mine Closure Plans (DMP and EPA, 2015). See Environmental Protection Authority, 'Mine Closure Plans' < https://www.epa.wa.gov.au/policies-guidance/mine-closure-plans>.

79 DMIRS, *Statutory Guideline for Mine Closure Plans and Mine Closure Plan Guidance – how to prepare in accordance with the Statutory Guidelines* (2020).

80 The Minister could exercise their authority under *Environmental Protection Act 1986* (WA) s 46 to amend the implementation conditions (providing the project has engaged Part IV and implementation conditions have been imposed in the past).

81 *Mining Rehabilitation Fund Act 2012* (WA) s 11, see also s 4 definition of 'mining authorisation'. P1.3 RMR, above n 12, [3.5.1]; Auditor General's Report (WA) *Ensuring Compliance with Conditions on Mining – Follow-up* (Report 20, November 2014) (**Auditor General's Report (2014)**) 5 – 6.

82 Auditor General's Report (2014), above n 81, 5.

since 2014, except for mines developed under State agreements.[83] State agreement mines are not required to make contributions because the Mining Fund Act exempts State agreement mining tenements from the definition of 'mining authorisations', to which the levy applies.[84] As a result, the State does not have legally binding financial protection in the case of rehabilitation failures for mines operating under its 29 State agreements.[85] Some proponents' mine closure information indicates that sufficient funding is allocated for rehabilitiation. However, this information is generalised and does not identify specific site costs—for instance, a global sum of 13.3 billion dollars for 92 legacy assets in Australia and other countries.[86]

Bringing Pilbara agreement mines into the Mining Fund Act scheme would require the JTSI to negotiate with the proponents, which may involve amendments to the Pilbara agreements and inserting a schedule into the Mining Fund Act.[87] Alternatively, the proponent may voluntarily opt-in to the scheme. At the time of the Auditor General's report on the Mining Rehabilitation Fund in 2014, no state agreement proponents had opted in.[88]

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83 *Mining Rehabilitation Fund Act 2012* (WA) s 4(2); Marsden Jacob Associates, Mining Rehabilitation Fund Post-implementation review. Prepared for the Department of Mines, Industry Regulation and Safety (July 2018) [2.3]; Auditor General's Report (2014) above n 81, 10.

84 *Mining Rehabilitation Fund Act 2012* (WA) ss 4(2), 11.

85 Marsden Jacob Associates, above n 83, [2.3]; Auditor General's Report (2014) above n 81, 6.

86 Rio Tinto, Sustainability, Closure (Website) <https://www.riotinto.com/sustainability/closure#performance>.

87 Auditor General's Report (2014), above n 81, 10.

88 Marsden Jacob Associates, above n 83, [2.4] citing Auditor General's Report (2014) above n 81, 10. See also, Auditor General's Report (2014) 7, 19.

5 Pilbara agreements and mine closure plans

Figure 5.1: Operating and closed Pilbara iron ore mines in 2016.[89]

Whether a Pilbara agreement mine is subject to an EP Act 1986 Part IV implementation condition that requires compliance with the DMIRS mine closure guidelines depends on first, whether the mine project engaged a Part IV review by submitting a development proposal after 1986. Secondly, if the mine was subject to Part IV review, whether the review occurred before or after the DMIRS mine closure guidelines were introduced as a standard implementation condition.

Post 2010, the EPA adopted a standard practice of recommending that Part IV implementation conditions require mine closure planning compliant with the DMIRS closure guidelines. Contemporary implementation conditions allow for any updates to that guideline to automatically apply and require a plan review every three years,[90] the proponent is responsible for compliance reporting and public availability of environmental data, except for confidential or commercially sensitive information.[91]

Prior to 2010, the Environment Minister could, and did, impose Part IV implementation conditions that required mine closure planning to varying degrees. A 2019 review of 277 ministerial statements from 1987 –

89 Peter Christener Australia location map.svg: NordNordWest - Main map was created using Open Street Map Data, rendering with Maperitive and editing with Inkscape, Location map was created using Australia location map.svg, Creative Commons license CC-BY-SA, file Iron Ore Pilbara 2.svg, created 18 January 2016.

90 See for example, Environmental Protection Authority, Ministerial Statement 1000, Brockman Syncline 4 Iron Ore Revised Proposal (11 March 2015) cll 7.2 – 7.3. Condtion 7.3 states, '
The proponent shall prepare the Brockman Syncline 4 Mine Closure Plan in accordance with the *Guidelines for Preparing Mine Closure Plans*, June 2011 and any updates, to the requirements of the CEO on advice of the Department of Mines and Petroleum', condition 7.3 requires a plan review within three years.

91 Ibid, cll 3 – 4.

2018, for mining sector projects, found that 85% of the projects had closure or rehabilitation requirements imposed by implementation conditions.[92] However, there was a variety of rehabilitation or decommissioning conditions and terms—31% of the reviewed projects had conditions that did not specify targets or rehabilitation outcomes.[93] The only distinction between Pilbara agreement mines' implementation conditions and other mining approvals was that, during 2005 – 2013 (the WA iron ore mining boom), there was a significantly lower requirement for research and development or rehabilitation trials.[94] The scope and content of the implementation conditions reflects the standard practice at the time of the Part IV approval—the earlier in time having less onerous requirements.[95]

In short, the Part IV system of applying the contemporary DMIRS closure guidelines by imposing an implementation condition on individual mining projects has lead to a greater inconsistency in mine closure planning conditions in comparison to mining projects subject to the Mining Act 1978 regime.

The following section discusses:

- mine projects developed under three eras of agreements (the 1960s, the 1970s and post 1986, Pilbara principal agreements, or a supplementary agreement from the relevant era);
- legacy mines;
- public availability of mine closure plans, and
- the EP Act Part III policy provisions and alternative models for regional planning, and knowledge data-bases and data-sharing systems models.

5.1 The chronological evolution of Pilbara agreement mine closure plans

The scope of each category of Pilbara agreement terms was affected by the political and social mores of the time. Broadly, the 1960s agreements conferred extensive rights and concessions in exchange for proponents' obligation to develop a steel industry,[96] the 1970s agreements reflect the era's social movement and the public's expectations regarding the government assuming responsibility for environmental protection,[97] and the 1990s agreements illustrate a winding back of the proponents' rights and concessions as it became clear a State steel industry was unlikely to eventuate.[98]

5.1.1 The 1960s Pilbara agreements

As discussed above, some 1960s Pilbara mines have not engaged Part IV review.[99] The Pilbara agreements enacted in 1963 and 1964 were the first to facilitate and authorise iron ore mining in the Pilbara. These agreements authorise mines that commenced operation in the 1960s—for example, the Mount Tom Price (**Tom Price),** Paraburdoo, Mount Whaleback (**Whaleback**), Pannawonnica, and Mount Goldsworthy

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92 Kragt, above n 55, 7.

93 Ibid, 7 – 9, [3.1]. The percentage calculation is based on the figure 87 out of 277 reviewed projects.

94 Ibid, 9 [3.1]. The review states that one percent Pilbara mine implementation conditions imposed this requirement as opposed to a 6% average.

95 Ibid, 8 – 9 [3.1].

96 Brown above n 43, 99 – 101 [2.2].

97 Ibid, 141 – 143.

98 Ibid, 179 – 183 [2.2] – [2.3]. For further on State iron ore development policy and the role of Pilbara agreements see 270 – 280 [3} – {3.3].

99 See for example, regarding the Western Turner Syncline approval in 2009, the water discharge licence and Tom Price mine, there is a comment that the mine has not undergone Part IV review because it is a 1960s mine. Department of Environmental Regulation (WA), *Environmental Protection Act 1986* – Amendment to license

conditions, L4792/1973/13 Premises: Greater Tom Price Mine (File No DER2013/001057) 7 [1.4.1].

(**Goldsworthy**) mines (the **1960s mines**).[100] Reflecting the State's sovereign risk policy, the EP Act 1986 did not abrogate the proponents' mining rights accrued prior to 1986.

In 2003, the proponents agreed to an amendment of the EP Act 1986 so that it applied prospectively to all State agreements.[101] However, even after 2003, the 1960s mines did not engage Part IV review because the agreement terms do not require the proponent to submit proposals for iron ore production expansions.[102] In 2010, during the Integration Act negotiations, the proponents of the 1960s mines agreed to amend the relevant Pilbara agreements to include a clause in the definition section that requires compliance with the EP Act 1986.[103] The clause provides that '[n]othing in this Agreement shall be construed to exempt the Company from compliance with any requirement … that may be made pursuant to the EP Act' (**EP Act clause**). On its face, this clause would capture expansions of the 1960s mines and therefore subject them to the Part IV review process and potential implementation conditions, but only if those mines were required to submit a proposal.

The 1960s agreements did not impose limits that would require a 1960s mine to submit a subsequent proposal when production increased. Consequently, production increases did not trigger a Part IV review.[104] However, on occasion, a 1960s mine may be included in closure plans when new pits are developed in close proximity to the original mine site, for example the Greater Paraburdoo Mining Hub, which includes the Eastern and Western range and the original 1960s Paraburdoo mine pit (identified as West Pit 4).[105] In contrast, Tom Price mine appears too distant to have been subsumed in the Western Turner Syncline development. Similarly, there is no indication that the Whaleback Hub (Whaleback mine, Orebodies 29, 30, 35) and the Eastern Ridge Hub (Orebodies 23, 24, 25, 32) will become one mining hub.[106]

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100 This case study does not attempt to identify all mines commenced in the Pilbara during the 1960s, for example there is also the *Iron Ore Nimingarra Agreement 1967* (WA) that ceased in 1991.

101 *Environmental Protection Amendment Act* 2003 (WA) s 123; *Environmental Protection Act 1986* (WA) s 5; Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 September 2003, question 1692 (B K Masters, C M Brown). All state agreement proponents agreed to the amendment except for Amcor Pty Ltd, *Paper Mill Agreement Act 1960* (WA).

102 Natalie Brown and Alex Gardner, 'Still Waters Run Deep: The 1963 – 64 Pilbara Iron Ore Agreements and Rights to Mine Dewatering' (2016) 35(1) *Australian Resources and Energy Law Journal*, 142, 11 – 12 of 30 pdf.

103 See for example, *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) sch 12, cl 4(1) inserts cl 1(l)(a) into the principal agreement (sch 1).

104 Brown above n 43, Chapter 3, Heading 5, 120 – 128

105 Rio Tinto, Hamersley Iron Pty Ltd, Paraburdoo Closure Plan 2019 Mineral Field 47 – West Pilbara, [3.3] in Environmental Protection Authority, Greater Paraburdoo Iron Ore Hub Proposal, Environmental Review documents (May 2020) app 5.2 <https://www.epa.wa.gov.au/sites/default/files/PER_documentation2/A5_2%20Paraburdoo%20Closure%20Plan%20%28Rio%20Tinto%202019d%29.pdf>.

106 Mining in the Newman area is divided into two hubs, the Whaleback Hub (Whaleback mine, Orebodies 29, 30, 35) and the Eastern Ridge Hub (Orebodies 23, 24, 25, 32) see Mining Data Solutions, Mount Newman (Whaleback, Eastern Range) Operations <https://miningdataonline.com/property/870/Mt-Newman-(Mt-Whaleback,--Eastern-Ridge)-Operation.aspx> See map Figure 5.1 for location of Whaleback mine in relation to satellite Orebodies, Mt Newman Township and Jimblebar hub.

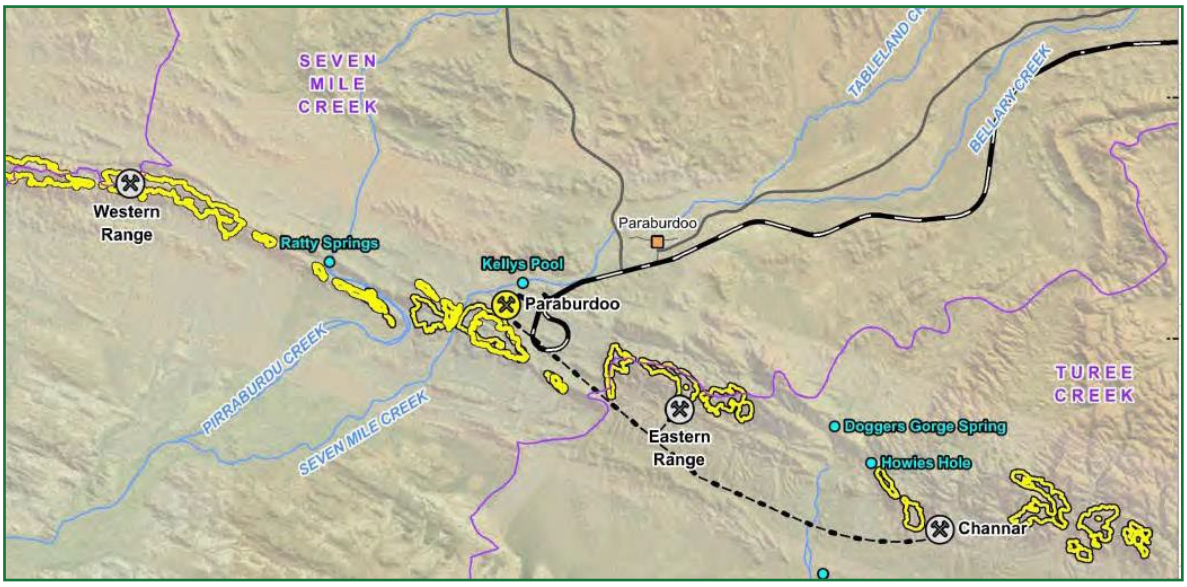

Figure 5.2: Paraburdoo and greater Eastern Range hub, map extract Part IV review EIS.[107]

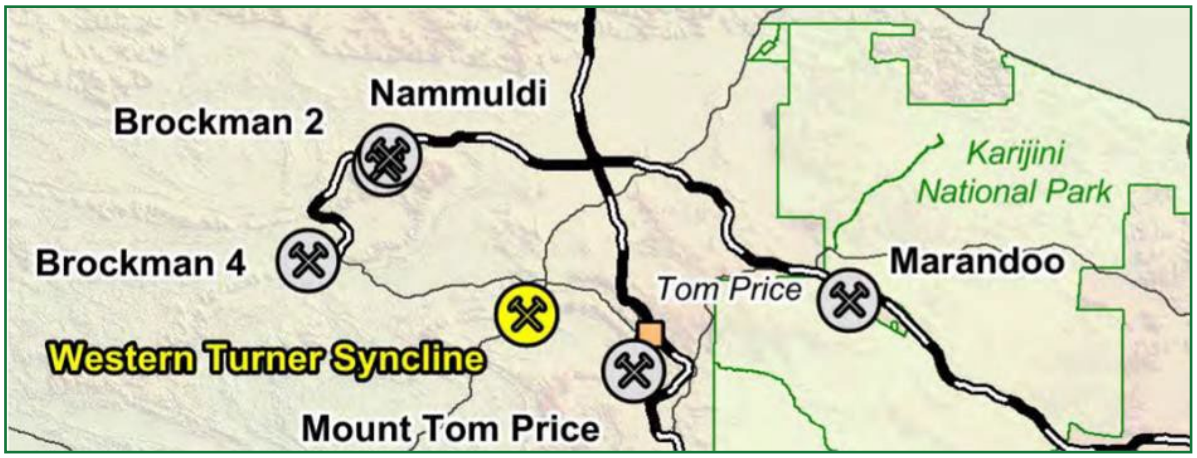

Figure 5.3: Tom Price town, Mount Tom Price mine and Western Turener Syncline location, map extract Pt IV review EIS.[108]

In addition, mines now closed that commenced during the 1960s (commonly referred to as legacy mines) will not engage Part IV review and DMIRS mine closure planning, therefore, relies on the proponent voluntarily undertaking the necessary work or JTSI arrangements. For example, around 1992, BHP became aware of potential acid drainage from the Billygoat tailings dump under the 1964 Goldsworthy agreement. In 2005, in a Mining Warden's Court case, the proponent's view (that was not challenged) was that there was no obligation under the EP Act or the State agreement terms to remediate,[109] but the proponent voluntarily did so 'out of a sense of environmental and industrial responsibility'.[110] However, since 2006, the *Contaminated*

[107] Rio Tinto, above n 105, [11.1] see also [11.2]; [22].

[108] Rio Tinto, Hamersley Iron Pty Ltd, Western Turner Syncline Iron Ore Project - Revised Proposal, Assessment 2072, Appendix 6 [6.1] (2021) <https://www.epa.wa.gov.au/proposals/western-turner-syncline-iron-ore-project-revised-proposal>.

[109] *Westover Holdings Pty Ltd v BHP Billiton Minerals Pty Ltd* [2005] WAMW 20, [8] – [9]; *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA).

[110] *Westover Holdings Pty Ltd v BHP Billiton Minerals Pty Ltd* [2005] WAMW 20, [25].

Sites Act 2003 (WA) regulations, which apply to all contaminated sites, would regulate this aspect of mine closure.[111]

In short, whether the development of a mine closure plan is imposed by an implementation condition or relies on the proponent, depends on when the mine commenced under a 1960s agreement, if the mine closed, or if the original pit is now part of a larger hub expansion.

The 1960s Pilbara agreements did not include clauses that allowed for 'additional proposals' or required compliance with environmental legislation. Additional proposal clauses allow for new developments under the same terms as the principal agreement. In 2010, the parties agreed to amend the original agreements by inserting additional proposal and EP Act clauses (the Integration Act amendments). Prior to 2010, new developments that could not be considered part of the mine authorised by principal agreement required supplementary agreements. The supplementary agreements scheduled to the principal agreements are discussed under the relative time categories below. A consequence of inserting the EP Act clause into the principal agreements is that 1960s mines could be subject to an EP Act Part III policy because these provisions apply irrespective of whether a proposal submission is required.

5.1.2 The 1970s Pilbara agreements

The 1970s Pilbara agreements raise complex questions in regard to statutory interpretation. A full examination is not within the scope of this case study. However, the following analysis provides a preliminary view and suggests avenues of further research.

In contrast to other Pilbara agreements that have an EP Act clause that specifies compliance with the EP Act 1986, the 1970s agreements included an environmental clause requiring the proponent to comply with 'any' environmental legislation (**environmental clause**). At the time, the EP Act 1971 was the relevant legislation, which exempted State agreements,[112] but the 1970s agreements' environmental clause prevailed over that exemption.[113] This was of little consequence because the 1971 Act was advisory and did not impose implementation conditions,[114] and the iron-ore market slump meant that many mines did not commence

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111 *Contaminated Sites Act 2003* (WA); *Contaminated Sites Regulations 2006* (WA). See also, *Mining Act 1978* (WA) s 6(2)(3).

112 See above, Heading [3.2].

113 The 1970s State agreements were subject to the *Environmental Protection Act 1971* Act and other environmental legislation, according to the agreement terms. The *Environmental Protection Act 1971* s 7 provision did not prevent the State agreement legislation making the ratified agreements subject to the environmental legislation. The *Environmental Protection Act 1971* s 7(2) states, 'this section has no application to Acts ratifying agreements to which the State is a party'—it identifies 'this section' not 'this Act'. In other words, Parliament left it to the State Agreement legislation to state whether or not the agreement was subject to environmental legislation.

114 *Environmental Protection Act 1971* (WA). A state agreement was defined as a 'General Referral' in s 57(1) because the Minister for State Development was not specified in ss 54 – 56. Section 57(1) required the EPA to be advised if a proposal may have a detrimental effect and then report on the matter when and as often as the Minister required. The Minister did not have to wait for a recommendation to approve.

until after 1986.[115] However, the inclusion of the environmental clause meant that the 1970s agreements were not exempt from the EP Act 1986.[116]

The 1970s agreements are further distinguished from the 1960s agreements in that they included an 'additional proposal' clause, which required the proponent to submit a proposal for significant mine expansions.[117] This had the effect of engaging the EP Act 1986 Part IV review each time the mine expanded. So, in contrast to the 1960s agreement mines, 1970s agreement mines could engage the Part IV review, and the additional proposals clause ensured there was continued review of mine expansions and revised implementation conditions. However, like the 1960s mines, 1970s mines that are non-operational or ceased do not engage Part IV.[118]

The interesting and salient point about this era of agreements is the scope of the environmental clause. The broadly phrased environmental clause states that,

> Nothing in this Agreement shall be construed to exempt the Joint Venturers from compliance with any requirement in connection with the protection of the environment arising out of or incidental to the operations of the Joint Venturers hereunder that may be made by the State or any State agency or instrumentality or any local or other authority or statutory body of the State pursuant to any Act for the time being in force.[119]

The clause requires compliance with 'any requirement in connection with protection of the environment … pursuant to any Act … in force'. The Mining Act 1978 and Mining Fund Act are discussed here to illustrate the complexities surrounding the application of the environmental clause.[120]

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115 Brown above n 43, 154 – 155 [3.4.1]. Examples of mines that did commence in the 1970s are Area C and Nimingarra 'A' and 'B', *Iron Ore (Goldsworthy-Nimingarra) Agreement Act 1972* (WA); Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 April 1972, 1043 – 1044 (Mr Graham). Nimingarra A and B mines are probably no longer operating, see Department of Mines and Petroleum (WA) *Goldsworthy Project Summary* (EREPT 06) and *Minedex, Goldsworthy Production J00479.* NB Area C is under the *Iron Ore (Mount Goldsworthy) Authorisation Agreement 1964* (WA) sch 2 cl 3(7) ratified in 1971, see environmental clause, sch 2, cl 28.

116 *Environmental Protection Act 1986* (WA) (No 87 of 1986) s 5(2) as passed. The inclusion of the environmental clause ensured the Government had no sovereign risk reason in enacting the *Environmental Protection Act 1986* to exempt the 1972 agreements from that Act, see, State Records Office (WA), *Environmental Legislation 1986* (item 1986 057 volume 1, consignment 6197, Department of Conservation and Environment). NB there are no page numbers in this file, see letter from Senior Assistant Crown Solicitor, 20 November 1984, at approximately page 22 – 23. See also, Brown and Gardner, above n 102, 150 (pdf p 8 of 30); Mark Gerus, 'Mining and Water Resources' in Richard H Bartlett, Alex Gardner and Bob Humphries, *Water Resources Law and Management in Western Australia* (1996) 318.

117 A proposal submitted to the Department of State Development (now JTSI) is referred by the department or the proponent to JTSI. See above, Heading [1].

118 For example, the Nimingarra and Yarrie mines appear to be closed or not operating, therefore mine closure planning would be pursuant to the proponent's social license to operate. Department of Mines, Industry, Regulation and Safety (WA), Minedex, Goldsworthy Project Summary (EREPT 06); (WA), Minedex, Goldsworthy Production J00479 <https://minedex.dmirs.wa.gov.au/Web/projects/details/fa135665-6b52-4d80-99f9-2491e0b4a63d>.

119 *Iron Ore (Goldsworthy-Nimingarra) Agreement Act 1972* (WA) sch 1, cl 23; *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) sch1, cl 26; *Iron Ore (Mount Bruce) Agreement Act 1972* (WA) sch 1, cl 30; *Iron Ore (Murchison) Agreement Authorisation Act 1973* (WA) sch 1, cl 27; *Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972* (WA) sch 1, s 19.01; *Iron Ore (Wittenoom) Agreement Act 1972* (WA) sch 1, cl 29. The *Rhodes* agreement differs a little in that it specifically requires compliance with the *EP Act 1971* 'or any other Act'.

120 *Mining Act 1978* (WA); *Mining Rehabilitation Fund Act 2012* (WA). A number of Acts, such as the *Rights in Water and Irrigation Act 1914* (WA), may impose environmental requirements relevant to mine closure planning or rehabilitation. However, it is not within the scope of this case study to analyse all legislation that may impose relevant environmental requirements.

The Mining Act 1978 provides it is to be construed consistently with State agreement provisions, or if the relevant mining lease was granted under the Mining Act 1904 that Act continues to remain in force.[121] As a result, this provision does not negate the operation of the environmental clause. Arguably, the broad scope of the 1970s agreements' environmental clause suggests that mines operating under 1970s agreements could be required comply not only by the EP Act 1986 but also other legislation that imposes environmental requirements. This is because the Pilbara agreement itself, by its own term, imposes 'any' environmental requirement (such as mine closure planning) under 'any Act in force'. The Mining Act is read consistently with State agreements terms, therefore, prima facie it cannot override State agreement terms or exempt the mine from provisions in the Mining Act when the agreement term requires compliance with any environmental provisions of the Mining Act.

Hypothetically, if the Mining Act simply included a broad term requiring compliance with the DMIRS closure guidelines then the Pilbara agreement environmental clause would require compliance with that provision because the State agreement regime is designed to ensure the effectiveness of the agreement terms despite the operation of other Acts (except for the EP Act 1986). The rules of statutory construction require inconsistent terms in the Mining Act and the Pilbara agreement to be read in conjunction to avoid, if possible, an implied repeal of one of the terms.[122] It would be difficult to overcome the strong wording of the Mining Act saving provision that serves to maintain the primacy of State agreement terms in the event of any contradiction between the two Acts. In this regard, the Mining Act's saving provision states that 'nothing' in the Act shall affect the provisions of a State agreement.[123] Consequently, the environmental clause in a Pilbara agreement would take precedence and require compliance with the environmental term in Mining Act.

The Government Agreement Act further confirms the primacy of State agreement terms by stating that such terms shall be deemed to operate and take effect 'notwithstanding any other Act or Law'.[124] The Government Agreements Act's purpose was to retrospectively correct deficiencies in State agreement ratification provisions that may not have adequately authorised the agreements to modify other laws.[125] In contrast to retrospective application that requires clear words of intent,[126] legislation is generally presumed to operate prospectively.[127] Therefore, we may presume the Government Agreement Act operates prospectively and retrospectively. The prospective operation of the Act confirms the capacity of the

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121 *Mining Act 1978* (WA) s 5(1) – (2).

122 *South Australia v Tanner* (1988) 166 CLR 161, 171, Wilson, Dawson, Toohey and Gaudron JJ quoting *Butler v the Attorney General (Vict)* (1961) 106 CLR 268, 275-276, Fullagar J.

123 *Mining Act 1978* (WA) s 5.

124 *Government Agreements Act 1979* (WA) s 3.

125 *Cazaly Iron Ore Pty Ltd v Hamersley Resources* Ltd [2009] WAMW 9, [158]; Western Australia, *Parliamentary Debates,* Legislative Assembly, 4 December 1979, 5705, 5846-5847 (Mr Mensaros, Minister for Industrial Development). The *Government Agreements Act 1979* (WA) s 3 is principally the Parliamentary response to the High Court decision on the effectiveness of State agreement ratifying provisions, and the validity of executive government actions pursuant to scheduled agreement terms, that were not properly authorised by the authorising Act, *Sankey v Whitlam* (1978) 142 CLR 1, 89-90; *Cazaly Iron Ore Pty Ltd v Hamersley Resources Ltd* [2009] WAMW 9, [159].

126 *Singh v the Commonwealth* [2004] 222 CLR 322 [19]; See also Pearce and Geddes, above n 32, 397. See for example, Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (2014), 193;'the intention appears with reasonable certainty', *Maxwell v Murphy* (1957) 96 CLR 261, 267 Dixon J; and a 'necessary implication' *Rodway v the Queen* (1990) 169 CLR 515, 518, Mason CJ, Dawson, Toohey, Gaudron, McHugh JJ. An example of retrospective application is the *Interpretation Act 1984* (WA) s 3(1).

127 Pearce and Geddes, above n 32, 414 – 416, and Perry Herzfeld and Thomas Prince, Statutory Interpretation Principles (2014) 187 – 192. See also, *Coleman v Shell Co of Australia* (1943) 45 SR (NSW) 27, 30-31, Jordan CJ citing *West v Gwynne* [1911] 2 Ch 1, 11 – 12, Buckley LJ; *Chang v Laidley Shire Council* (2007) 234 CLR 1 [113].

environmental clause to take effect,[128] despite provisions in other legislation that purport to exempt State agreements.

In short, the State agreement regime is designed to ensure the State agreement provisions prevail over or modify other Acts and laws. This raises statutory interpretation questions about the precedence of the environmental clause. How does the environmental clause interact with the provisions in other legislation that impose environmental requirements? As Justice Parker noted, State agreement terms do not necessarily operate as the parties intend.[129]

The Mining Act 1978 and Mining Fund Act both have provisions that could be construed as imposing 'a requirement in connection with protection of the environment' for the purposes of the environmental clause. The Mining Act imposes statutory covenants (conditions) on mining leases that require mine closure planning,[130] and the Mining Fund Act requires contributions to the Rehabilitation Fund.[131]

To avoid their application to State agreements the Mining Act 1978 and the Mining Fund Act include definitions that impliedly or expressly exclude State agreements (these are a type of application provision).[132] The Mining Act impliedly excludes State agreement proposals from the definition of 'mining proposal' and 'relevant mining proposal',[133] and the Mining Fund Act expressly excludes State agreements from its definition of 'mining authority'.[134] The Mining Fund Act avoids the environmental clause because the Act expressly excludes State agreements, so the provisions that impose a contribution obligation do not apply.[135]

The interaction of the environmental clause with the Mining Act provisions that require a mine closure plan is not so clear cut because the Act's mining proposal definitions do not expressly exclude State agreement proposals. The DMIRS closure guidelines are applied as a covenant when there is, or has been, the

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[128] For judicial commentary on the *Government Agreements Act 1979* (WA) prospective operation see *Genbow Pty Ltd v Griffin Coal Mining Company Pty Ltd* [2013] WAMW 11 [92] – [94] quoting Warden Calder, *Cazaly Iron Ore Pty Ltd v Hamersley Resources Ltd* [2009] WAMW 9 [155].

[129] *Re Michael; Ex Parte WMC Resources* [2003] WASCA 288 [45], [53] – [54] Parker J.

[130] The *Mining Act 1978* (WA) s 82 provides for the application of statutory conditions (covenants) to mining leases, s 82(1)(1b) states s 82(1)(ca) does not apply to mines authorised by State agreements but does not otherwise limit or affect the application of s 82 that requires compliance with s 84AA, the mine closure review provision.

[131] *Mining Rehabilitation Fund Act 2012* (WA) s 9A; see also Mining Rehabilitation Fund Act Regulations 2006 (WA).

[132] See explanation of 'application provisions', above at Heading [3].

[133] *Mining Act 1978* (WA) s 70O, provides two definitions for the purposes of Division 3, 'relevant mining proposal' (pre-existing mines) that is narrow and 'mining proposals' (new mines) that is broader. Relevant mining proposals are defined as a mining proposal that accompanied an application for a lease under the Mining Act, or a 'mining proposal for which there is approval' as described in section 82A(2)(b), s 82A(1) states the section applies to 'the application for a mining lease made under this Act'.

[134] *Mining Rehabilitation Fund Act 2012* (WA) s 4. The Mining Fund Act provisions that impose mandatory contributions to a fund for the rehabilitation of mines may also be construed as requirement 'in connection with the protection of the environment' for the purposes of the environmental clause. Section 4 expressly exempts mines operating under State agreements by excluding those tenements from the definition of 'mining authorisation'. The Act only imposes the levy on mines that fall under the definition of 'mining authorisation', which does not include tenements, granted or held, under State agreements.

[135] See *Mining Rehabilitation Fund Act* (2012) s 4 that reads as follows: 'Mining authorisation
(1) In this section —
Government agreement has the meaning given in the Government Agreements Act 1979 section 2;' and
'(2) For the purposes of this Act, each of these is a mining authorisation —
(a) a mining tenement unless it is granted, or held, pursuant to a Government agreement', unless of a prescribed class under the *Mining Rehabilitation Fund Regulations 2013* (WA). The prescribed classes in the regulations describe specific types of residue storage facilities, for example radioactive or acid generating materials, see *Mining Rehabilitation Fund Regulations 2013* (WA) sch 1, cl 3. The regulations presumably apply to these facilities.

submission of a 'mining proposal' or a 'relevant mining proposal'.[136] Hence, to avoid the application of the environmental clause, the the definitions of 'proposal' or 'relevant proposal' need to be interpreted to exclude proposals for State agreement mines. A 'relevant mining proposal' is narrowly defined to include pre-existing mines and a 'mining proposal' is more broadly defined to include new mines.[137] Relevant mining proposals are defined as a mining proposal that are accompanied by an application for a lease under the Mining Act, or a 'mining proposal for which there is approval'.[138] 'Mining proposals' are simply defined as a proposal in the form prescribed by the DMIRS guidelines (Division 3 mining leases) and contains a mine closure plan.[139] On the one hand, the JSTI Minister approves the State agreement development proposal (not DMIRS or the Mines Minister), which means that a State agreement proposal is not a 'proposal' or 'relevant proposal' under the Mining Act. On the other hand, the Mines Minister grants the State agreement mining lease 'as of right' after the JTSI Minister approves the proposal. Therefore, it is possible that the procedure of the Mines Minister granting a mining lease may require an application under the Mining Act that could bring a State agreement mining proposal within the definitions of relevant proposal or mining proposal. Without access to the documents that facilitate the grant of mining leases by the Mines Minister for State agreement mining projects it is not possible to form an opinion on this point.

It is likely that, as a matter of policy, for the purposes of consistent administration, the parties construe the 1970s agreements' environmental clause to operate in the same way as the post 1986 agreements, that is, the environmental clause requires compliance with the EP Act 1986. In other words, the parties to the contract have agreed how the terms apply. However, the agreements scheduled to the 1970s agreement acts were ratified as legislation, which means these agreements are vulnerable to judicial review challenges from third parties. A key distinction between the 1970s agreements and other eras of State agreements is the method of ratification. The 1970s agreements commonly ratified the contract as legislation by stating the contract terms take effect as if 'enacted in this Act'.[140] In practical terms, this means that the contract terms (unlike an ordinary contract that is subject to the doctrine of privity)[141] are vulnerable to judicial review for breach of statutory provisions—that is, a third party with a sufficient interest (standing) has the capacity to take a judicial review action to enforce the State agreement term because the term is statute. In contrast, under agreements ratified as contracts, third parties can only challenge the ratifying Act. Under contract agreements, the parties to the contract may agree on how a term operates and the government (as

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136 *Mining Act 1978* (WA) s 70O.

137 Ibid s 70O, the definition reads as follows: 'relevant mining proposal, in relation to a mining lease, means —
(a) a mining proposal that accompanied the application for the mining lease under section 74(1)(ca); or
(b) a mining proposal for which there is approval as described in section 82A(2)(b)'.
Section 82A(1) provides the section applies to mining leases made under the *Mining Act 1978* (WA). Section 82A(2) states such leases are deemed granted subject to a condition that requires the lodgement of a mining proposal in the 'prescribed manner'.

138 Ibid s 82A(2)(b) referred to in the definition of 'relevant mining proposal' at (b) reads as follows:
Every mining lease to which this section applies shall be deemed to be granted subject to a condition requiring the lessee, before the lessee carries out mining operations of a prescribed kind on any part of the land the subject of the mining lease —
(a) to lodge in the prescribed manner a mining proposal in respect of those operations; and (ba) to pay the prescribed assessment fee in respect of the mining proposal; and
(b) to obtain written approval for the mining proposal from a prescribed official.

139 Ibid s 70O the definition reads as follows: 'mining proposal means a document that —
(a) is in the form required by the guidelines; and
(b) contains information of the kind required by the guidelines about proposed mining operations in, on or under the land in respect of which a mining lease is sought or granted, as the case requires; and
(c) contains a mine closure plan.

140 See for example, *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) s 3(1); *Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972* (WA) s 3.

141 Third party privity refers to only the parties to the contract having the capacity to enforce rights.

a party to the contract) may apply a policy that reflects that understanding.[142] This is not the case when the contract terms are ratified as legislation. Any policy must be lawful; that is, the policy must comply with the legislation.[143] The 1970s agreements environmental clause is unforgiving in this respect, it would be difficult to interpret the plain words of the environmental clause as allowing a policy that requires compliance with the EP Act 1986 but exempts compliance with environmental requirements in other Acts.[144]

The parties may, of course, resolve current and future issues of statutory interpretation, arising from 1970s State agreements environmental clause interaction with other laws, by agreeing to introduce legislation to amend or remove the environmental clause. Notably, the environmental clause was not removed or amended in 2010,[145] when the Integration Act amended the Pilbara agreement Acts' by inserting the EP Act clause into the 1970s agreements.[146] This means the environmental clause operates in addition to the EP Act clause and the 1970s agreements may be required to comply with environmental requirements other than those imposed under the EP Act. How the 1970s agreements' environmental clause interacts with environmental terms in other legislation will depend on whether that legislation sufficiently excludes State agreements from the application of that term.

This analysis of the 1970s Pilbara agreements is from a legal perspective applying the rules of statutory interpretation. It is not a comment on the practical necessity or logic of applying a policy that makes the administration of the State agreement regime more consistent. In practice, applying a different set of rules to a sub-group of Pilbara agreements would make the regime, which already applies various individual requirements, more complex to understand and more difficult to administer.

5.1.3 The post 1986 Pilbara agreements

The post 1986 agreements include principal agreements, such as Hope Downs or Yandicoogina, and also supplementary agreements, for example the Brockman 2 and Marandoo mines.[147] Post 1986, Pilbara agreements included EP Act clauses, clauses that require the submission of an additional proposal for expansions or changes (that apply the EP Act clause *mutatis mutandis*), and clauses that require additional proposals for production increases ('limits on mining clauses' specified a tonnage per annum that could not be exceeded). Development proposals and additional proposals are not publicly available, however, it is presumed the additional proposal would identify a specific expansion and, therefore, require another proposal for any subsequent changes or increased production (noting that the express limits on mining clauses have been exceeded in the past). Consequently, any mine expansions post 2010, or future

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142 This will depend on all the circumstances of the case, for example, the State agreement reviewed in *Re Michael; Ex Parte WMC Resources* [2003] WASCA 288 was a contract type agreement.

143 *Green v Daniels* (1977) 51 ALJR 463.

144 For discussion of inflexible application of policy (a ground of judicial review) see *Minister for Immigration and Ethnic Affairs v Tagle* (1983) 67 FLR 164. Legislation may be challenged if a policy is unlawful (does not come within the subject matter, scope and pupose of the Act) or if it is lawful policy but is applied inflexibly. Legislation is vulnerable to third party judicial review challenges on the ground that the policy was applied inflexibly—that is, the merits of each case and the rights and interests of third parties must be considered.

145 See for example, *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) sch 5 cl 4(2) inserts sub-cl 2(4) into the principal agreement.

146 See above, Heading [3.2.3].

147 *Iron Ore (Channar Joint Venture) Agreement Act 1987* (WA); *Iron Ore (Marillana Creek) Agreement Act 1991* (WA); the *Iron Ore (Hope Downs) Agreement Act 1992* (WA); *Iron Ore (Yandicoogina) Agreement Act 1996* (WA); *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA); *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006* (WA);. The supplementary agreements authorising the Brockman 2 and Marandoo mines enacted in 1990 and 1992 respectively, *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) ss 3I – 3J, schs 10, 11. See also, 'additional areas', *Iron Ore (Mount Newman) Agreement Act 1964* (WA) sch 4, cl 3(8) inserts cl 9A; Western Australia, Parliamentary Debates, Legislative Assembly, 12 September 1990, 4949 (Mr Carr). NB *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010* (WA) does not confer mining rights, the *Mining Act 1978* (WA) applies.

developments, would have undergone, or will undergo, a Part IV review that attracts a contemporary implementation condition that imposes mine closure planning consistent with the current and future DMIRS closure guidelines. For example, the proponents' strategic or derived proposals for future developments across mining leases granted pursuant to several agreements will all be subject to this type of implementation condition.[148]

Mines that have not required the submission of an additional proposal for a recent expansion (common issues requiring an additional proposal include increased groundwater abstraction or expansion lower into the water table, increased footprint and so forth) may operate either with mine closure plans or rehabilitation strategies that satisfy that mine's specific implementation conditions, or the proponent may voluntarily comply with the DMIRS closure guidelines as an exercise of social licence. Post 2000, implementation conditions imposing mine closure or rehabilitation requirements became more prevalent; in contrast to implementation conditions from the 1986–1999 era that imposed less onerous requirements.[149]

The EPA's evolving standard practice developed new implementation conditions reflecting the best practice of the relevant time. As a result, a variety of closure or rehabilitation requirements were applied to each mine site on a case-by-case basis. Sometimes sites in close proximity will have quite different implementation conditions. For example, the Brockman 2 mine underwent Part IV review in 1991, the implementation conditions required mine site rehabilitation to the EPA's satisfaction,[150] a change in 2009 imposed a closure condition requiring partial backfill of mine voids (Pits I, 4, 4 Extension, 5, and 6), establishment of protective bunds around mine voids, removal of infrastructure, the ripping and spreading of topsoil and, if necessary, the seeding of waste dumps, hardstand and road areas, and a further change in 2012 applied the same conditions.[151] The map below (extracted from the Part IV review documents) does not appear to include the original Brockman 2 mine site in the new proposal, possibly because the mine temporarily closed during the 2008 global financial crisis.

[148] Environmental Protection Authority, Ministerial Statement, 'Pilbara Expansion Strategic Proposal' (statement 1105, 11 July 2019) cl 15-2, see Table 2 and Figure 2 for proposed mine sites, 20, 25. For the definition of derived and strategic proposals *Environmental Protection Act 1986* (WA) ss 39B, 40B.

[149] Kragt, above n 55, 7 – 9.

[150] Environmental Protection Authority, Brockman No. 2 Detrital Iron-Ore Mine, Ministerial Statement 131 (1991) condition 5 and undertaking 6.

[151] Ibid, (2009, 2012).

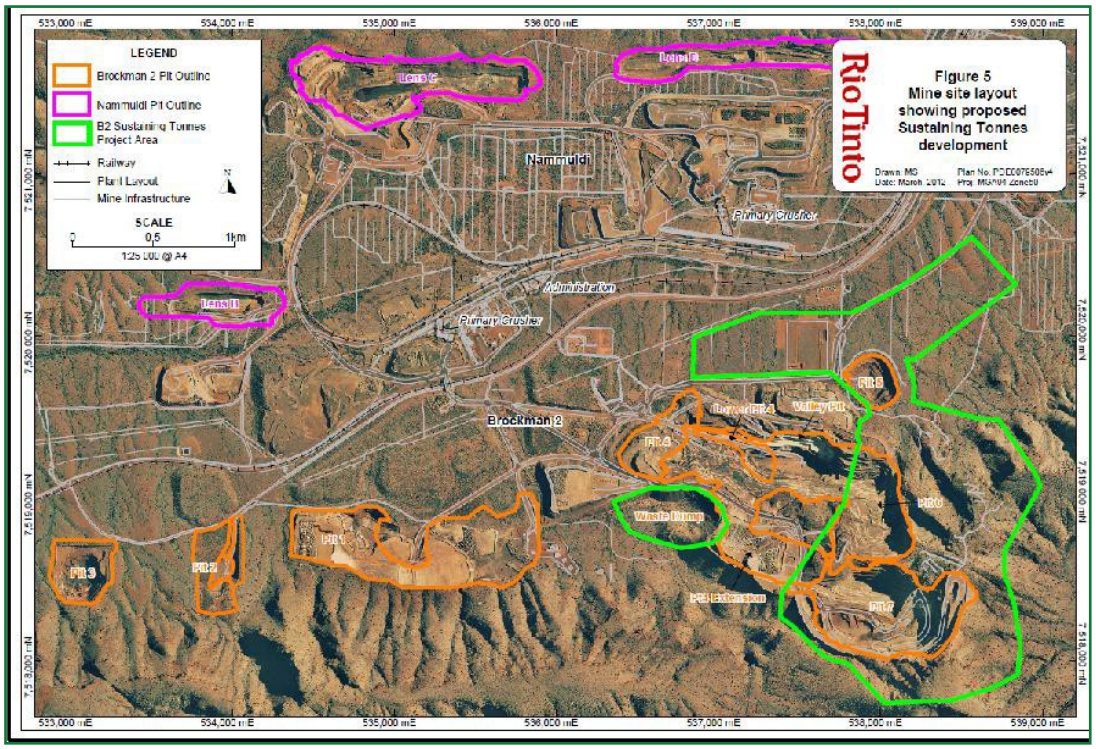

Figure 5.4: Brockman 2 mine expansion, map extract, Part IV Ministerial Statement.[152]

There was a further expansion of Brockman in 2013. While the Ministerial Statement has similar implementation conditions to other post 2010 approvals, it does not require compliance with the DMIRS closure guidelines, but it does require compliance with JTSI's acid mine drainage guideline.[153] In contrast to later closure plan conditions, this statement requires the public availability of data (by the proponent) for the life of the proposal with no exclusion of commercially confidential information.[154] The proposal applies to Pit 4, the Pit 4 extension, Pit 6 and the valley Pit. As can be seen in the map below this may mean that other parts of the mine site (Pits 5 and 7 for example) may be subject to the prior implementation conditions.

152 Ibid, (2012).

153 Environmental Protection Authority, Brockman 2 Detrital Iron Ore Mine Extension Phase 2B, Ministerial Statement 867 (2013) condition 9 - 10.

154 Ibid, condition 5.

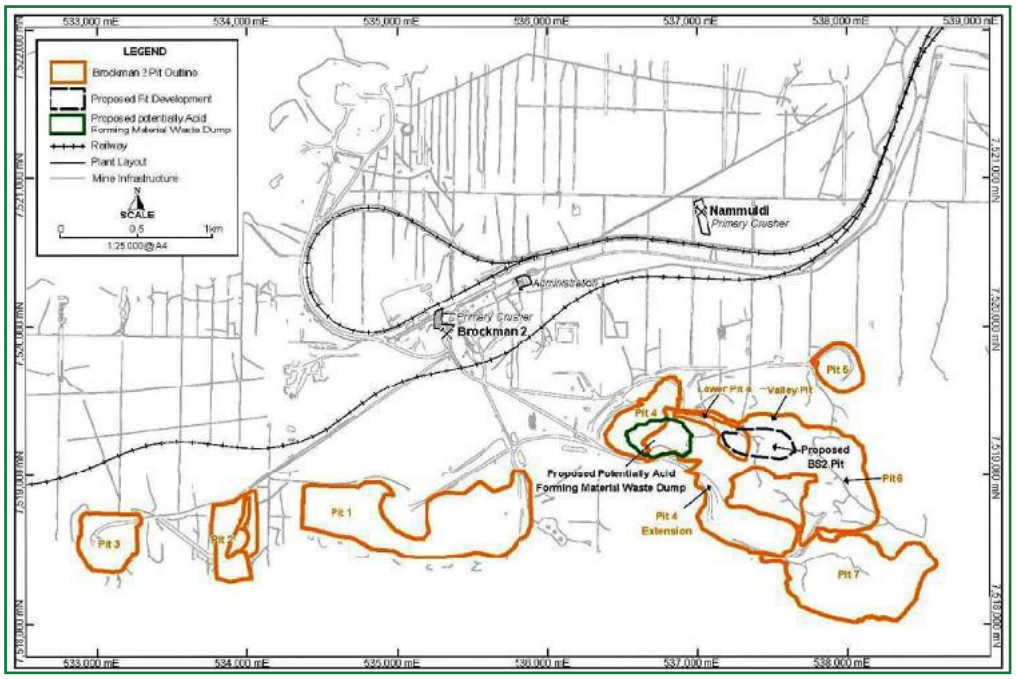

Figure 5.5: Brockman 2 mine expansion, map extract, Part IV ministerial statement.[155]

This example demonstrates the potential for inconsistent implementation conditions applying to different parts of a mine site. It depends on what parts of the mine site are encompassed by the proposal that triggers the application of implementation conditions, and the time the proposal was submitted for review. It is likely that mines that continue to operate under implementation conditions that were applied prior to 2010 (that is, before imposing the DMIRS closure guidelines became standard practice) may have varying (less stringent) closure conditions. If the implementation conditions requiring mine closure plans are inadequate, the proponent may exercise their social licence to apply contemporary standards to those sites, or submit a contemporary plan for an entire hub that encompasses adjacent sites, such as the Paraburdoo mining hub.[156]

The EP Act Part IV review system is inherently prone to inconsistency because there is no EP Act provision that would require the proponent to submit a proposal encompassing sites that have prior approval. Implementation conditions are only subject to change if the site requires an additional proposal to approve changes or, the proponent requests a change or, the Environment Minister requests a change on their own initiative (as noted above, the Minister has rarely exercised this authority, however, proponents commonly request amendments for various reasons).[157] In contrast, DMIRS has applied the Mining Act 1978 regime to new and existing mines as a tenement condition ensuring a consistent application of the DMIRS closure guidelines to all mines on the mining lease .

Table 1 summarises the interaction of Pilbara agreements with the environmental legislation from 1960 – 2010.

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155 Ibid, Figure 1.

156 Rio Tinto, Hamersley Iron Pty Ltd, Paraburdoo Closure Plan 2019 Mineral Field 47 – West Pilbara, [3.3] in Environmental Protection Authority, Greater Paraburdoo Iron Ore Hub Proposal, Environmental Review documents (May 2020) app 5.2.

157 *Environmental Protection Act 1986* (WA) ss 45C, 46.

Table 5.1: Pilbara agreement terms interaction with the environmental legislation 1960 – 2010

Agreement mines year	Environmental clause (EC)	Subject to EP Act 1971	EP Act Clause (proposal complies with EP Act)	Development proposal subject to EP Act 1986	Exempt from EP Act until 2003	Additional Proposal clause subject to EP Act	Subject to EP Act Part III policy provisions (post 2003)
1960s principal agreements	NO	NO	Inserted by Integration Act 2010	NO	YES	Inserted by Integration Act 2010	YES
1964 principal Goldsworthy Agreement[158]	Inserted sch 2 (1971)	YES (after 1971)	Inserted by Integration Act 2010	YES (post 1971)	NO	Inserted by Integration Act 2010	YES
1970s principal agreements	YES	YES (by EC)	Inserted by Integration Act 2010	YES	NO	YES	YES
1990s new and supplementary agreements	NO	NO	Yes (enacted)	YES (enacted)	NO	YES	YES

5.2 Legacy mines

A key distinction between the Mining Act 1978 and EP Act 1986 regime is the application to legacy mines. As discussed above, Pilbara agreement mines will only attract an implementation condition requiring compliance with the DMIRS closure guidelines when a Part IV review is triggered post 2010 by the applicants' submission of a proposal. This means that Pilbara agreement mines that have ceased operation prior to 2010 must rely on the proponent to comply with the DMIRS closure guidelines as an exercise of social license, or possibly the parties agree that the Pilbara agreement imposes mine closure obligations, which would be managed by JTSI. As previously noted, this case study cannot comment on the arrangements managed by JTSI because they are confidential. However, legacy mines operating under the 1970s agreements, which are subject to the environmental clause and other environmental planning obligations, may well have mine closure plan obligations imposed by the agreement.[159] In contrast, mines that are only subject to the EP Act may have a variety of implementation conditions (depending on the time of the Part IV review was conducted) or, if ceasing operation prior to 1986 or simply not engaging Part IV (the 1960s mines), no implementation conditions at all. The result is an inconsistent system, a variety of requirements, two

[158] The *Goldsworthy Agreement* is not a typical 1960s agreement for various reasons, in most ways it resembles a 1970s agreement after the 1971 supplementary agreement. For full explanation see Brown above n 43, (Part 2) 381 – 385, appendix [4.4] <https://api.researchrepository.uwa.edu.au/ws/portalfiles/portal/35367711/THESIS_DOCTOR_OF_PHILOSOPHY_BROWN_Natalie_Ellison_2018_Part_2.pdf>.

[159] *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) sch 1 cll 7(2), 6(1)(i); Dr D Kelly, State Agreement Acts (Environmental Assessment Workshop, 20 July 1976) and K C Webster, Assessment from the User Viewpoint (Government Sector), (Environmental Assessment Workshop, 22 July1976) in State Records Office (WA), Environmental Impact Assessment (item 1976 1247, volume 2, consignment 5654, Department of Mines) 73 – 74, 75, 77.

systems of management, and a reliance on the submission of new proposals, or the proponent voluntarily complying with the DMIRS closure guidelines.

5.3 Public availability of mine closure plans or information

Contemporary Part IV conditions generally require the proponent to publicly provide compliance and/or environmental data. At the time of writing, after a search of the websites, the author found generalised information on sustainability, but no information on individual mines.[160] During the proponent's Part IV review assessment, there are detailed and comprehensive mine closure plans available on the EPA website, which include projected closure dates for individual mines.[161] However, after the project is approved, these environmental review documents (EIS) are removed from the EPA website and archived as hardcopy at the WA State Library.[162] The DMIRS website Minedex, while not particularly user friendly, does provide current and historic development proposals and mine closure plans for individual non-State agreement mines.[163]

DMIRS provides guidance and structure for plans under both regimes,[164] and some Pilbara agreement mines are listed on the Minedex environmental register, but, there is no documentation available.[165] The difficulty of access to information is contributed to by different rules and systems used by the various authorities managing mining information, the availability and procedure will depend on whether the EPA, DWER, DMIRS, or JTSI is responsible for the information management. Where the proponent provides the

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[160] See for example, Rio Tinto, *Sustainability Fact Book* (2020) <https://www.riotinto.com/en/invest/reports/sustainability-report> See also, BHP, Annual Report 2021, <https://www.bhp.com/investors/annual-reporting/annual-report-2021> 49-50, 180, 274 – 279, [1.13.14 and 4.84 generally, see also 3] report refers to WA iron ore, area 3667 km2 at 274, specific vulnerable sites for example Karijini at 275, but no information on specific mines.

[161] See for example, Rio Tinto, above n 105. See App 5.2, Table 1: Indicative Mine Schedule at p 6. Rio Tinto, Hamersley Iron Pty Ltd, Paraburdoo Closure Plan 2019 Mineral Field 47 – West Pilbara, [3.3] in Environmental Protection Authority, Greater Paraburdoo Iron Ore Hub Proposal, Environmental Review documents (May 2020) app 5.2 <https://www.epa.wa.gov.au/sites/default/files/PER_documentation2/A5_2%20Paraburdoo%20Closure%20Plan%20%28Rio%20Tinto%202019d%29.pdf>.

[162] Western Australian State Library, search terms 'environmental review documents' and 'iron ore' <https://encore.slwa.wa.gov.au/iii/encore/record/C__Rb2802273__S%28environmental%20review%20documents%29%20%28iron%20ore%29__Orightresult__U__X1?lang=eng&suite=def>.

[163] See for example, DMIRS, Minedex, Environmental Registration 61467, Cliffs 2016 Koolyanobbing Range E Deposit Extension Yilgarn Operations – Koolyanobbing Range E Deposit Extension <https://minedex.dmirs.wa.gov.au/Web/environment-registrations/details/61467>: Mining Proposal Addendum to Notice of Intent 1303, Mining Lease M77/607-I, mine closure plan attachment 6, p 190 <file://uniwa.uwa.edu.au/userhome/staff5/00067245/Downloads/mp_61467.pdf> All approvals and proposals since its commencement in 1993 are available under the environmental registrations tab see, Minedex, Tenement M77/607-I <https://minedex.dmirs.wa.gov.au/Web/tenements/details/M%20%207700607>.

[164] The Part IV review system encompasses other departments such DWER (among others) to assist and manage the review for the departments' specific area of expertise. The current system of 'Integrated Project Approvals System' (commonly referred to as IPAS) using a 'Lead Agency' framework was introduced in 2009 based on the recommendations of the Keating Report, Michael Keating, 'Review of Project Development Approvals System' (Government of Western Australia Independent Review Committee, April 2002). DMIRS is a 'lead agency' as opposed to a 'support agency' such as the EPA. See, Government of Western Australia, *Lead Agency Framework* (24 August 2021) <https://www.wa.gov.au/government/publications/lead-agency-framework> See further, Brown above n 43, 186 [3.3.1]. See further, Department of Premier and Cabinet (WA), 'Lead Agency Framework, A guidance note for implementation' (March 2011) 9, 29; Auditor General's Report, 'Improving Resource Project Approvals' (Report 5, October 2008) <https://audit.wa.gov.au/wpcontent/uploads/2013/05/report2008_05.pdf>.

[165] Minedex, Environmental Registration, Yandicoogina <https://minedex.dmirs.wa.gov.au/Web/environment-registrations/details/88354>, <https://minedex.dmirs.wa.gov.au/Web/environmentregistrations/details/99032>, <https://minedex.dmirs.wa.gov.au/Web/environment-registrations/details/15473>.

information to the regulator, the relevant authority may deem, or proponents may nominate, the information as commercially confidential. For example, if a mine closure plan for Whaleback was submitted to JTSI, even if the proponent did not nominate the information as confidential, JTSI may still decide not to publish the information because there is no requirement to do so. Further, the contemporary implementation conditions regarding mine closure usually allow the proponent to not disclose information that is commercially confidential. Some water licence information managed by DWER is also in this category. The management of information in this manner is inefficient and ad-hoc, and possibly more costly than an aggregated and/or integrated knowledge data-base contributed to by multiple departments (**knowledge data-base**).

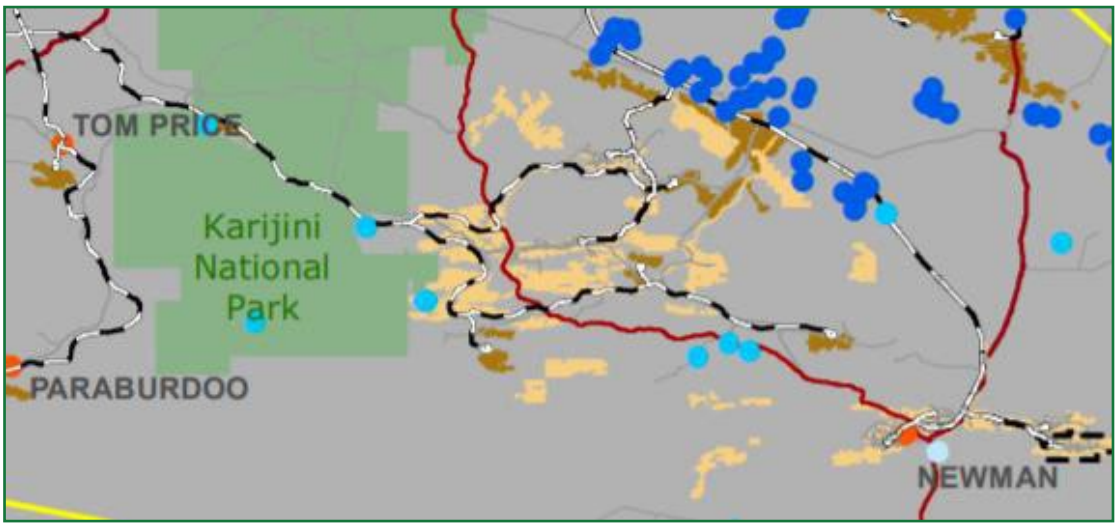

Figure 5.6: Mining footprint crossover in pink and brown areas, Jimblebar Hub Part IV strategic assessment map extract.[166]

It is acknowledged that data-sharing constraints inhibit proponents' capacity to plan for cumulative impacts,[167] so it is likely that it also constrains the development and management of compatible post mining land use. For example, the Rio Yandi and Hope Downs and the BHP Yandi mines are all in the Weeli Wolli/Marillana Creek area and relatively close to FMG's Chichester Hub operating on the Fortescue Marsh border. The State has previously recognised the benefit of, and explored establishing, a knowledge data-base. The State has cited the cost of developing and maintaining, and issues regarding who should host such a knowledge database, as the reasons previous attempts (such as SEAK, Shared Environmental Assessment Knowledge)[168] have not come to fruition.[169] The next section discusses examples of regional plans,

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166 BHP**,** Jimblebar Optimisation Project Validation Notice (10 March 2020) 19 pdf 27/112 <https://www.bhp.com/-/media/bhp/regulatory-information-media/iron-ore/western-australia-iron-ore/0000/western-australia-iron-ore-pilbara-strategic-assessment-commonwealth/bhp-jimblebar-optimisation---draft-validation-notice---20200310.pdf>.

167 Environmental Protection Authority, 'Cumulative Environmental Impacts of Development in the Pilbara Region' (Advice for Minister of Environment under section 16(e), August 2014) Brown above n 43, 284 [4.2].

168 The State government announced a policy commitment of eight million dollars in 2013 to establish SEAK. See Environmental Protection Authority, 'Annual Report 2012 – 13' (9 October 2013) 76 <https://www.epa.wa.gov.au/sites/default/files/Annual_reports/EPA%20AR%202012-13_web.pdf>.

169 Parliament of Western Australia, Legislative Council, Subcommittee of the Standing Committee on Estimates and Financial Operations 2012–13, Agency Annual Report Hearings, Transcript of Evidence Taken at Perth, Office of the Environmental Protection Authority (6 November 2013) 17; Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 June 2014, Question Without Notice no 383, Parliament 39 session 1 (J Norberger, WR Marmion). See also, Brown above n 43, 284 – 288.

knowledge databases and data-sharing models operating in this State and other jurisdictions to consider the benefits of and the possibility of developing these systems for mine closure planning.

5.4 The EP Act Part III policy and alternative models

There are Australian and international models for establishing agencies to facilitate regional planning, data-sharing and knowledge databases, such as shared stewardship regional planning, State or independently hosted data-sharing sites, and user-pays models to defray costs. Aspects of these models and systems may be transferrable to mine closure planning in the Pilbara.

An avenue of further research could be the potential development of a regional plan via an EP Act statutory Part III policy,[170] or other instrument agreed by the parties, that could incorporate environmental, economic and social benefits for the Pilbara, such as land repurposing. A regional plan requires a statutory structure to streamline regulation and oversight and, the plan structure also needs to provide for flexible content that allows for adaptive management as conditions or best practice standards evolve. A regional plan could encourage and allow for more progressive outcomes such as land repurposing,[171] for example, the Genex Pumped Hydro Electric project at the Queensland Kidston Goldmine (the Kidston mine closed in 2001) (**Genex**).[172]

A benefit of utilising the EP Act Part III regime is that the mechanism already exists. However, creating an instrument specific for the task outside of the Part III process could mitigate or avoid the statutory confines of the EP Act by addressing limitations such as scope, funding, management and flexibility. The EPA may not be able to consider, or advise on, social and economic benefits,[173] which may mean repurposing projects, such as Genex, may not be within the scope of the EPA's recommendation to implement a Part III policy. However, the Environment Minister is not limited in this respect,[174] so potentially, a Part III policy that incorporates sufficient flexibility could develop a regional plan that allows for best practice environmental, social and economic outcomes (repurposing), and also streamlines regulation and management. A Part III policy could potentially replace inconsistent implementation conditions and apply to all Pilbara agreement mines, including legacy mines and operating mines that have not engaged Part IV (1960s mines). However, a task-specific model is a better option, because, in relation to repurposing as a part of mine closure planning, there is a gap in the regulatory provisions generally,[175] and in the EP Act 1986 provisions specifically.

The introduction of a task specific plan or system is preferable because some models may require agreement by the parties (to avoid breaching the sovereign risk policy) and may require funding (that may be mitigated by introducing a user-pays model, discussed below). On a preliminary view of models in other jurisdictions, the benefits of regional planning, modelling for cumulative impacts, and best practice economic, social, and environmental outcomes, could create win-win propositions for Pilbara proponents and stakeholders.

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170 *Environmental Protection Act 1986* (WA) Part III, see also section 5 for application of policies as statute. For further reading on this point see Brown above n 43, 232.

171 P1.3 RMR, above n 12, [1.2.5], see also, [5.4], [7.2.1], [7.3.2], [8.5], [9.2], [9.4] – [9.6].

172 Genex Power, *Kidston Storage Hydro Project* (Financial Close Report August 2021) <https://arena.gov.au/assets/2021/09/kidston-pumped-hydro-energy-storage-financial-close-report.pdf>.

173 Conservation Council of WA v Minister for Environment [2019] WASCA 102 [92] citing *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority* (1996) 90 LGERA 136. While these cases discusses Part IV implementation condition recommendations the same limitation may apply to Part III policy recommendation, the scope of the EPA's advice has not been judicially considered in the Part III context.

174 *Conservation Council of WA v Minister for Environment* [2019] WASCA 102, generally and specifically at [99], [150]; *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority* (1996) 90 LGERA 136; Brown above n 43, 237 [4.1].

175 See P1.3 RMR, above n 12, [5.5].

The mining industry recognises the important role the government could take in facilitating cumulative impact management,[176] which may be achieved through regional planning. An Australian example of a regional plan is the La Trobe Valley case study discussed in this report.[177] An international example is Athabasca oil-sands regional plan. The Government of the Alberta Province (Canada) introduced legislation to facilitate shared-stewardship collaborative planning in the Athabasca region's oil-sand mining industry.[178] A central theme of the framework is to move from case-by-case approvals to regional planning.[179] Alberta's Integrated Resource Plans are place-based plans that identify long term objectives for specific areas,[180] which includes continuing consultation and collaboration with multidisciplinary experts, stakeholders and the community.[181] Some aspects of Canada's resources management regime have informed the Mineral Council of Australia's 'Towards Sustainable Mining' framework.[182]

To complement the Athabasca oil-sands regional plan there is a comprehensive knowledge data-base—the Alberta oil-sand information portal. The portal includes an interactive map with hyperlinks to information such as environmental approval documents, production history, company enforcement actions (regulation breaches), and water licences.[183] In addition, there is a comprehensive data library with user-friendly quick search tabs that access information by company name, agency, location or category as well as the standard search by title or keyword.[184] The site also provides hyperlinks to other relevant datasets, such as yearly technical reports on regional aquatics monitoring.[185] A similar knowledge database for the Pilbara may assist management of cumulative impacts, and interim or long-term planning. Industry has previously engaged in improving the State's data management system of water accounting.[186] A WA example of a knowledge database is DWER's interactive map water register.[187]

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176 Deloitte Access Economics, '2015 – 2025 Australian Resources Sector Outlook' (Chamber of Minerals and Energy of Western Australia, 2014) <https://www.cmewa.com.au/wp-content/uploads/2019/07/2015-2025-Western-Australia-Resources-Sector-Outlook.pdf>.

177 P1.3 RMR, above n 12, Latrobe Valley Case study, generally and specifically [2.1.2.2].

178 *Alberta Land Stewardship Act*, SA 2009, c A-26.8.

179 Brown above n 43, 308; Nigel Bankes, Sharon Mascher and Martin Olszynski, 'Can Environmental Laws Fulfil Their Promise? Stories from Canada' (2014) *Sustainability* 6024, 6027.

180 Alberta Government, *Integrated Resource Plans* <https://www.alberta.ca/integrated-resource-plans.aspx> The planning model is results-based, using comprehensive baseline data to set firm 'place specific' objectives that require defined results rather than simply mitigating impacts, see Alberta Government (Canada), *Oil Sands Consultations Multi Stake Holder Committee Final Report* (2007) 18; Alberta Government (Canada) *Towards Environmental Sustainability, Proposed Regulatory Framework for Managing Environmental Cumulative Effects* (2007) 6 – 9.

181 See for Collaborative Stewardship Reports, Alberta Government, Open Government Program, Oil Sands Program: Integration Workshop Reports Part 1 and 2 (2019) <https://open.alberta.ca/dataset?audience=Scientists&license_id=OGLA&tags=Lower+Athabasca+Region>.

182 Mineral Council of Australia, *Towards Sustainable Mining: Taking ESG Accountability to a New Level* <https://www.minerals.org.au/towards-sustainable-mining>.

183 Alberta Government, Alberta Oil Sands Information Portal, Interactive Map <http://osip.alberta.ca/map/>.

184 Ibid, Data Library <http://osip.alberta.ca/library/Browser>.

185 Ibid, Reporting Source: Athabasca Oil Corporation, Athabasca Oil Hangingstone Industrial Waste Water Reports: 2012, 2013 <http://osip.alberta.ca/library/Dataset/Details/611> further resources, RAMP, Region Aquatic Monitoring Program <http://www.ramp-alberta.org/ramp/results/report.aspx>.

186 Mineral Council of Australia, *Water Accounting Framework for the Australian Minerals Industry* <https://www.minerals.org.au/water-accounting-framework-australian-minerals-industry> See also, MCA Member Adoption Explanatory Note, 'Adoption by MCA member Companies—What does it mean?' <https://www.minerals.org.au/sites/default/files/MCA%20Adoption%20Explanatory%20Note.pdf>.

187 Department of Water and Environmental Regulation, *Water Register* <https://maps.water.wa.gov.au/#/webmap/register>.

Figure 5.7: DWER Water Register, Groundwater licence Marandoo mine site (Pilbara) and location insert.[188]

The Queensland Office of Groundwater Impact and Assessment (**OGIA**) is an example of independent agency 'user-pays' model that collects and aggregates information for the purpose of establishing a knowledge data-base, facilitating data-sharing, regional groundwater modelling, and advising government and industry (for example, advice on cumulative impacts).[189] The OGIA has also created a system that allows public access to, and data-sharing between proponents, of otherwise potentially confidential information by using a 'Deed of Licence' that denatures and limits the use of the information.[190]

The cost of managing knowledge data-bases and facilitating can impede the development of these models. User-pay models can mitigate funding issues that impede the management and the effectiveness of government agencies,[191] or the payment can be used to fund an independent agency to perform those functions. The OGIA is an example of an independent agency, empowered by statute, and funded by the user-pays model. The National Oil and Petroleum Safety and Environmental Management Authority (NOPSEMA) is a Federal Government agency example of a cost recovery levy system (user-pays) model for management and assessment of offshore gas and oil.[192]

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188 Ibid.

189 *Water Act 2000* (Qd) ss 3A, 479; Queensland Government, Business Queensland, *Office of Groundwater Impact Assessment* <https://www.business.qld.gov.au/industries/mining-energywater/resources/landholders/csg/ogia> for knowledge data-base example see, Queensland Government, Water Monitoring Information Portal <https://water-monitoring.information.qld.gov.au/> See also, Brown above n 43, 286 – 288.

190 Brown above n 43, 287 [4.2].

191 An example is the EPA's capacity to oversee and audit compliance, Auditor General (WA), *Ensuring Compliance with Conditions on Mining* (Report 8, September 2011) 15 – 17, 25. See further, Brown above n 43, 247 [4.4].

192 NOPSEMA, Australia's Offshore Energy Regulator, *Cost Effectiveness and Levies* <https://www.nopsema.gov.au/offshore-industry/cost-effective-and-levies>.

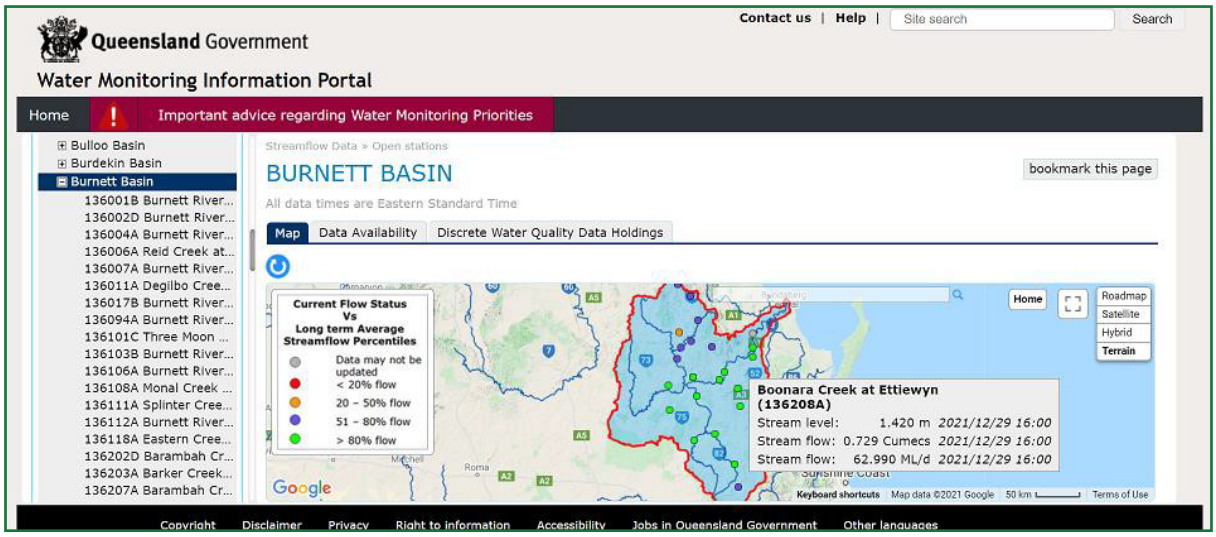

Figure 5.8: Queensland Government, Water Monitoring Information Portal.[193]

Elements of these models that enable regional planning, knowledge data-bases, and data-sharing, may assist proponents, stakeholders and government regulators. Further research could examine the viability and benefits of developing a Pilbara mining, task-specific agency, potentially based on the user-pays model. Such an agency could manage a knowledge data-base, and/or facilitate data-sharing, and/or develop a regional plan that streamlines regulation and management. Transparent and centralised management could promote progressive mine closure planning, enable stakeholder and community engagement, and encompass social and economic benefits (such as repurposing), as well as environmental outcomes.

6 Conclusion

The main distinctions between mandatory mine closure plans imposed by the Mining Act 1978 or EP Act 1986 Part IV review implementation condition are as follows. Under the Mining Act: 1) mandatory planning guidelines have been applied to new and existing mines, 2) proponents are subject to mandatory contributions to the Rehabilitation Fund, and 3) historical and current development and planning information is publicly available. In contrast, first, Pilbara agreement mines that are not subject to the Mining Act regime may or may not be subject to a Part IV implementation condition requiring mine closure planning compliant with the DMIRS closure guidelines. Secondly, mines not subject to implementation conditions imposing the DMIRS closure guidelines include the 1960s Pilbara mines (operating or ceased) that have not been subsumed into a greater hub plan; and Pilbara mines that have ceased operating prior to, or have not required a Part IV review after it became standard practice to impose such conditions. Thirdly, information regarding mine closure plan requirements imposed by JTSI either under an agreement obligation or by agreement with the proponent, is not publicly available.

Public availability of individual mine closure plans, even when those plans have previously been publicly available, is inconsistent. Information on proponent websites is generalised and the information on the EPA website is archived after the Environment Minister's approval. The limited availability of information, either because the information is archived or held by JTSI, contributes to the regime's opacity. Without access to all information, this case study was unable to conclude or form an opinion about whether all Pilbara agreement mines past and present have plans compliant with the DMIRS closure guidelines. The sporadic information

193 Queensland Government, Water Monitoring Information Portal <https://water-monitoring.information.qld.gov.au/>.

spread over multiple websites, departments, or in hardcopy stack in the State Library, stands in stark contrast to knowledge data-bases such as Alberta Oil Sands Information portal.[194]

In relation to mine closure rehabilitation funds, the proponents indicate that sufficient funding is allocated for this purpose. However, this information is generalised and does not identify specific site costs.[195]

The interaction between the broad environmental clause in the 1970s agreements and provisions in other Acts that impose environmental requirements on mines raises complex questions of statutory interpretation. A management policy that assumes the 1970s agreements are only subject to the EP Act 1986 and not subject to environmental provisions in other Acts may not reflect the legal position. This unresolved question adds a further layer of complexity to the State agreement regime from a legal perspective.

In short, due to the complex legal interaction of the State agreements with the EP Act Part IV, the regime does not apply implementation conditions that require compliance with the DMIRS closure guidelines consistently to the Pilbara mines. This system relies on the proponent to apply the DMIRS closure guidelines consistently to all projects, whether required to by an implementation condition or not. Future Pilbara agreement mines and a majority of Pilbara agreement mines receiving Part IV approval after 2010 do have, or will have, implementation conditions imposed that require compliance with the current and future DMIRS closure guidelines. It is noted that the pending amendments to the Mining Act 1978 may affect the current practice of applying the DMIRS closure guidelines as a standard implementation condition.[196] This may lead to further inconsistency if, or when, a new standard practice is imposed by future implementation conditions.

It is recommended that potential models for a regional plan that streamlines management and regulation of mine closure while providing for flexible content, and/or models for a knowledge data base, or data-sharing system as described above at heading [5.4] are further explored. While an agreed task-specific model is preferable, the EP Act Part III policy provisions also provide a potential mechanism to achieve some or all of the aims outlined. In addition, the intersection of mine closure, environmental requirements, and land rights of Native Title Holders (as third parties as well as stakeholders and Traditional Owners) is relevant in this sphere of research. Particularly in context of Pilbara and other State agreement mining operations' impacts on water, and collaborative planning for repurposing and post-mining land use. Lastly, a comparative empirical study of the efficacy of mine closure planning and outcomes under the different regimes. For example, mines subject to the EP Act implementation conditions compared to mines managed by JTSI under agreement obligations, or mines with voluntary plans. It is possible that all Pilbara agreement mines not subject to EP Act implementation conditions imposing DMIRS mine closure planning are subject to (or have agreed to) mine closure plan requirements imposed by JTSI. This avenue of research would require the assistance of, and provision of information from, JTSI and/or the proponents.

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194 See above at Heading [5.4].

195 See above, Heading [4.2] and Rio Tinto, Sustainability, Closure (Website) <https://www.riotinto.com/sustainability/closure#performance>

196 *Mining Amendment Bill 2021* (WA). See P1.3 RMR, above n 12, [5.2.1.4].

7 Glossary

7.1 Legislation

Contaminated Sites Act	*Contaminated Sites Act 2003* (WA)
Contaminated Sites Regulations	*Contaminated Sites Regulations 2006* (WA)
EP Act or EP Act 1986	*Environmental Protection Act 1986* (WA)
EP Act 1971	*Environmental Protection Act 1971* (WA)
Government Agreements Act	*Government Agreements Act 1979* (WA)
Integration Act or Integration Act 2010	*Iron Ore Agreements Legislation Amendment Act 2010 (No 2)* (WA)
Mining Act or Mining Act 1978	*Mining Act 1978* (WA)
Mining Act 1904	*Mining Act 1904* (WA)
Mining Fund Act	*Mining Rehabilitation Fund Act 2012* (WA)

7.2 Departments

DMIRS	Department of Mines, Industry, Regulation and Safety (Mining Act 1978 administrator)
DWER	Department of Water and Environmental Regulation (EP Act Part V and *Rights in Water and Irrigation 1914* (WA) administrator)
EPA	Environmental Protection Authority (EP Act Part IV administrator)
JTSI	Department of Jobs, Tourism, Science and Innovation (State agreement administrator)

7.3 Defined terms

DMIRS closure guidelines	The DMIRS mine closure planning guidelines
EIS or environmental review	Proponent documents satisfying Part IV review Environmental Impact Statement (currently referred to as environmental review). The case study used the term EIS to preclude confusion with Part IV review (the EPA and Environment Minister's procedures).
Environmental clause	A term common to 1970s Pilbara agreements that requires compliance with any environmental requirement in any legislation. The clause provides, '[n]othing in this Agreement shall be construed to exempt the Joint Venturers from compliance with any requirement in connection with the protection of the environment arising out of or incidental to the operations of the

	Joint Venturers hereunder that may be made by the State or any State agency or instrumentality or any local or other authority or statutory body of the State pursuant to any Act for the time being in force'.
EP Act clause	A State agreement term requiring the development proposal to comply with the EP Act 1986 and receive approval from the Environment Minister (Common to post 1986 Pilbara agreements and all agreements after the Integration Act 2010). The clause provides that '[n]othing in this Agreement shall be construed to exempt the Company from compliance with any requirement … that may be made pursuant to the EP Act.'
Implementation condition	A condition imposed by the Environment Minister after an EP Act Part IV environmental review, usually as recommended by the EPA
Knowledge data-base	A data-base that integrates and aggregates knowledge from multiple sources.
Limit on mining clause	State agreement term that imposes a tonnage per annum that when exceed required the proponent to submit an additional proposal.
Part III policy	EP Act 1986 Part III, statutory policy provisions. Part III policies have the force of law and the provisions are not enlivened by a proposal submission. Policies are usually developed for specific regions and purposes.
Pilbara agreements	Pilbara iron ore mines authorised by state agreements
Pilbara agreement mines	The mines (or mine) authorised by a Pilbara agreement.