Australian Resources & Energy Law Journal

Volume 42 Number 2
December 2023

Practical legal insights for the energy and resources industries.

Published by
Energy & Resources Law
ABN 98 006 037 529

Co-Editors
Dr Penelope Crossley, Associate Professor, The University of Sydney Law School
Peter Holden, Chair, Editorial Board

Citing ARELJ

This volume may be cited as (2023) 42(2) ARELJ.

Volumes published between 1997 and 2002 were known as Australian Mining and Petroleum Law Journal and should be cited as, for example, (2002) 21 AMPLJ

Volumes earlier than (1997) 16 AMPLJ may be cited as, for example, (1996) 15 AMPLA Bulletin ISSN 1447-9710

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ER Law Limited
Suite 7.13, 365 Little Collins Street Melbourne VIC 3000
Tel +61 3 9248 5400; Email erlaw@erlaw.org.au

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Australian Resources & Energy Law Journal

Volume 42(2) December 2023

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COMMUNITY LEGAL RIGHTS IN MINE CLOSURE PLANNING; A COMPARATIVE ANALYSIS OF THREE AUSTRALIAN STATES

Professor Alex Gardner, University of Western Australia Law School, and
Laura Hamblin, formerly research associate at the UWA Law School, 2021

The research presented in this article was supported by CRC TiME. The content of the article is a revised version of a key theme of the "Final Report, Project 1.3 – Mapping the Regulatory Framework of Mine Closure". The support of the Australian Government through the Cooperative Research Centre Program is acknowledged. The article is current to March 2023.

How important is the legal definition of community rights to consultation in mine closure planning? This article presents a comparative analysis of the regulation of mine closure planning through the operation of mineral resources, environmental and planning laws across three Australian States: Western Australia, Queensland and Victoria. Each state has unique mining industries and quite different legal frameworks for mine closure planning. A key difference is in the legal definition of the duty of mining tenement holders to consult community interests (both private and public interest holders). We address core concepts and key goals in mine closure planning, the legal duties of mining tenement holders to undertake mine closure planning, and the community rights to engage in that planning process. We identify key differences in the essential requirements for closure plan approval, especially in relation to community engagement rights of notification and participation.

1 Introduction

Why does the *Mining Act 1978* (WA) not provide secure legal rights for community consultation in relation to mining lease proposals and mine closure plans? Addressing this question presents an important theme for this comparative review of some core features of the regulatory frameworks for mine closure in three Australian States. It also raises important questions for future legal research.

Western Australia, Queensland and Victoria have prominent but vastly different, and thus uniquely significant, mining industries. Western Australia's mining industry has a long history of large and smaller scale mining of a diverse range of minerals by various methods that pose significant mine rehabilitation challenges.[1] Queensland's mining industry is similarly large and diverse, dominated by export coal production, and planning future minerals development in a decarbonising world.[2] Victoria has a smaller mining industry with a large historical legacy dominated by a coal mining industry for domestic electricity generation in the Latrobe Valley, which is closing as the State actively transitions to renewable power sources.[3] These States also have significant differences in the regulation of their mining industries.

What all three States do have in common is the significance of their mining industries to both the State economy and the communities who depend on or live near mining operations. Importantly, all three States are confronting large legal and regulatory challenges in managing mine rehabilitation and closure. The key to addressing these challenges is effective mine closure planning: the closure of a mine site has ripple effects that are not merely environmental and economic, but social and cultural too.

The initial approval of a mine closure plan occurs before any mining has begun and, with the life cycle of a mine often spanning decades, regulatory bodies are approving hypothetical closure scenarios, potentially subject to vast changes. Regulatory bodies may then seek to enforce closure requirements enshrined in a plan that may wane in relevance as mining operations progress, the updating of which may depend on the miner. Yet remedying the regulatory system so that it creates adaptable but consistently effective mine closure outcomes for affected communities still begins at planning. Although that planning is an iterative process across the life of the mine, it is very important at the initial stage of approval. Recent legislative reforms in all three States are adding to the

regulatory rigour and adaptability of mine closure planning, though there are very different legal requirements for community consultation. This article aims to explain and assess the regulatory reforms by undertaking a comparative analysis of mine closure planning across Western Australia, Queensland and Victoria, with a focus on the initial approval stage and how stakeholders and communities are brought into that process. The facilitation of continuous and comprehensive community engagement is critical to ensuring that mine closure planning accounts for environmental, economic, social, cultural and safety outcomes after mine closure, but it has not been possible to consider here the process of ongoing mine closure planning, especially for amending mine closure plans and determining satisfaction of mine closure plans leading to resource tenure relinquishment.[4]

The article begins by considering core concepts of mine closure planning and the regulatory goals that inform it. It then provides a comparative overview of each State's mine closure planning requirements under the mineral resources, environmental and land use planning laws and draws out some of the different regulatory structures and processes for mine closure within each State. The third step in our analysis compares the ways in which those laws provide for local communities' participation in mine closure planning, with specific attention to whether the regulatory provisions create legally enforceable rights for effective community engagement. The article concludes with a summary of the key points from the discussion of three themes in our analysis: (i) the importance of clear definitions of core concepts and key goals, (ii) mine closure planning as an essential part of a mining proposal, and (iii) the legal definition of community engagement and consultation rights.

Mine closure planning and implementation is necessarily influenced by many other spheres of law including taxation law, investment law, water law, and the rights of traditional owners, to name a few. A potentially directly relevant Commonwealth law is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which may require environmental impact assessment of a mining proposal and closure plan and lead to approval conditions supplementing State requirements.[5] Whilst acknowledging the importance of these adjacent spheres of the regulatory frameworks for effective mine closure planning, this article does not attempt to address their impact. In particular, the rights of Traditional Custodians are a crucial part of mine closure planning that are only briefly noted here and that would benefit from future research.

2 Core Concepts and Key Goals

Mining, environmental and planning laws across Australia lack definitions of important terms regularly employed in relation to mine closure planning. The definitions of "closure", "rehabilitation" and "repurposing" are fundamental but unsettled. Below, we provide general definitions of these concepts as they inform key goals of the subsequent discussion of mine closure planning.

2.1 Closure

Traditionally, the term "mine closure" has been used to refer to the point at which mining operations have ceased and the mine is being decommissioned, often because the asset is no longer considered profitable for the operator.[6] The contemporary meaning may be broader, encompassing relinquishment of the mining tenure. A mine can be put into "care and maintenance" rather than being entirely decommissioned (this is distinct from closure) or be "relinquished" after being decommissioned and rehabilitated. A mine can also be legally "abandoned" by an operator through forfeiture, surrender or expiry of the lease. All of those are types of mine closure. This can raise questions of the extent of closure liabilities of a new operator that takes on the tenure.

Mine closure can also be partial, where either one element of operations is shut down, or one part of the land ceases to be used for mining. Successful rehabilitation to the point of relinquishing the land back to the State is still unusual in Australia, but there are examples of closure, including examples of long-lived large-scale mines having successfully rehabilitated some areas that have been relinquished back to the State.[7]

2.2 Rehabilitation

Mine "rehabilitation" typically refers to the process of repairing damage to the landscape caused by mining practices and operations.[8] Most contemporary conceptions of mine closure include a requirement to rehabilitate impacted land. At a minimum, the mine site must be made safe and the

risk of structural collapse must be minimised.[9] However, regulatory standards for the definition of mine rehabilitation generally go further than mere physical safety and stability and include a requirement to rehabilitate the mine site to a level that will support future land uses.[10] The common standard of mine rehabilitation requires the land to be restored to its pre-mining state as much as possible, where there is no other beneficial restorative use.[11] The Regulations may also permit mining infrastructure to be retained for future use by community members for non-mining purposes (see 2.3 Repurposing, below).[12] It is important to note that no existing legislated standards address reparations for damage to cultural sites, despite destruction of cultural sites being a possible impact of mining activity.

The rehabilitation process must be tailored to each mine site and account for different regional land-use plans, such as for water catchment or agriculture. This makes it difficult for any regulator to set uniform standards: rather, regulators and industry bodies generally prepare comprehensive guidelines to assist companies in meeting the legal requirements in collaboration with authorities and local communities.[13] Yet there is an evolving legal standard that rehabilitation should be progressive and the outcomes achieve a safe and stable land form that causes no environmental harm or pollution and is capable of sustaining post-mine land use (see discussion below in relation to Queensland in Part 3.2 and Victoria in Part 3.3).

2.3 Repurposing

The core meaning given to this term is the adaptation of the concept of closure to include repurposing of mining assets to future non-mining uses instead of their removal and the rehabilitation of the mined area. However, the repurposing of mine assets or mined land forms may be presented as a part of rehabilitation. Generally, there is a lack of clearly established regulatory measures governing repurposing of mine assets into non-mining uses, so this aspect of mine closure is presently more subject to the social license to decommission and repurpose.[14] This can leave questions about managing residual risks of repurposed assets. A transformative approach to mine closure and repurposing should also encompass community and Traditional Custodian concerns, including addressing residual risks.

2.4 Comparative Summary of Core Concepts and Goals

In broad terms, the definition of mine closure spells out the key goals: decommissioning, rehabilitation and relinquishment of tenure. Closure may be partial, built on progressive rehabilitation. There are evolving legal standards for rehabilitation outcomes to achieve land forms that are stable, non-polluting and can sustain a post-mine land use. Those goals may also now be served by repurposing mine land forms and assets for post-mine land uses, though legal definitions of this concept are indefinite.

3 Mine Closure Planning – an Essential Part of Presenting a Mining Proposal

This part provides an overview and comparative summary of how mine closure planning is regulated in each of our three focus States. The provision of financial security for rehabilitation commitments is also a key step in the closure planning process, which we do not consider here.

3.1 Western Australia

Western Australia has two foundational pieces of legislation that regulate the making and approval of mining proposals and mine closure plans:

- The *Mining Act 1978* (WA) (Mining Act) administered by the Department of Mines, Industry Regulation and Safety (DMIRS).
- The *Environmental Protection Act 1986* (WA) (EP Act WA) administered by the Department of Water and Environmental Regulation (DWER) and the Environmental Protection Authority (EPA).

3.1.1 Alternative Pathways to Approval under the Mining Act

The Mining Act and the EP Act WA interact to establish two alternative pathways for seeking approval, including environmental impact assessment approval, of a minerals production operation.

1 The first pathway (the traditional pathway) involves the application for a mining lease with a mining proposal[15] that may be referred by any person for environmental impact assessment (EIA) under the EP Act WA where the proposal is likely, if implemented, to have a significant effect on the environment (see below Part 3.1.2).[16] If an EIA is required, it must be completed before the Minister for Minerals may grant the mining lease. The grant of the mining lease will authorise the commencement of mining operations.

2 The second pathway (the deferred proposal pathway introduced in 2004)[17] authorises a mining lease application without a mining proposal if the application is supported by a statement of proposed mining operations and a "mineralisation" or "resource" report. Only the proponent may refer such an application for environmental impact assessment.[18] A mining lease granted under the deferred proposal pathway is granted with a condition requiring the lessee to obtain written approval of a mining proposal from the Executive Director of DMIRS Resource and Environmental Compliance Division before carrying out any mining operations.[19] Almost all mining lease applications are made by the deferred proposal pathway.[20] Once a mining proposal is submitted to DMIRS for approval, it may be referred to the EPA for an EIA under the EP Act WA and must be so referred by the Executive Director if it appears to be likely to have a significant effect on the environment.[21]

The key point here is that a mining proposal process by either pathway must contain a mine closure plan (MCP).

The Mining Act definition of "mining proposal" includes an MCP.[22] In turn, an MCP is defined to be a document that has the form and content "required by the guidelines" that are approved and made publicly available by the Director General of Mines.[23] It is also a statutory condition of a mining lease that the lease holder must review the MCP and obtain written approval of the reviewed MCP every three years after it was approved, either in the grant of the lease or under the deferred proposal pathway.[24] However, the Mining Act fails to address three important legal questions about the guidelines and the effect of an approved MCP.

First, the Mining Act does not state the legal effect of the guidelines on the decision to approve an MCP. On the basis of the High Court decision in *Forrest & Forrest v Wilson*, a case which interpreted the Mining Act provisions regulating the mining lease application process, there is a duty to fulfill the statutory requirements of the application process.[25] Contrary to the DMIRS statement,[26] the statutory guideline prescription of the form and content of the MCP is less likely to be legally binding because the Mining Act references are merely by way of definition of terms and there are no operative provisions in the Mining Act that give a binding legal effect to the guidelines in reviewing or approving a mining proposal or MCP. The lack of standard legislative process in making the guidelines also tells against their having a binding legal effect, though it is likely that the Minister granting a mining lease or the prescribed official approving a mining proposal would be legally bound to have due regard to the prescriptions of the guidelines.[27]

Second, the Mining Act does not specify the legal effect of the approval of a mining proposal or MCP, nor separately confer any legal force on those documents. The Mining Act does provide that a lease holder in breach of any of the statutory covenants or conditions is liable to have the lease forfeited or pay a financial penalty not exceeding $50,000,[28] but it is not clear that a condition requiring compliance with a mining proposal or MCP is incorporated into the mining lease. Thus, there is a legal duty to have an approved mining proposal and MCP, and the lease is liable for forfeiture or penalty if the MCP is not reviewed every three years, but there is no statutory legal sanction for breach of the MCP.

Third, the practice seems to be to include approved MCPs on the Mining Act register, Minedex,[29] though it is not clear what is the legislative basis for doing so, or its legal effect.[30]

3.1.2 The Role of Environmental Impact Assessment

The Mining Act mining lease process interacts with the EP Act WA process for EIA, which has some important definitions.[31] The EP Act WA defines "proposal" broadly, including as a "project, undertaking or development", and defines a "significant proposal" as one likely, if implemented, to have a significant environmental impact.[32] A "mining proposal", as defined in the Mining Act, will often come within the EP Act WA definition of a "significant proposal", which makes it eligible for any

person to refer to the EPA to determine whether an EIA is required.[33] A mining proposal presented under either the traditional or deferred pathway can be referred to the EPA for assessment, but only the mining lease applicant can refer a mining lease application made under the deferred proposal pathway. The EPA decides whether an EIA is needed and sets the requirements of the EIA process for each proposal in accordance with its statutory powers, administrative procedures and guidelines.[34]

In order to make an assessment of a mining lease application, the EPA applies environmental principles set out in the EP Act WA.[35] These principles are aimed at providing direction for the EPA in meeting their objectives; namely, using its best endeavours to protect the environment and prevent, control and abate pollution and environmental harm.[36]

Under the *Environmental Protection Amendment Act 2020* (WA) (the EP Amendment Act), numerous changes have been made to the provisions of the EP Act WA, Part IV, Environmental Impact Assessment.[37] While none of them specifically addresses mine closure planning or the relationship between the EP Act WA and the Mining Act, three points may be made about the potential effect of some amendments on mine closure planning.

1 The amendments do not substantially amend the essential EIA process but have added greater flexibility to the EPA, and ministerial and proponent roles in EIA, such as expressly providing that the EPA may, in its assessment, "take into account other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment". This consideration could be the basis for reducing regulation under Part IV.[38] One may ask whether the mine closure planning process under the Mining Act guidelines is a "statutory decision-making process" as the process is not defined by statute.

2 The amendments introduced EIA cost recovery fees for proponents and the requirement to consider the cumulative impacts of a proposal on the environment as part of the EIA.[39] These two new features of the EIA process likely add costs that would not be incurred under the Mining Act mine closure planning process.

3 The EP Amendment Act removed the provisions in Part IV for dealing with a proponent's confidential information; new confidentiality provisions are in the Regulations.[40] It is a question for further research how the new confidentiality provisions compare with the confidentiality of the Mining Act mine closure planning process and what effect each may have on the transparency of the process.

The Part IV EIA provisions are especially important in relation to mines developed under State Agreements, which are a feature of the Western Australian mining regulatory landscape.[41] State Agreements are legal agreements between companies and the State Government, authorised by Acts of Parliament, and are used predominantly to facilitate large resources projects.[42] They are individually negotiated and the tailored terms can allow companies exemption from several other regulatory requirements.[43] Their use is declining, though many existing projects are still conducted under a State Agreement and new mines may be opened under existing agreements.[44] The use of individual agreements allows for a more tailored set of requirements, such as the construction of infrastructure and closure requirements that deal with unique features of the affected region.[45] Modern political discourse highlights that allowing for individual agreements can be anti-competitive.[46] The significant legal point about State Agreements is that the mining leases are granted "as of right" after a mining proposal under the State Agreement is approved, but the process of approving the proposal and granting a mining lease is removed from the Mining Act. The EP Act WA requirements of EIA are still applicable and mine closure planning may be required through that process.[47] The EPA may refer to the Mining Act mine closure plan guidelines in conducting its assessments.[48]

3.1.3 Statutory Guidelines for Mine Closure Plans

The most recent Statutory Guidelines for Mine Closure Plans (the Guidelines) came into operation in March 2020.[49]

The Guidelines suggest a set of standard conditions to be incorporated into the mining lease conditions on approval of the MCP for small mining operations, including that rehabilitation be "in a progressive manner where practicable" to ensure that the landforms are "safe, stable, non-polluting,

integrated with the surrounding landscape and support self-sustaining, functional ecosystems or alternative agreed outcome to the satisfaction of the [relevant DMIRS officer] …”.[50] The implication is that the outcomes will be agreed with the stakeholders consulted by the mining lessee.

For large mining operations, the Guidelines are brief and set out the structure and content requirements of closure plans but do not establish closure standards; there is not even a suggestion that rehabilitation be progressive.[51] The closure plan must set out:

- “all legal obligations for rehabilitation and closure that will affect the post-mining land use and closure outcomes”;
- the post-mining land uses and an environmental risk closure assessment; and
- the completion criteria and closure analysis that will be used to determine whether rehabilitation and closure are successfully completed.[52]

There is much doubt about the legal effect of the content of the MCP. The provision in the Statutory Guideline that the MCP “must detail all legal obligations for rehabilitation and closure” cannot give legal effect to the MCP content unless the MCP purports to be some form of contract entered into with the Department. The closure plan must be approved by the Executive Director, Resource and Environmental Compliance, DMIRS, and it will be the plan setting the criteria for assessment of the mine closure, except where the plan is amended or additional conditions are set by DMIRS or through the EIA process.[53] DMIRS also has an Environmental Objectives Policy that provides overarching objectives for mine closure for industry, community and the Department, the principal objective being: “Resource industry activities are designed, operated, closed, decommissioned and rehabilitated in an ecologically sustainable manner, consistent with agreed environmental outcomes and post-mining land-uses without unacceptable liability to the State”.[54] The question, addressed in Part 4.1 below, is how are the outcomes and post-mining land uses agreed?

3.1.4 2022 Legislative Amendments

The *Mining Amendment Act 2022* (WA) (Mining Amendment Act) was assented to on 28 September 2022 but its key provisions were not (March 2023) proclaimed into operation.[55] It amends the Mining Act to replace the existing provisions regulating repair of injury to land and mine closure planning,[56] streamlining the process for authorisation of prospecting and exploring for minerals and for authorisation of mining operations. The Mining Amendment Act was presented as improving the efficiency of approvals processes for the industry and government, which it does.[57] It retains the traditional and alternative pathways for seeking approval of proposed mining activity.[58] However, it also strengthens the legal enforceability of the conditions of approval for mining operations, including for mine closure planning.

In summary, the Mining Amendment Act inserts “Part 4AA – Conditions and Approvals” creating four new instruments to be submitted for ministerial approval of mining activity:

1. an automated approval for an “eligible mining activity” (EMA) by the lodgement of an EMA notice to undertake prescribed activity with minimal disturbance to the surface of the land subject to automatically assigned prescribed conditions, though this could be excluded from more sensitive categories of land;
2. a *programme of work* authorising activity preparing for and carrying out prospecting or exploration that is not an EMA;
3. a *mining development and closure proposal* authorising activity preparing for and carrying out mining operations under a mining lease, the approval of which must be recorded in an approvals statement (described below); and
4. a *mine closure plan* for planning and reporting on the decommissioning, rehabilitation and closure of mined land, which must be lodged by a date specified in an approvals statement and include the closure outcomes.

An *approvals statement* records, in relation to a mining lease, the terms of an approval, including conditions and any relevant information, proposed closure outcomes and the date by which a mine closure plan must be lodged. It must be made available for public inspection. An activity must not be carried out except in accordance with one of these instruments and compliance with these approved instruments, including an approvals statement, is a condition of a mining lease.[59] Non-compliance

with a tenement condition still renders the tenement holder liable to have the mining lease forfeited or pay a financial penalty.[60]

The instruments that pertain specifically to mine closure planning are the mine development and closure proposal, the approvals statement, and the MCP. Each must contain information regarding decommissioning, rehabilitation of land and the closure outcomes, but the MCP is described as "a planning and reporting document". There are no amendments that guide public consultation on mine closure planning, and only the approvals statement needs to be made available for public inspection.[61] Unless a Government agreement (referred to above as a State Agreement) provides otherwise, these instruments do not apply to a mining lease held under the agreement.[62] The amendments strengthen governmental enforcement of closure planning but appear to reduce transparency and say nothing about community consultation.

3.2 Queensland

The Queensland regulatory system for mining rests on two core legislative pillars:

- The *Mineral Resources Act 1989* (Qld) (MR Act Qld) administered by the Department of Resources (DoR); and
- The *Environmental Protection Act 1994* (Qld) (EP Act Qld) administered by the Department of Environment and Science (DES).

3.2.1 The MR Act Mainly Regulates Resource Tenure and Infrastructure

The MR Act establishes most of the procedural aspects of acquiring mining tenure, including the process of application for a mining lease and the relevant considerations when determining whether or not to grant the application.[63] The holder(s) of an existing prospecting permit, exploration permit for coal or a mineral development licence, or a person with the consent of the permit or licence holder, may apply for a mining lease in respect of any area within their exploration tenements.[64]

An application for a mining lease must be accompanied by a Statement outlining the mining program (including the method of operation and expected start time) or outlining the alternative proposed use of the lease area (such as infrastructure).[65] The application should state the resources (human, technical and financial) proposed to be committed to the mining operations and give details of the applicant's financial and technical resources.[66] There is no express provision in the MR Act for the mining program to include an MCP, as recent reforms (discussed below, Part 3.2.2) have incorporated this requirement into the application for an environmental authority under the EP Act Qld.[67] If objections are made to the mining lease application or to a related environmental authority application, the Chief Executive of the DoR must refer the application and all objections notices, including those to the environmental authority application, to the Land Court for hearing and recommendations to the Minister.[68] In making those recommendations, the Land Court considers a range of factors that relate to the technical and financial capacity of the applicant to conduct the proposed operations and land use factors, such as whether the proposed mining operation is an appropriate use of land.[69]

The MR Act also sets out relinquishment requirements, which need to be considered when undertaking mine closure planning. It suffices to explain here that part of the MR Act closure requirements includes an onus on the mine lease holder either to remove all mineral and property from the area or to provide security to cover the cost of the State selling or destroying the remaining property.[70]

3.2.2 The EP Act Mainly Regulates Rehabilitation of the Land and Environment

The EP Act Qld sets the environmental standards for any resource activity undertaken in Queensland, defined as including any activity that involves a "mining activity".[71] The relevant requirements were significantly amended by the *Mineral and Energy Resources (Financial Provisioning) Act 2018* which amended the EP Act Qld to require that an environmental authority for a mining activity include a "progressive rehabilitation and closure plan", and established new financial security provisions.[72] The key point here is that mine closure planning has been integrated into the Environmental Authority (EA) under the EP Act Qld, Chapter 5, administered by the DES. An

application for an EA relating to a "site specific application for a mining activity relating to a mining lease [must] be accompanied by a proposed [Progressive Rehabilitation and Closure] plan" (PRC Plan).[73]

The main purposes of a PRC Plan are to require the holder of an EA for a site-specific mining lease application to set out how and where environmentally relevant activities will be carried out to maximise progressive rehabilitation to a "stable condition" and to provide the condition to which the EA holder must rehabilitate the land before the authority can be surrendered.[74] Land is in a stable condition if it (a) is safe and structurally stable, (b) is not causing environmental harm, and (c) can sustain a post-mining land use.[75]

The EP Act Qld prescribes the form and content of the PRC Plan for achieving these purposes,[76] including:

1 the nature and likely duration of the relevant mining activities, plus the methods and milestones for rehabilitating the land to a stable condition,
2 a proposed PRC Plan Schedule defining how and where the activities will be carried out and the "post-mine land uses" (PMLUs) or "non-use management areas" (NUMAs) to result from the rehabilitation plan, and
3 an explanation of (a) how each PMLU or NUMA is consistent with the outcome of consultation with the community and any governmental land use strategies or plans, and (b) reasons why a NUMA cannot be rehabilitated to a stable condition.

The PRC Plan Schedule may propose a NUMA only if (a) rehabilitating the land would cause a greater risk of environmental harm than not rehabilitating it, or (b) the risk of non-rehabilitation is confined to the area of the resource tenure and it is in the public interest not to rehabilitate that land to a stable condition.[77] A specific statutory limit on proposing a NUMA is that a void situated wholly or partly in a flood plain must be rehabilitated to a stable condition.[78] If a PRC Plan Schedule proposes a NUMA at the end of the application stage, the administering authority must ask a qualified entity to carry out and report to the administering authority on a public interest evaluation of it.[79]

The EP Act Qld, Chapter 3, also establishes a comprehensive process for an EA approval and for Environmental Impact Statements (EISs). The EA approval process has four stages: application, information, notification and decision.[80] PRC Plans may be incorporated as part of or accompany an EIS before an EA application is made,[81] in which case the information stage of the EA application will not apply unless there are proposed changes to the PRC Plan considered in the EIS process.[82] However, if an EIS has not been undertaken before, the administering authority may require an EIS as part of the information stage of a site-specific EA application for a mining activity.[83] The EIS process is aimed at assessing both the adverse and beneficial social, economic and environmental impacts of a project as well as how to mitigate adverse impacts and propose an environmental management plan.[84]

There are detailed criteria for the DES to consider when deciding to approve a PRC Plan.[85] In deciding whether to approve the PRC Plan Schedule, the DES must carry out an objective assessment and may only approve the Schedule if each PRC Plan objective can be achieved according to the Schedule. There are also criteria for assessing progressive rehabilitation of PMLUs or improvement of NUMAs. In summary, the detail of regulatory guidance for approval of a PRC Plan is remarkable, including in the way it links the regulation of rehabilitation under the EA to approved land use.

There is a further requirement under the *Strong and Sustainable Resource Communities Act 2017* (Qld) (SSRC Act) for any resource project which requires an environmental impact assessment also to conduct, and make publicly available, a social impact assessment.[86] The operation of this legislation seems mostly relevant to State significant mining projects that come within the jurisdiction of the Coordinator-General under the *State Development and Public Works Organisation Act 1971* (Qld). The Coordinator-General operates independently of, but alongside, the DES and the DoR to conduct a preliminary assessment of significant projects.[87] Any project that requires an environmental or social impact assessment must be approved by the Coordinator-General.[88]

The Social Impact Assessment Guideline sets out the relevant considerations when assessing the issues that affect the local people and communities in proximity to a proposed project, including impacts on:

- culture, history and ability to access cultural resources;
- communities' physical safety, exposure to hazards or risks, and access to and control over resources;
- communities' quality of life including liveability and aesthetics, as well as the condition of their environment (for example, air quality, noise levels, and access to water); and
- livelihoods, for example, whether peoples' jobs, properties or businesses are affected, or whether they experience advantage/disadvantage.[89]

The above impacts are those most likely to be relevant to closure planning and the ability of applicants to demonstrate management and mitigation measures for any social impacts identified can have a bearing on the Coordinator General's decision to grant project approval. Each proposed mitigation measure must also identify any residual impacts and how these might be addressed.[90]

3.3 Victoria

The *Mineral Resources (Sustainable Development) Act 1990* (Vic) (MRSD Act) is the chief Act regulating mining and mine closure in Victoria. It is administered by Earth Resources Regulator (ERR), part of Resources Victoria, which sits within the Department of Energy, Environment and Climate Action (as of March 2023).

The minerals production tenement is called a mining licence. The MRSD Act prescribes the process for applying for the grant of a mining licence, including special provisions for the grant of mining licences relating to coal.[91] The licence application must describe the mineral resource and contain all the details required by the Regulations,[92] and the licence may include conditions about rehabilitation of the land and about the elimination and minimisation of risks to the environment, to the public, or to land or infrastructure in the vicinity, and protection of groundwater.[93] However, the true regulation of the proposed mining project operations comes through the work plan, application for and approval of which occur after the grant of a licence.

Most major mining proposals are likely to engage with two statutes administered by the Department of Transport and Planning (DTP) and the Minister for Planning. The *Environment Effects Act 1978* (Vic) (EE Act) may require an integrated environmental impact assessment through the preparation of an Environmental Effects Statement (EES). The EES process is discussed further in part 3.3.2 below. The *Planning and Environment Act 1987* (Vic) (PE Act) governs land use planning and provides that mining projects must gain planning permission under the local planning scheme, except where an EES has been undertaken, or a planning scheme amendment.[94]

The *Environment Protection Act 2017 (Vic)* (EP Act Vic) provides the framework for the protection of human health and the environment from pollution and waste and is administered by an independent Environment Protection Authority (EPA). After a mining licence is granted, mining work plan applications must be referred to the EPA.

3.3.1 MRSD Act Process

The MRSD Act together with the *Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019* (Vic) (MRSD (Mineral Industries) Regulations)[95] establish the process for a mining licence application. An application must include, among other things:

- a description of the mineral resource that will be economically viable to produce;[96]
- details of the proposed program of work for each year of the licence, which would necessarily indicate when closure is planned and a schedule for the commencement of mining (but not a detailed schedule for the cessation of mining);[97] and
- details of the applicant's experience in mining works and associated rehabilitation.[98]

A mining licence will entitle the holder to explore for minerals, undertake mining on the licensed land and construct any necessary or incidental facilities required to do so.[99] When considering whether

or not to grant a licence, the Minister must determine whether the licence holder is "fit and proper".[100] In doing this, the Minister will have regard to whether ERR has previously had to take action to rehabilitate land due to the applicant's failure to comply with its rehabilitation requirements under the MRSD Act, whether the applicant has previously had a licence cancelled, or whether the applicant has been convicted of an offence involving fraud or dishonesty.[101] The licence can be granted without a mine closure plan. In summary, the licence is an allocation of mineral rights and confers the right to apply for work plan approval.

A mining licence holder must not do any work except in compliance with the licence and approved work plan.[102] The work plan includes detail of all work to be undertaken,[103] risk management measures,[104] the rehabilitation plan,[105] a community engagement plan[106] and other matters required by the Regulations.[107] For example, the Regulations specify details for the information and management plans for the items identified above, including rehabilitation, risk management and community engagement.[108] The requirements for the work plan are significantly more detailed than for the licence application, so a significant amount of detail about mining methods and impacts will only be available after the licence has been granted.[109]

The Department Head decides whether to approve a work plan, which must "be appropriate in relation to the nature and scale of the work proposed to be carried out".[110] The Department Head can require changes to a work plan or rehabilitation plan, and may approve with or without conditions or refuse to approve.[111] The Department Head must decide the work plan application within 28 days after notice that a range of consultative procedures have been completed.[112] Some important additional requirements apply to coal mines and "declared mine land rehabilitation".[113]

The rehabilitation plan is a distinct document to be approved during the work plan approval process and forms part of the work plan. Its content is defined by both statute and regulations, with a primary consideration being "the desirability or otherwise of returning agricultural land to [its pre-mining licence] state".[114] The mining licensee must rehabilitate the land in accordance with the approved rehabilitation plan[115] and the owner of the underlying land may request the licensee to make a written agreement as to the rehabilitation plan.[116] The rehabilitation plan requires a description of proposed post-mining land uses (with a consideration of community views), proposals for the "progressive rehabilitation, stabilisation and revegetation of extraction areas, waste disposal areas and other land affected by the mining work", and how any landforms will achieve "complete rehabilitation", being "safe, stable and sustainable" and capable of supporting the proposed post-mining land use.[117] The rehabilitation plan must also define the criteria for measuring whether those objectives have been met, a schedule for rehabilitation milestones and an assessment of residual risks that rehabilitated land may pose to the environment, any member of the public or surrounding land, property or infrastructure.[118]

The question arises whether the language used in the Regulations for achieving "rehabilitation", including "proposed land uses for the affected land after it has been rehabilitated", encompasses repurposing of mine assets. The answer may lie in various legislative provisions. First, the post-mining landform must be "safe, stable and sustainable".[119] This means that the post-mining landform:[120]

(a) is not likely to cause injury or illness; and

(b) is structurally, geotechnically and hydrogeologically sound; and

(c) is non-polluting; and

(d) aligns with the principles of sustainable development.

In applying that definition, ERR has regard to the principles of sustainable development outlined in s 2A of the MRSD Act.[121] Those principles include (a) "community wellbeing and welfare should be enhanced by following a path of economic development that safeguards the welfare of future generations", and (h) "development should make a positive contribution to regional development and respect the aspirations of the community and of Indigenous peoples".

It is feasible to say that mine legacy landforms may be repurposed for rehabilitation purposes but the language of these principles and of the Regulations does not clearly address the question of repurposing of assets and the residual risks that may arise.

3.3.2 EES and Land Use Planning Processes

A mining proposal, in the form of a work plan or proposed variation of a work plan, that is likely to have a significant impact on the environment at a regional or State level, will be required to go through an Environment Effects Statements (EES) process, which is administered by the Minister responsible for the EE Act (Planning Minister).[122] There is a variety of ways in which an EES for a mining project can be required, including:

- a proponent of works can seek the advice of the Planning Minister as to whether it needs to prepare an EES;[123]
- a decision-maker considering a mining work under the MRSD Act (or another Victorian Act such as the EPA under the EP Act Vic) may refer the matter to the Planning Minister for advice as to whether an EES is required;[124] and
- the Planning Minister may also independently call for an EES or supplementary EES.[125]

Importantly, once the Planning Minister has determined that an EES is required, other decision-making processes will be suspended until the EES process is completed.[126]

The *Ministerial Guidelines for the Assessment of Environmental Effects under the Environment Effects Act 1978* (Guidelines) establish what an EES should contain and how an EES is assessed. An EES must take an holistic, integrated approach and consider the impacts of the proposed activities on physical and ecological systems, human communities and land use, and economic interests.[127] Within that context, cumulative and indirect effects must also be considered to the extent that existing knowledge will allow.[128] The EES must include a management framework addressing the effects and risks identified and establish the standards against which the success of that framework will be measured.[129] Adaptive management approaches are encouraged, but the Guidelines note that such an approach must be accompanied by effective, regular monitoring.[130]

Significantly, the EES process requires public notification and consultation, and part of the assessment process requires the Planning Minister to determine the form and extent of public review required[131] – this is discussed in further detail below. Following the public review, the Planning Minister will provide a final assessment of the EES. This assessment is not an approval decision; rather, it is an assessment that other decision-makers must consider when granting or refusing to grant relevant approvals of works, such as for the mining licence work plan and rehabilitation plan.[132]

The PE Act provides land use decision-making guidance through the State Planning Policy Framework and relevant Local Planning Policy Frameworks. Where the project requires a planning scheme amendment, the amendment will generally be publicly exhibited in conjunction with the relevant EES.[133] An application for an EP Act Vic development licence will usually also be exhibited simultaneously with the EES. A work plan cannot be approved until all required planning approvals have been granted or the Planning Minister has submitted the EES assessment.[134] Where an EES is not required but a planning permit is required, the MRSD Act provides a statutory endorsement process to integrate a work plan (or work plan variation) approval process with the PE Act planning permit process in order to avoid duplication.[135]

Overall, the Victorian mine work and rehabilitation planning approvals process integrates the MRSD Act processes with the EES and land use planning procedures.

3.4 Comparison of Key Elements of the Mine Closure Planning Process

All three jurisdictions have regulatory frameworks for mine closure planning that utilise statute, regulations and guidelines. The Queensland legislation is the most comprehensive and detailed in all three forms of these instruments and, potentially, the most complex to administer but likely the most certain in its regulatory requirements. The Victorian legislation has key powers and propositions in the MRSD Act and relies on regulations to provide the substantive detail for the mine closure planning content and process. The Western Australian legislation is the least comprehensive and the least certain in the standard regulatory requirements. Uniquely, it relies very much on guidelines that have a simple form of statutory recognition and doubtful legal force, though this will change when the 2022 legislative amendments are implemented. State Agreement mines are exempt from the standard requirements.

The mine closure planning process across the three jurisdictions features some significant common elements and some key differences.

1 All three require mine closure planning to be undertaken before mining operations can commence, but there are important differences.
   (a) Queensland requires the environmental authority and PRC Plan to be approved at the same time as the grant of the resource tenement and has separate government agencies administer separate resources and environmental legislation for the resource tenure and environmental authority approvals.
   (b) Victoria provides for the grant of the mining tenement with minimal proposal information and a subsequent work and rehabilitation plan approval process defined in detail by statute and regulations that are administered by the resource agency administering the resource tenure, but including some integration with the environmental protection and land use planning regimes.
   (c) Western Australia provides alternative pathways under the Mining Act for approval of a mining proposal and mine closure plan: (i) the traditional pathway through grant of the mining lease by which the mining proposal and closure plan can be tested by objections in the Warden's Court; and (ii) a deferred proposal pathway that defers presentation and approval of the mining proposal and mine closure plan to a bureaucratic process conducted after grant of the mining lease, defined only by guidelines of uncertain legal effect, and administered by the same resource agency that administers resource tenure. Large mining projects are often regulated under State Agreements that avoid the Mining Act process but may, through the EIA process, apply the closure planning guideline.
2 All three provide for an EIA process to be conducted for projects with significant environmental effects, though the institutional and procedural design of the EIA varies greatly.
   (a) Queensland administers the statutory EIA process under the same EP Act Qld and through the same environment agency as administers the environmental authority.
   (b) Victoria links the mining work and rehabilitation plan process to the EES process conducted under separate legislation by a separate planning department producing a ministerial recommendation to inform approval of the plan under the MRSD Act.
   (c) Western Australia conducts EIA of significant proposals by a separate independent EPA on referral from DMIRS, the resources agency, with final approval given by joint decision of the Environment Minister and the Resources Minister. EIA is the only basis for requiring mine closure planning for State Agreement mines.
3 All three provide soft law guidance for the preparation and approval of the mining proposals and rehabilitation plans, but Queensland and Victoria provide detailed regulations to set a legal framework for the process and outcomes, whereas Western Australia presently provides only soft law guidance on the process of mine closure planning and execution with no substantive statement of the expected outcomes. The Western Australian 2022 amendments will, when implemented, strengthen the legal basis for closure planning, but they lack a statement about the goals of mine closure planning, may reduce transparency, and do not address community consultation.

4 Community Engagement – Rights to Information and Comment

This part will consider to what extent each of the above approvals processes facilitates effective community engagement with mine closure planning, with a focus on the initial approval procedures.

4.1 Western Australia

Under the Mining Act, there are three main forms of notice of a mining lease application:

1 notice by the applicant to landholders and local government affected by the lease application;[136]
2 notice by the Registrar on the notice board of the Registrar's office;[137] and
3 notice by the Director-General on the Department's website.[138]

Access to the application documents requires further steps. The Mining Act requires that all documents that comprise a mining lease application and any document accompanying a mining lease application must be made available for public inspection by the Director General of Mines at "reasonable times".[139] The Director General of Mines is the chief executive officer of the DMIRS.[140] "Reasonable times" is not defined but would be subject to existing legal standards of reasonableness. Mining regulations can require a fee be paid for inspecting or obtaining a copy of a document from a mining application; the prescribed fees are minimal.[141]

It is important to distinguish between the community consultation rights under the traditional statutory procedures for the grant of a mining lease and the lack of clear rights under the deferred proposal pathway.

The Mining Act provides that "any person" may object to the grant of a mining lease.[142] Objections are lodged either at any Mining Registrar's office or online using the Mineral Titles Online forum.[143] If an objection is lodged within the procedural requirements of the Mining Act, then the Warden may hear the application for the mining lease and give any person who filed an objection an opportunity to be heard about the granting of that lease.[144] An objection can be based on public interest grounds, including on environmental impacts.[145]

Where an application is made using the deferred proposal pathway, which is almost always,[146] there are limits on the objections that can be made. An objection cannot be filed on the basis that there is no significant mineralisation in the land referenced in the application.[147] Objections lodged on environmental or socio-economic grounds are limited to the existing information about such impacts as provided in the application and, if the application uses the deferred proposal pathway, much information would be absent due to the lack of mining proposal. The limitation this imposes on competing land users in the Warden's Court process is highlighted in a recent case where a pastoral company made objections seeking more detailed mining lease conditions than those proposed by DMIRS.[148] The "key thread" running through the pastoralist's objections "was a complaint as to the absence of information as to what the Applicant's detailed mining proposal might entail", to which the Applicant replied it was entitled to do so by the Mining Act.[149]

With the deferred proposal pathway, the mining proposal is not submitted to DMIRS for assessment until after a lease application has already been granted – the proposal is, therefore, not part of the lease application and so the proposal and its mine closure plan do not have to be made available under the Mining Act for public inspection prior to being approved. DMIRS maintains a publicly accessible register of mine applications but does not provide opportunity to comment through that register.[150] Current policy documents for the deferred proposal pathway do not require public notification of, or consultation on, an MCP.[151] The MCPs are made publicly available on the DMIRS website following approval. The relevant Statutory Guidelines require that a mining proposal contain information on consultation with stakeholders and a strategy for ongoing engagement.[152] Thus, while an applicant using the deferred proposal pathway should expect to demonstrate to DMIRS some degree of community consultation, there is no legally enforceable process for public disclosure of the mining proposal and closure plan, and there is no statutory process before a Warden's Court or otherwise by which community comments and objections may be made independently of the mining lessee and considered by the decision-maker.[153] Research is needed to ascertain if third parties believe that they have adequate opportunity to make effective submissions on mining proposals and closure plans via the deferred proposal pathway process.

The land use planning system offers no alternative for community consultation. When granting or renewing a lease, the Minister, Warden or Mining Registrar should take into account any planning schemes and any local government objections on that basis.[154] However, a contradiction of a planning scheme and mining lease is not fatal to the granting of the lease if the Minister considers it appropriate and has taken into account the effects of the prospective lease on the scheme.[155]

Should a mining proposal and closure plan be referred to the EPA for EIA, the EPA facilitates public comment in administering its procedures under the EP Act WA; that is, there is public consultation on whether or not a mining proposal should be assessed and, if so, there will be further consultation on the environmental review document published by the proponent.[156] The EPA does this through its online consultation hub.[157] Further, any person may appeal to the Minister for Environment against an EPA report assessing the mining proposal.[158] Another research question is what proportion of

mining proposals and closure plans are referred to the EPA and, of those referred, how many are assessed with a public consultation process?

There are additional rights for landholders with intensive land use interests in Crown land to be notified or consulted before a mining lease holder conducts mining exploration or production activity on such land. The mining lessee requires the written consent of the landholder before undertaking mining activities on Crown land that is under a form of intensive land use (e.g., crop, orchard, stockyard, water works, plantation, airstrip, house, or other substantial building) or must give the landholder notice before passing over Crown land within a buffer area of such land use areas in order to access the tenured land.[159] In such situations, the mining lessee must take special care and make good any damage, including by compensation. There may be situations where a landholder on the Crown land may still wish to make objections as to the conditions appropriate to protect their broader land use, and the effectiveness of the legal process will be important.

In contrast, a mining lease over private land with such intensive uses may only be granted with the consent of the landholder, who is entitled to orders of restoration or a determination of compensation for damage to or loss of use of the land.[160] Further, there are ministerial and parliamentary consent requirements for the grant of a mining lease or conduct of mining activities on special classes of public reserve land (e.g., national parks and nature reserves, marine foreshore, navigable areas and town sites),[161] and such consents may be subject to conditions for management and compensation.[162] While private landholders clearly have stronger rights to agree with a mining lessee the terms of rehabilitation, they could still benefit from a capacity to make informed objections to a mining lease application. Those concerned with public interest objections could find submissions through the Warden's Court process an effective way to test the terms of an application and inform or influence the ministerial and parliamentary consent process.

4.2 Queensland

The Queensland legislation for community engagement in mine closure planning contrasts greatly with that of Western Australia.

After filing an environmental approval (EA) application with an accompanying PRC Plan, the administering authority is provided with an initial opportunity to request further information.[163] This stage can last years, as the applicant must be given at least six months to respond to a request, and at least two years if that request includes the requirement for an EIS.[164] It is largely at the discretion of the applicant to provide the information, provide partial information, or provide no information, though this will be taken into account in determining whether an approval is granted.[165] As set out above in Part 3.2, there are extensive notification requirements during both the EA and EIS processes, which include that public notification must be given of the proposed terms of reference and the final EIS. Those notices must include comprehensively prescribed content, including information about how to submit comments on the EIS, which informs the exercise of the public right to make submissions on a submitted EIS.[166] During the EA process, the applicant must provide public notification of their PRC Plan – that is, making the PRC Plan available for the public to review and, if they choose, to send a written comment to the administering authority during a designated submission period.[167] The MR Act requires the applicant to publish the notice in a newspaper and give notice to "every affected person".[168] The EP Act WA also requires the applicant to have the application documents publicly available on its website and physically available for inspection during its normal office hours.[169] Public notification is not required where there has been an EIS provided that included community consultation, and no changes have been made to the PRC Plan since.[170]

Under the EP Act WA, if the administering authority decides to approve an application for an EA (and the accompanying PRC plan) relating to a mining lease, a legal person making a submission in respect of that application may provide written notice that their submission is to be considered an objection to the application.[171] If such an objection notice is provided within 20 business days of the decision being made available to the public, the objection must be referred to the Land Court.[172] Objections to the grant of a mining lease or EA may be made to the Land Court on the grounds of impact on human rights protected by the *Human Rights Act 2019* (Qld).[173]

There is some industry concern that the community right to make submissions persists irrespective of the significance of any amendment to the proposed licence or its conditions being requested by

an objector.[174] If the submitting party requests that their submission be taken to be an objection to the application after the administering authority's approval of an application, that objection must be referred to the Land Court, no matter how minor. There are examples of objections that were not well articulated or supported by evidence, including fears about the miner's unsatisfactory past performance and uncertainty for future rehabilitation, proceeding to the Land Court.[175] However, this industry concern must be balanced against the benefits of maintaining community consultation procedures in the context of mine closure. The outcomes of the lengthy court proceedings leading to the recommendations and reasons of Member Stilgoe in *New Acland Coal Pty Ltd v Oakey Coal Action Alliance Inc (No 2)* [2021] QLC 44 (17 December 2021) affirm the value of strong community engagement procedures that include objections before the Land Court. While Member Stilgoe rejected many of the objections on conditions and recommended approval of the coal mine extension, she expressed respect for the objectors' views, understanding of their frustration and mistrust of the applicant, and cited resulting changes in the applicant's conduct at [84]-[85], [97]-[98], [182]-[183].

After an EA or PRC Plan Schedule has been approved and issued, the administering authority must include a copy of it in the relevant register.[176] Amendments, including to the PRC Plan Schedule, must be made publicly available.

4.3 Victoria

Victoria has extensive requirements for notification and public comment in relation to mining licence applications, and associated EES and planning approval processes. There are various procedures for granting coal mining licences (by the Minister, the Governor-in-Council and by tender); our explanation focuses on the primary mining licence process and the procedures for determining the subsequent works and rehabilitation plan.[177]

4.3.1 Consultation under the MRSD Act

The mining licence applicant must publicly advertise the application and give specific notice of it to the owner and occupier of affected land.[178] The advertisement and notice must include how to make an objection, a description of the rights under a mining licence, further statutory requirements before mining may be carried out, details of a proposed program of work and how the applicant will manage impacts of the proposed work on the community (including landholders) and the environment.[179] The Department Head must also give specific notice of the application to persons nominated under the *Aboriginal Heritage Act 2006* (Vic) and the Executive Director under the *Heritage Act 2017* (Vic).[180]

Any person may object to, or make a comment on, a mining licence application within 21 days after the last date on which the application was advertised.[181] Within 120 days of an application for a mining licence being accepted, the Minister may grant or refuse the licence after considering the objections and comments.[182] The process seems to be entirely within the management of the relevant agency and Minister. However, the Minister may appoint a panel to consider and advise on any matter related to mining and the administration of the MRSD Act that is referred by the Minister to the panel.[183] The panel may regulate its own proceedings and may seek written submissions and/or conduct public hearings. The panel reports to the Minister with recommendations within 60 days. The MRSD Act does not specifically state whether a panel could advise on the grant of a mining licence. However, the breadth of its general remit suggests that the Minister could seek a panel's advice on almost any aspect of MRSD Act administration and the 60 days' time limit on its functions could fit within the time limit for the grant of a mining licence. If so, this would provide an independent and expeditious process under the MRSD Act for a public hearing and determination of objections and comments on the grant of the mining licence. There is the opportunity to consider, in broad terms, the impacts of the proposed mining operations on the surrounding community and environment, and the conditions to be imposed on a mining licence may relate to the rehabilitation of land, the management of risks to the local environment and community, and protection of groundwater.[184]

In addition, it is technically possible that a member of the community who is directly affected, or likely to be directly affected, by work under a licence could refer a dispute between the community member and the department to the Victorian Mining Warden about, for example, the grant or administration

of a mining licence.[185] However, there is some research to suggest that this process does not, at least in practice, cover general third-party objections to the grant of a mining licence.[186]

The MRSD Act provides for further general and specific consultation before the mining licensee may commence work under the licence.[187] Three key points should be mentioned here. First, the detailed consideration of the plan of operations and rehabilitation comes with the process for approving the work and rehabilitation plans. There is no right under the MRSD Act for the public to make a submission on a work plan or variation to a work plan. However, a mining licence holder has a statutory duty to consult with the community throughout the period of the licence by:

(a) sharing information about any activities authorised by the licence that may affect the community; and
(b) giving members of the community a reasonable opportunity to express their views about those activities.[188]

Further, the Regulations give detailed guidance on the information that the work plans must contain to comply with the duty to consult the community, including how the licensee will receive feedback from the community.[189] Secondly, if the land affected by the mining works is private land, the licensee must obtain written consent to the mining from the landholders (owners and occupiers) and have registered compensation agreements with them.[190] Thirdly, the Minister must consult with the municipal council (local government authority) and land owner before determining the amount of a rehabilitation bond.[191]

4.3.2 Consultation under Other Acts

Arguably, what is missing from the procedures under the MRSD Act is the careful consideration of the public interest factors relating to environmental protection and land use planning. The most significant public notification requirements are part of the EES and planning approval processes as opposed to the mining licence application process discussed above. A general objective of the EES process is to provide public access to information on potential environmental effects of a project and the ability to make a submission on the proposal.[192] All projects referred to the Planning Minister for a decision about whether or not an EES is required, and relevant Ministerial decisions and reasons, will be listed on DTP's website, together with relevant project documentation.[193]

When the Planning Minister determines the requirement for an EES, they will also determine the process for the EES, which usually includes public exhibition of the EES and a public hearing. The EES will usually be notified in at least one daily newspaper, the relevant local regional newspapers, and the Engage Victoria website. The exhibition period is usually 20 to 30 business days[194] with public access to a copy of the EES provided as the Minister specifies.[195] Where a planning permit, planning scheme amendment or development licence is needed, these will also be exhibited concurrently with the EES documents.[196]

Where a planning permit or a planning scheme amendment is required for a proposed mining project, the public may make submissions under the PE Act to the relevant authority who must consider all submissions. A submission may be rejected if the relevant authority considers it to have been made to obtain a commercial advantage.[197] Where a written objection is received, the affected person may then apply to the Victorian Civil and Administrative Tribunal to have a decision reviewed.[198] If the mine also requires a development licence under the EP Act WA, it will be advertised and the public are able to make submissions.[199]

Some of the Victorian administrative institutions also assist in facilitating public consultation through soft law mechanisms. It is the role of the Mine Land Rehabilitation Authority to prepare a monitoring framework and evaluation method that can be used to assess the effectiveness of rehabilitation strategies, in consultation with community and public sector bodies as well as other stakeholders.[200] Victoria maintains a mining register, which records mining licences, approved work plans and rehabilitation bonds, but not rehabilitation plans.[201] However, only the basic details of these documents are provided on the register and, for example, the full work plan and the rehabilitation plan are not included on the register. Victoria's publication of EES and mining licence documents currently do not allow for especially easy access as there is no centralised database.

4.4 Comparison of Community Engagement Rights

Key community engagement rights are rights to receive information and to comment on the proposed instruments before they are granted or approved. Again, we see that there are some quite significant differences between the three jurisdictions.

Perhaps the most significant difference is the statutory transparency and certainty of the Queensland procedures for community rights in relation to the grant of resource tenure and the environmental authority. Neither instrument may be granted until there has been a full community consultation process that involves effective public notice, opportunities to make submissions, rights to object and have the objections to both instruments determined simultaneously and independently in Land Court proceedings that lead to public reasoned recommendations to the respective decision-makers, who must consider them. Both instruments have direct legal effect.

By contrast, Victoria and Western Australia have developed resource tenure systems that by clear statutory design (Victoria) and by prevalent practice (Western Australia) lead to the grant of the resource tenure before an application is made for approval of a detailed mining proposal and closure plan (work and rehabilitation plan in Victoria). In both States, the resource tenement application must provide some information about the mineral resource and the proposed program of work, and there is the statutory capacity for both States to issue the resource tenement with general conditions relating to rehabilitation. The key difference between these two States is that Victoria's regime for work and rehabilitation plan approval is provided in detailed legislation, including a licensee's statutory duty of consultation and potential for an independent panel investigation. Western Australia's prevalent regime is described by statutory guidelines of dubious legal effect that give control of community consultation to the mining lease holder subject only to the bureaucratic oversight of DMIRS (the mining agency). Further research is needed to ascertain industry practice in implementing these guidelines and to understand perceptions of the practice by industry, government and community.

The legal effect of the rehabilitation or closure plan is also different. In Victoria, the mining licensee must rehabilitate the land in accordance with the approved plan. In Western Australia, there is the current potential to make compliance with an approved MCP a condition of the mining lease, but the practice is uncertain. The Mining Act amendments in 2022 (not yet in operation) will better secure the legal effect of an approved mine development and closure proposal, though with less transparency as only the approvals statement will be open for public inspection, not the actual closure plans. It is also notable that the 2022 amendments say nothing about community consultation on the mine closure planning process.

Both States may trigger EIA of the mining (work) proposal and closure (rehabilitation) plan. Both States' EIA legislation provides for extensive community consultation, though there are significant questions about how often the EIA process will be required for mine closure planning – this is a question for further research. Western Australia's legislation provides greater guidance for an independent assessment by the EPA informing a Ministerial regulatory decision that prevails over the mining lease, while Victoria's EES process appoints an inquiry and advisory committee that reports to the Minister for Planning who gives an advisory recommendation to the Department Head who approves the work and rehabilitation plan.

5 Conclusion

The regulation of mine closure planning grapples with a multitude of competing interests of government, industry and various community stakeholders seeking to address the broadly defined goals of closure, rehabilitation and repurposing. These competitive tensions influence the development and practice of regulation. As with most fields of law, there is a constant need to "catch-up" to industry, scientific standards and community expectations.

This article has considered the existing regulatory frameworks in three very different Australian States, all of which rely on their mining industries. Some comparative themes emerge from our analysis of mine closure planning, with a focus on the initial approval stage. We have identified key differences in the essential requirements for closure plan approval, especially in relation to community engagement rights of notification and participation. It has not been possible to explore

here the process of ongoing mine closure planning, including for amending mine closure plans and determining satisfaction of mine closure plans leading to resource tenure relinquishment. Similar questions will arise.

First, while there is a clear need for regulatory requirements to be legally enforceable and incentivise responsible and comprehensive planning, there is a competing need for flexibility and evolution as the mine life cycle progresses and the environmental, cultural and social motivations for closure outcomes evolve. Addressing these goals will benefit from more certain definitions of core concepts and their roles in discerning key goals in mine closure planning. A notable definitional difference between the three jurisdictions is that Queensland and Victoria spell out the central goal of progressive rehabilitation in similar legislated terms to require a rehabilitated site to be safe and structurally stable, not causing pollution or environmental harm, and supporting a sustainable post-mine land use. Western Australia lacks a legislated definition of these core outcomes, even in the 2022 amendments, and says nothing about progressive rehabilitation.

Second, there is a clear contrast in the regulatory rigour of the three States' mine closure regimes. All three States require a rehabilitation and closure plan to be presented and approved before mining operations can begin, but there are significant differences in the law and policy means for regulating those requirements. Queensland spells out the procedures and community consultation rights in detailed legislation (statute and regulations), as well as guidelines, that require approval of the Progressive Rehabilitation and Closure Plan and Schedule as part of the EA administered by the DES under the EP Act Qld before the resource tenure may be issued. There is also an additional source of legal credibility in the Queensland system in that the rehabilitation and closure plan is incorporated into the EA administered by the DES, rather than the agency responsible for the issue of resource tenure.

Western Australia and Victoria require the rehabilitation and closure plan to be approved, often with environmental impact assessment, after the resource tenure is issued and before work begins. But they differ greatly in the level of legislative definition in the requisite procedures and the ultimate legal effect given to the resultant rehabilitation and closure plan. The Victorian process is spelled out in legislation (the MRSD Act and detailed regulations) with supplementary non-statutory guidance. The Western Australian regime, being defined by "statutory guidelines" of uncertain effect, lacks enforceability and, perhaps, legal credibility. In Victoria, the mining licensee must rehabilitate the land in accordance with the approved plan, whereas in Western Australia the 2022 amendments still make compliance with an approved mine development and closure proposal (and subsequent mine closure plan) a condition of the mining lease, breach of which raises the spectre of lease forfeiture or a modest $50,000 penalty. The risk of forfeiture may incentivise competition between miners for resource tenure, but the legal logic of forfeiture does not suggest an effective incentive to fulfil mine closure commitments owed primarily to the local communities. A full discussion of enforceability was beyond the scope of this article.

Third, there is a stark difference in how the three jurisdictions address rights of community engagement, which extends beyond impacts on landholders directly affected by mining activities proposed on their land to include broader public interest environmental concerns and community socio-economic concerns for post-mining land use. All three States define rights and procedures for community consultation on rehabilitation and mine closure planning. Again, Queensland has the most comprehensive regulation whereby the detailed legislative provisions of the EP Act Qld integrate with the procedures of the MR Act to secure robust opportunities for community engagement. Neither the resource tenure nor the EA (incorporating the progressive rehabilitation and closure plan) may be granted until there has been a full community consultation process that involves effective notice, opportunities to make submissions, rights to object to draft decisions and have the objections to both instruments determined simultaneously and independently in Land Court proceedings that lead to public reasoned recommendations to the respective decision-makers, who must consider them.

Victoria and Western Australia provide less secure rights of community engagement that are administered primarily through the mining legislation (unless environmental impact assessment is required). The Western Australian Mining Act regime creates a deferred proposal pathway to the grant of a mining lease that is considerably weaker in community engagement rights because almost

the entire process is defined by statutory guidelines of dubious legal effect that relegate community engagement to lease holder responsibility with merely bureaucratic oversight. Further research is needed into the industry practice of consultation under the guidelines and the influence of EIA on general mine closure planning. Could objector communities in WA look elsewhere for a better definition of consultation process, such as in the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*?[202]

How would members of industry respond to a move towards legally stronger rights of community engagement and objection? Similarly, how does industry respond to multiple authorities being required from separate regulatory bodies, such as the separate administration of resource tenure and rehabilitation regulation in Queensland? Greater regulatory rigour can improve industry certainty and create predictable outcomes, ultimately reducing the burden on enforcement bodies. Whether it is better to prioritise clear legislated parameters for mine closure planning may be akin to "measure twice, cut once". Further, a significant gap in the legislative frameworks, especially in Western Australia, is the need to address the social transition of mining communities in regions where there are pressures for long-term changes in the mining economy. Comprehensive, consultative planning now is the key to well-balanced closure, rehabilitation and repurposing in the future.

In closing, we reiterate our opening question: why does the *Mining Act 1978* (WA) not provide secure legal rights for community consultation in relation to mining lease proposals and mine closure plans? Industry and government agencies could reflect on the legislative changes they have pursued since the Supreme Court strongly affirmed environmental objections in the Warden's Court in the late 1990s. Do the circumstances of the Western Australian mining industry warrant much less legal definition of the rights and responsibilities for community consultation, including on mine closure planning?

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1 WA Department of Mines, Industry Regulation and Safety, Major Commodities Review 2022-23".

2 Qld Government, Department of Resources, *Queensland Resources Industry Development Plan*, June 2022.

3 Vic Government, Department of Jobs, Precincts and Regions, *Latrobe Valley Regional Rehabilitation Strategy*.

4 See L Hamblin, A Gardner, Y Haigh, *Mapping the Regulatory Framework of Mine Closure*, May 2022, CRC TiME, for a broader exploration of the full life cycle of mine closure regulation.

5 In *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; (2013) 214 FCR 301, [144], [227]-[230], referring to the range of approval conditions, which included mine closure. In setting conditions under the EPBC Act, the Commonwealth Minister must consider any relevant conditions under State or Territory law: at [80] citing *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14.

6 WA Government, Department of Mines, Industry Regulation and Safety, *Mine Closure Completion Guideline*, November 2021, 4, Figure 1, "Mine Closure Process".

7 David Lamb, Peter Erskine and Andrew Fletcher, "Widening Gap between Expectations and Practice in Australian Minesite Rehabilitation" (2015) 16(3) *Ecological Management and Restoration* 186.

8 Environment Victoria, *Mine Rehabilitation*.

9 WA Government, Environmental Protection Authority, *Post-mining Rehabilitation* (2017); Queensland Resources Council, *Rehabilitation and Surrender* (2021).

10 Above n 9; see also the definition of "stable condition" in *Environmental Protection Act 1994* (Qld), ss 111A, 126B.

11 Above n 8, Environment Victoria; above n 9, Queensland Resources Council.

12 Above n 9, Queensland Resources Council.

13 Above n 9, WA EPA; Queensland Resources Council.

14 DP Murphy, J Fromm, R Bairstow, D Meunier, "A Repurposing Framework for Alignment of Regional Development and Mine Closure", A B Fourie & M Tibbett (eds), Mine Closure 2019: Proceedings of the 13th International Conference on Mine Closure, Australian Centre for Geomechanics, Perth.

15 *Mining Act 1978* (WA), s 74(1)(ca)(i). A mining proposal may also be lodged "within the prescribed time and manner" after the lease application and still be treated as having accompanied the lease application: s 74(1AA).

16 *Environmental Protection Act 1986* (WA), s 38.

17 *Mining Amendment Act 2004* (WA), Part 6, amendments about mining leases, which inserted s 74(1)(ca)(ii) and (iii) and associated provisions such as s 74(1a).

18 Curiously, above n 15, the Mining Act WA, s 6(1a), confines this limited right of EIA referral to where there is a statement of proposed mining operations and a "mineralisation report"; the right of referral is not so limited where the statement of proposed mining operations is accompanied by "resource report". These two terms are defined in s 74(7); the former refers to a report of exploration results and the latter to a published report of the details of minerals located in or under the land. The content of a statement of proposed mining operations is defined s 74(1a).

19 Above n 15, Mining Act WA, ss 82A(2); *Mining Regulations 1981* (WA), r 32A(3).

20 Personal communication to Alex Gardner by DMIRS officers at a research meeting on 29 October 2021.
21 Above n 16, EP Act WA, ss 38(1), (3) and (4).
22 Above n 15, Mining Act WA, ss 70O.
23 Above n 15, Mining Act WA, ss 70O & 70P.
24 Above n 15, Mining Act WA, ss 82(1)(ga) and 84AA.
25 *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; 262 CLR 510.
26 WA Government, Department of Mines, Industry Regulation and Safety, *Information for Consultation: Public Release of Draft Statutory Mining Proposal and Mine Closure Plan Guidelines and Guidance Notes for Comment* (undated), 3.
27 Michael Hunt, et al. *Hunt on Mining Law of Western Australia*, Federation Press, 2015, 121-2 does not address the question of the legal effect of the guidelines. Compare *Green v Minister for Climate Change, Environment and Water* [2008] NSWLEC 48 [52].
28 Above n 15, Mining Act WA, s 82.
29 Mine Closure Plans are regarded as an "environmental approval" under the Mining Act, above n 15, and may be located at *Environmental Regulation* on the DMIRS website.
30 Above n 15, Mining Act WA, s 103F requires the Director General of Mines to compile and maintain a register, containing prescribed particulars relating to mining tenements. Above n 19, Mining Regulations WA, reg 84C, prescribes that content in relation to mining tenements, specifying (viii) applications relating to the tenement and the outcome of those applications, and (x) any additional conditions imposed in relation to the tenement after it is granted. It is not clear that an MCP is an application and it will only be an additional condition if a condition requiring compliance with the MCP is added to the lease conditions. A search of the Regulations for "mine closure plan" gave no result.
31 The interaction of the Mining Act WA (above n 15) tenement application process and environmental impact assessment under above n 16, the EP Act (WA), is discussed in *Polaris Metals Pty Ltd v The Wilderness Society WA and Ors* [2017] WAMW 21.
32 Above n 16, EP Act WA, ss 37B, 38.
33 Above n 16, EP Act WA, ss 38.
34 Above n 16, EP Act WA, ss 38G & 40; see EPA WA, *Step-by-step through the Proposal Assessment Process.*
35 Above n 16, EP Act WA, s 4A; EPA WA, *Statement of Environmental Principles, Factors and Objectives and Aims of EIA* (2023), 3-4.
36 Above n 16, EP Act WA, s 15.
37 *Environmental Protection Amendment Act 2020* (WA) made extensive amendments to the text of Part IV of the principal Act that came into operation on 23 October 2021: see Western Australian legislation Table 1 – Acts in force.
38 Above n 37, EP Amendment Act WA, s 27, inserting s 44(2AA) into the principal Act.
39 Above n 16, EP Act WA, s 48AA pertaining to fees and s 3(1B) pertaining to cumulative effects. The Act does not define "cumulative impacts"; instead the Procedures Manual has been amended to give a definition and explain how cumulative impacts are to be considered; WA Environmental Protection Authority, *Environmental Impact Assessment Procedures Manual*, October 2021, 66, definition of "cumulative environmental impacts".
40 Above n 37, EP Amendment Act WA, s 16 repealing and replacing s 39; s 99 inserting a new s 122B; and amended *Environmental Protection Regulations 1987* (WA) Part 2A, Publication and confidentiality.
41 WA Government, Department of Jobs, Tourism, Science and Innovation, *State Agreements* (16 November 2020).
42 Above n 41.
43 Above n 41.
44 WA Government, Department of Jobs, Tourism, Science and Innovation *List of State Agreements in Western Australia* (16 November 2020).
45 Jodi Reinmuth, et al., *A Decade of State Agreements in Western Australia: Trends and Predictions* (13 August 2020), Allens Linklaters.
46 Above n 45.
47 Above n 16, EP Act (WA), s 5.
48 WA Government, Environmental Protection Authority, *Mine Closure Plans*.
49 WA Government, Department of Mines, Industry Regulation and Safety, *Statutory Guidelines for Mine Closure Plans* (WA) (2020, updated in January 2023); supplemented by *Mine Closure Plan Guidance – How to Prepare in Accordance with Part 1 of the* Statutory Guidelines for Mine Closure Plans, (2020, updated in January 2023).
50 Above n 49, Statutory Guidelines, 10.
51 Above n 49, Statutory Guidelines.
52 Above n 49, Statutory Guidelines, 4-5.
53 Above n 15, Mining Act WA, ss 84AA(2)-(3) and 84; EP Act WA ss 45C, 46.
54 WA Government, Department of Mines, Industry Regulation and Safety, *Environmental Objectives Policy for Mining* (2020) (WA).
55 WA Government, *Mining Amendment Act 2022* (WA).
56 Above n 55, Mining Amendment Act WA, ss 25 – 30, amending provisions relating to mining leases.
57 Parliament of Western Australia, Legislative Assembly, *Hansard*, Minister for Mines and Petroleum, Mr Bill

Johnston, Second Reading Speech, Mining Amendment Bill 2021, 4609a-4610a.
58 Above n 55, Mining Amendment Act WA, ss 4, 26, amending, respectively, above n 15, Mining Act ss 6, 74.
59 Above n 15, Mining Act WA (as amended), ss 103AE, 103AH, 103AL, 103AO.
60 Above n 15, Mining Act WA (as amended), s 82(1)(g) and (2).
61 Above n 15, Mining Act WA (as amended), s 103AP(3).
62 Above n 15, Mining Act WA (as amended), ss 103AH(6) and 103AL(5). There is no express exception for mine closure plans but the exclusion of State Agreement projects would likely be implied by the link to mining development and closure proposals.
63 *Mineral Resources Act 1989* (Qld), ch 6.
64 Above n 63, MR Act Qld, s 232.
65 Above n 63, MR Act Qld, s 245(1)(n)
66 Above n 63, MR Act Qld, s 245(1)(n) & (o).
67 *Mineral and Energy Resources (Financial Provisioning) Act 2018* (Qld).
68 Above n 63, MR Act Qld, s 265
69 Above n 63, MR Act Qld, ss 269(4)(i), (j), (k) and (m).
70 Above n 63, MR Act Qld, ss 313 and 314.
71 Above n 10, EP Act Qld, s 110.
72 We do not have the opportunity to discuss the financial security provisions here.
73 Above n 10, EP Act Qld, ss 125(1)(n). The Queensland Department of Environment and Science has produced a very useful "Guideline: Progressive Rehabilitation and Closure Plans", version 2, 17 March 2021. The EA application for a mining lease activity is "site specific" because there are no applicable standard criteria: see s 112 definition of "ineligible ERA" ands 124 definition of "site-specific application".
74 Above n 10, EP Act Qld, s 126B.
75 Above n 10, EP Act Qld, s 111A.
76 Above n 10, EP Act Qld, ss 126C and 126D.
77 Above n 10, EP Act Qld, s 126D(2).
78 Above n 10, EP Act Qld, s 126D(3). The operation of this provision in the transition to the new statutory standards is considered in the Ensham Case Study article in this issue of the ARELJ.
79 Above n 10, EP Act Qld, ss 136A, 316PA and 316PB. The report may also be subject to review under s 316PC.
80 Above n 10, EP Act Qld, s 114.
81 Above n 67, MERFP Act Qld, ss 96A.
82 Above n 10, EP Act Qld, s 139.
83 Above n 10, EP Act Qld, ss 37 and 143.
84 Above n 10, EP Act Qld, s 40.
85 *Environmental Protection (Rehabilitation Reform) Amendment Regulation 2019*, inserting the following key amendments into the *Environmental Protection Regulation 2019* (Qld), ss 41A-41C, 184, 187A-187B, 213, and Sch 8A, PRCP objective assessment.
86 *Strong and Sustainable Resource Communities Act 2017* (Qld), ss 9.
87 Qld Government, State Development, Infrastructure, Local Government and Planning, *Assessments and Approvals*.
88 Above n 87, Assessments and Approvals.
89 Qld Government, Coordinator-General, *Social Impact Assessment Guideline 2018* (Qld) 6.
90 Above n 89, Social Impact Assessment Guideline, 7.
91 *Mineral Resources (Sustainable Development) Act 1990* (Vic), Part 2.
92 Above n 91, MRSD Act, s 15(1BB) and (6B).
93 Above n 91, MRSD Act, s 26(2)(a).
94 Above n 91, MRSD Act, ss 42(6)-(7) oust planning permit requirements for mining undertaken where an EES process is undertaken.
95 *Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019* (Vic), r 15.
96 Above n 91, MRSD Act, s 15(1BB) and (6B).
97 Above n 95, MRSDMI Regulations, r 15(1)(d).
98 Above n 95, MRSDMI Regulations, r 15(1)(i).
99 Above n 91, MRSD Act, s 14(1).
100 Above n 91, MRSD Act, s 16(1).
101 Above n 91, MRSD Act, s 16.
102 Above n 91, MRSD Act, Part 3, especially ss 39-40A; NB s 40(3)(e).
103 Above n 91, MRSD Act, s 40(2), with the exception of mining covering an area of 5 hectares or less that does not involve any underground operations, blasting, clearing of native vegetation or chemical treatments.
104 Above n 91, MRSD Act, s 40(3)(b) and (c).
105 Above n 91, MRSD Act, s 40(3)(e).
106 Above n 91, MRSD Act, s 40(3)(d).

107 Above n 91, MRSD Act, s 40(3)(g).
108 Above n 95, MRSDMI Regulations, rr 43-46.
109 Above n 91, MRSD Act, s 39.
110 Above n 91, MRSD Act, s 40(3)(a).
111 Above n 91, MRSD Act, s 40A.
112 Above n 91, MRSD Act, s40A(2).
113 Above n 91, MRSD Act, Part 7C.
114 Above n 91, MRSD Act, s 79.
115 Above n 91, MRSD Act, s 78(1).
116 Above n 91, MRSD Act, s 78(4).
117 Above n 95, MRSDMI Regulations, r 43.
118 Above n 95, MRSDMI Regulations, r 43(2)(c) – (f).
119 Above n 95, MRSDMI Regulations, r 43(2)(b).
120 Above n 95, MRSDMI Regulations, r 4, definition of the term.
121 Vic Government, Earth Resources Regulation, *Preparation of Rehabilitation Plans: Guideline for Mining and Prospecting Projects*, 2020, Version 1.0, section 6.4, p 16.
122 Under the *Environment Effects Act 1978* (Vic). Refer to the *Ministerial Guidelines for the Assessment of Environmental Effects under the Environment Effects Act 1978*, 2006, for further information on what is considered to be a "significant impact" and the process for referring proposals under the EE Act. In addition, if the Minister administering the MRSD Act considers that the proposed work plan or variation to a work plan will have a "material impact" on the environment, they may require the licence holder to submit an Impact Statement, a copy of which must be provided to the Minister administering the Act (Planning Minister): above n 91, MRSD Act, s 41A.
123 Above n 122, EE Act Vic, s 8(3). A proponent may decide to refer the project to the Planning Minister for a decision as to whether an EES is required before getting to the work plan approval stage in order to avoid delays.
124 Above n 122, EE Act Vic, s 8(1).
125 Above n 122, EE Act Vic, ss 5 & 6 (note also s 8(4)).
126 Above n 122, EE Act Vic, ss 8A-8F.
127 Above n 122, Ministerial Guidelines, 16.
128 Above n 122, Ministerial Guidelines, 18.
129 Above n 122, Ministerial Guidelines, 20.
130 Above n 122, Ministerial Guidelines, 20.
131 Above n 122, Ministerial Guidelines, 23.
132 Also, any environmental approvals and water licences.
133 *Planning and Environment Act 1987* (Vic), ss 153 & 97B.
134 Above n 92, MRSD Act, s 40A(2)(a).
135 Above n 92, MRSD Act, Part 6B.
136 Above n 15, Mining Act WA, ss 33, 74(3) & 118; and above n 19, Mining Regulations WA, rr 7, 64A & 64B.
137 Above n 19, Mining Regulations WA, r 64(2).
138 Above n 19, Mining Regulations WA, r 64(3A).
139 Above n 15, Mining Act WA, ss 74(5).
140 Above n 15, Mining Act WA, s 8.
141 Above n 15, Mining Act WA, ss 74(6); above n 19, Mining Regulations WA, r 23B.
142 Above n 15, Mining Act WA, s 75(1); above n 19, Mining Regulations WA, r 146. The objection should be lodged within 21 days by a person who received notice of the application and within 35 days after the application was lodged.
143 Western Australia, Department of Mines, Industry Regulation and Safety, *Objections to Mining Tenement Applications*.
144 Above n 15, Mining Act WA, s 75(4).
145 *FMG Pilbara P/L v Yindjibarndi Aboriginal Corporation* [2011] WAMW 13 [34]. This right was clearly established by the Full Court of the Supreme Court of Western Australia in *Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd* (1998) 20 WAR 549, which is discussed in J Hart & A Gardner, "*Re Warden Calder; Ex parte Cable Sands (WA) Pty Ltd* – Environmental Objections in the Mining Warden's Court" (1999) 18 AMPLJ 28-41.
146 As noted above in part 3.1, this practice is almost ubiquitous.
147 Above n 15, Mining Act WA, s 75(1a).
148 *AC Minerals Pty Ltd v Cowarna Downs Pty Ltd* [2022] WAMW 22.
149 Above n 148, AC Minerals v Cowarna Downs, [165].
150 WA Government, Department of Mines, Industry Regulation and Safety, *Mining Notices (Including Tenement Application Advertising*.
151 *Guidelines for Mineralisation Report and Supporting Statement for a Mining Lease Application* (WA) (2016).
152 Statutory Guidelines for Mining Proposals (WA) (2020) p 7 and Statutory Guidelines for Mine Closure Planning p 4, clause 4.

153 *AC Minerals Pty Ltd v Cowarna Downs Pty Ltd* [2022] WAMW 22 at [191]-[199]. The Warden's response to the problem, leave it to the Minister's discretion to impose conditions at the time of approving a mining proposal, is no answer to the needs of objectors for an independent and transparent forum.

154 Above n 15, Mining Act WA, s 120.

155 Above n 15, Mining Act WA, s 120(2).

156 WA Government, *EPA consultation and public comment,* Environmental Protection Authority (15 July 2021) <https://consultation.epa.wa.gov.au>.

157 WA Government, *EPA consultation and public comment,* Environmental Protection Authority (15 July 2021) <https://consultation.epa.wa.gov.au>.

158 *EP Act* (WA) Part VII.

159 Above n 15, Mining Act WA, s 20.

160 Above n 15, Mining Act WA, ss 123-125.

161 Above n 15, Mining Act WA, ss 24, 24A, 25.

162 Above n 15, Mining Act WA, s 26-26A.

163 Above n 10, EP Act Qld, s 140.

164 Above n 10, EP Act Qld, s 141.

165 Above n 10, EP Act Qld, s 146(1).

166 Above n 10, EP Act Qld, s 54.

167 Above n 10, EP Act Qld, s 160.

168 Above n 63, MR Act Qld, s 252A.

169 Above n 10, EP Act Qld, s 157.

170 Above n 10, EP Act Qld, s 150(d).

171 Above n 10, EP Act Qld, s 182.

172 Above n 10, EP Act Qld, s 182.

173 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33.

174 For example, Queensland Resources Council, *Streamlining Report*, June 2020, 21: "Speaking more holistically, the land access space has been plagued with a small cadre of opportunistic lawyers who have taken advantage of complicated regulatory processes". See also, *Pembroke Olive Downs Pty Ltd v Sunland Cattle Co Pty Ltd* [2020] QLC 27 and *MGT Minerals Pty Ltd v Dunn & Ors* [2020] QLC 5.

175 *Consolidated Tin Mines Ltd v Dunn* [2017] QLC 18. Compare *Hancock Coal Pty Ltd v Kelly & Ors* [2013] QLC 9 where the objector opposed the applicant's request for leave to file additional affidavits alleging delay by the objectors but suggesting an attitude by the applicant that the Land Court was "a rubber stamp".

176 Above n 10, EP Act Qld, s 197.

177 Above n 92, MRSD Act, Part 2, Division 2. We do not address Part 2, Division 3.

178 Above n 92, MRSD Act, s 15(5) and Regulations 22 and 23. This requirement applies to the highest ranking applicant. The MRSD Act provides for competition between miners, and between miners and other land use interests. The primary process addresses the ranking between competing mining interest holders and once an applicant has been notified that it is the highest ranking applicant it has 14 days to undertake the required public notification.

179 The information to be provided in the public advertisement and notice is described in Schedule 1 to the Regulations.

180 Above n 92, MRSD Act, s 18. This requirement applies to the highest ranked application.

181 Above n 92, MRSD Act, s 24 and s 24A. The MRSD Act does not distinguish between objections or comments other than to say that an objection must include the grounds on which it is made, and a comment must include the basis for the comment. The difference seems to be that an objection opposes the grant while a comment does not.

182 Above n 92, MRSD Act, s 25(2).

183 Above n 92, MRSD Act, Part 4A. We have not had the opportunity to research the use of such panels in preparing this report. This is an area that warrants further research.

184 Above n 92, MRSD Act, s 26(2).

185 Above n 92, MRSD Act, ss 4 and 97.

186 Above n 92, MRSD Act, ss 4 and 97. Elda Poletti, "Victorian Developments – Role of the Mining Warden" (2007) 26 ARELJ 358, discusses the case of *John Pennington Morgan and Philip Robert Taylor v Kevin Ryan Mining Warden and the State of Victoria & Ors* (Supreme Court of Victoria (unreported, Coldrey J), 30 August 1991).

187 Above n 92, MRSD Act, s 42.

188 Above n 92, MRSD Act, s 39A and see Part 3 generally.

189 MRSD (Mineral Industries) Regulations 2019 r 46.

190 Above n 92, MRSD Act, s 42(1)(h).

191 Above n 92, MRSD Act, s 80(2).

192 Above n 122, Ministerial Guidelines, 2.

193 Above n 122, Ministerial Guidelines, 6.

194 Above n 122, Ministerial Guidelines, 23.

195 Above n 122, Ministerial Guidelines, 23. This includes provision of the EES on the proponent's website, with links from the Department's website.

196 Above n 122, Ministerial Guidelines, 29.

197 Above n 133, PE Act Vic, s 57.

198 Above n 133, PE Act, Vic, s 82B.

199 Above n 16, EP Act, WA, s 52(2).

200 Above n 92, MRSD Act, s 84AZC.

201 Above n 92, MRSD Act, Part 6, s 69 and MRSD (Mineral Industries) Regulations 2019 Part 6 and Schedule 13.

202 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023).

ARTICLE

QUEENSLAND'S MINE REHABILITATION REQUIREMENTS FOR VOIDS: ENSHAM CASE STUDY

Professor Alex Gardner, University of Western Australia Law School
Lauren Downes, formerly Research Associate at the UWA Law School, 2021

The research presented in this article was supported by CRC TiME. The content of the article is a revised version of a report for the CRC. The support of the Australian Government through the Cooperative Research Centre Program is acknowledged. The article is current to March 2023.

The Ensham coal mine is an interesting case study of Queensland's 2018 mine rehabilitation legislation reforms for open-cut mine voids in floodplains. The reforms establish two key principles of rehabilitation: that there could be no residual mine voids in flood plains and that progressive rehabilitation was to be secured by implementation of a Progressive Rehabilitation and Closure Plan and accompanying schedule incentivised by a new financial assurance scheme. However, transitional provisions have permitted exemptions for existing mines in flood plains that risk a troublesome legacy for historically poor progressive rehabilitation practices and raise questions around community expectations for access to information and consultation.

1 Introduction

The State of Queensland reformed its mine rehabilitation legislation, namely the *Environmental Protection Act 1994* (Qld) (EP Act), in 2018 through the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (Qld) (MERFP Act). A case study of the Ensham open-cut coal mine[1] in central Queensland highlights three issues for the efficacy of this regulatory framework.

The first issue concerns an available exclusion of rehabilitation requirements for existing mining voids (the area of excavation created by open cut mining) in flood plains. Under the EP Act, as amended by the MERFP Act, a holder of an environmental authority (EA) may, in its Progressive Rehabilitation and Closure Plan (PRCP) and PRCP Schedule, identify land as a Non-use Management Area (NUMA).[2] This is land that would not be rehabilitated "to a stable condition" and not have a post-mining land use. This rehabilitation exception as a NUMA is not applicable to mining voids wholly or partly in flood plains – these must be rehabilitated to a "stable condition",[3] as defined in the EP Act. This is the "section 126D(3) rehabilitation obligation".[4] However, the transitional provisions of the mining rehabilitation reforms differentiate the rehabilitation obligations of pre-existing mines (those existing at the time of the reforms, such as the Ensham Mine) and new site-specific mines.[5] Pre-existing mines with a "land outcome document" that presents an outcome similar to a NUMA can establish criteria for rehabilitation or management of a void in a flood plain that supersede this section 126D(3) rehabilitation obligation.[6]

The MERFP Bill Explanatory Notes for the transitional provisions reveal that this exemption from section 126D(3) "does not retrospectively breach existing rights and provides certainty to industry on the transitional process".[7] However, this grandfathering is arguably disconnected from environmental risks of such residual voids, creating two classes of mines based on the timing of a mine's existence (pre-existing versus new). This Ensham case study provides an example of a pre-existing mine's use of a "land outcome document" to exempt rehabilitation of residual voids in a flood plain but without clarity around the non-use management status of the area of the residual voids.

The second issue discussed in this case study is progressive rehabilitation. The design of a financial assurance system to increase progressive rehabilitation was "a clear objective of the EPA's work in 2004", yet the EP Act fell short by failing to clearly outline criteria for certification of final rehabilitation for industry, and a scheme of refunding financial assurances at the termination of mining activity.[8] These issues remained unaddressed until the 2015 State election when the then Labor Opposition ran on the campaign "[to] investigate the expansion of upfront rehabilitation bonds for resource companies to fully fund long-term rehabilitation activities".[9] Thereafter, the Queensland Treasury

Corporation published a number of discussion papers advising of the shortcomings of the current financial assurance framework and that, in 2017, there were "220,000 hectares of disturbance, with an estimated rehabilitation cost of $8.7 billion".[10] Queensland's 2018 mining regulation amendments concerning progressive rehabilitation were intended to ensure "rigorous" review of NUMA approvals in PRCPs, "through an objective *public interest evaluation*" for future or newly established mines.[11]

However, the reforms may not effectively address instances in which progressive rehabilitation has been lacking in large, open-cut, mature mines in operation at the time of these legislative changes. As of 2021, approximately 33% of the Ensham Mine's 4,944.7 ha of scheduled rehabilitation areas had been progressively rehabilitated.[12] According to Ensham's PRCP, this level of progressive rehabilitation exceeds that of other open-cut mines in Queensland.[13] For established mines, such as Ensham, that are approaching closure and have large voids that have not been substantially progressively rehabilitated across their mine life, the most economical rehabilitation option may be to rehabilitate residual voids to accord with legislated requirements. Under Queensland's legislation, "rehabilitation" does not necessarily mean these voids will be re-filled. This may be contrary to community understanding of what rehabilitation is.

Thirdly, this case study highlights areas in the regulatory framework in which information transparency could be improved – particularly public access to information – which raises issues of accountability, quality of community engagement and, ultimately, social licence on the part of mining companies and government. Information transparency is also relevant to community engagement and expectations for rehabilitation, such as the meaning of "rehabilitation" of residual voids (i.e., refilling to establish a pre-mining state versus the legislated "stable condition" standard).

This article is structured as follows. Part 2 presents the legal and operational context of the Ensham Mine. It also describes the operational history of flooding and its relevance to rehabilitation and management of post-mining residual risks, which leads to a discussion of the rehabilitation legal reforms. Part 3 discusses the reform of Queensland's rehabilitation legislation framework as it concerns residual voids, including the transitional provisions of the EP Act. Part 3 also explores Ensham's Residual Void Project (RVP) for the development of the rehabilitation criteria for residual voids and considers the community engagement process. Part 4 comments on the transitional regulatory design issues in Queensland's framework, issues concerning progressive rehabilitation of pre-existing open-cut mines such as Ensham, as well as transparency of information and community consultation. Part 5 concludes and suggests future research.

2 Legal Interests and Operational Context of the Ensham Mine

The Ensham Mine is in the Bowen Basin in central Queensland,[14] located approximately 35 km north-east of the town of Emerald (population of approximately 14,300)[15], 49 km north-west of Blackwater (population approximately 4,700)[16] and has recently obtained Commonwealth approval for an extension project.[17] It sits in the Nogoa River catchment in the Fitzroy Basin.[18] The legal interests and operational context of the Ensham Mine provide the setting for considering the legal rehabilitation reforms.

2.1 Legal Context: Mine Tenure and Other Legal Interests

The Mine is situated within an area defined by seven mining leases (ML7459 (Ensham 1), ML7460 (Ensham 2), ML70326 (White Hill), ML 70049 (Yongala), ML70365 (Maria), ML70366 (Dorrigo) and ML70367 (Vogla)) and two mineral development licences (MDL 217 and MDL 218) issued between 1993 and 2010.[19] Mining lease 70049 sits on land owned by the Shaw family. The remaining mining leases are on land owned by the Operator, Ensham Resources Pty Ltd.[20] The Western Kangoulu People are native title claimants of the Ensham Mine area.[21] Although they do not currently have a registered native title claim, the Garingbal and Kara People have a connection to the land within Ensham's existing mining leases.[22]

Environmentally relevant activities of Ensham's mining operations are undertaken pursuant to Environmental Authority EPML00732813 (Ensham EA).[23] The Ensham EA has had several amendments and corresponding effective dates over the life of the Mine.[24] At the date of this writing (December 2021), Ensham was operating under the Ensham EA dated 3 September 2020.

As will be seen, the international character of the mine owners is noted in the community consultations about the mine closure options. According to that Ensham EA, the Ensham EA holders

are: Idemitsu Australia Resources Pty Ltd (ACN 010 236 272) (Idemitsu), Bowen Investment (Australia) Pty Ltd (ACN 002 806 831) (Bowen) and Bligh Coal Limited (ACN 010 186 393) (Bligh).[25] The three EA holders also comprise the Ensham joint venture, in which Idemitsu has 37.5% participating interest, Bowen has 15% participating interest and Bligh has 47.5% interest[26] (collectively these are referred to in this case study as the Ensham Joint Venture or Ensham EA holders). As Bligh is a subsidiary of Idemitsu, Idemitsu effectively has an 85% participating interest in the Ensham Mine.[27] Similarly, the Ensham Mine is operated by Ensham Resources Pty Ltd (ACN 011 048 678),[28] the Operator, a wholly owned subsidiary of Idemitsu Australia Resources Pty Ltd.[29] Idemitsu Australia Resources Pty Ltd is a subsidiary of Idemitsu Kosan Co. Ltd, a Japanese energy and natural resources conglomerate that is listed on the Tokyo Stock Exchange.[30] Bligh Coal Limited is a subsidiary of Idemitsu Australia Resources Ltd and Bowen Investment Australia Ltd is a subsidiary of LG Corporation, a Korean company.[31]

2.2 Operational Context

The Ensham Mine is a thermal coal mine with surface and underground operations. Open-cut surface mining started in 1993. Underground operations opened in 2011 as a brownfields project – the Ensham Central Project. Major flooding occurred in 2008 and 2011, which sets part of the context for the mine rehabilitation regulation.

2.2.1 The Mine and Land Use

The Mine is variously described as comprising seven or eleven mining pits (Pits A, B, C, D, E, F and Y), as some are further subdivided (A Pit South, A Pit Central and A Pit North; F Pit South and F Pit North; and Y Pit South, Y Pit Central and Y Pit North).[32] Underground operations are accessed through Pit C. These portals are also used to move extracted coal to the coal handling plant from where the coal, once processed, is transported by rail to the Gladstone Power Station and to port for export.[33]

Post-mining land use will largely comprise grazing. Presently, the Nogoa Pastoral Company actively grazes "a large portion of [the] area [of]" ML 70326, ML 70365, ML7459, and ML 70366 as part of their pastoral activities.[34]

Ensham's mining leases are scheduled to expire in January 2028. These can be extended under the *Mineral Resources Act 1989* (Qld) (MR Act) upon application by Ensham (and approval by government).[35] Under the MR Act, the extension application cannot be submitted more than one year before the current term expires.[36] Should Ensham seek to extend its leases, it need not submit an extension application until 2027. Ensham has proposed a "Life of Mine Extension Project", which evidences an intention to submit an extension application that would extend the operations of underground bord and pillar operations into further zones and the mine life to 2037.[37]

More than 1,550 ha of open-cut mine rehabilitation has occurred at the Mine since 2003. This progressive rehabilitation "equates to approximately one third of total mining disturbance".[38] Following the Life of Mine Extension Project, underground rehabilitation would follow cessation of operations expected by 2037.[39] Decommissioning and rehabilitation of extension project surface infrastructure would complete by 2043.[40] This would include rehabilitation of Pits C and D, which will be used to access underground operations.[41] The site would then be monitored for 10 years upon completion of rehabilitation works (to 2053), followed by a 2-year certification period.[42]

2.2.2 Flooding History

The 2008 and 2011 flooding at Ensham Mine, discussed later in this article, is relevant to site rehabilitation. The Ensham Mine was a case study in the Queensland Floods Commission of Inquiry (2012), following the late 2010 to early 2011 Queensland floods.[43] The Mine is adjacent to the Nogoa River, with some pits located partially in the floodplain. In 2008, floodwaters breached the levee banks and inundated four open-cut coal mining pits with an estimated 150,000 ML of water that submerged a dragline.[44] Following this, the Queensland Government authorised Ensham to discharge 138,000 ML of the water between February and September 2008.[45] Increased salinity was found in water quality monitoring in September 2008, which affected water supplies and reduced drinking water quality (for humans and livestock) in some downstream communities.[46] The impact

on water supplies caused community concern, and negative media coverage led Ensham to cease dewatering the pits voluntarily, despite being authorised to continue the discharge.[47]

After the 2008 floods, Ensham built large levees that were designed for a one in 1,000-year flood.[48] (Presently, Pits B, C and D are protected by "0.1% Annual Exceedance Probability regulated structured levees".)[49] The levees prevented the Nogoa River and its tributaries from flooding Ensham's open pits in the 2010-11 wet season. However, heavy rainfall at the mine site increased surface water, which flooded active pits that were already holding water from the 2007-08 season, requiring an authorised release of water into the Nogoa River.[50]

The experience of the 2008 floods led the Queensland government to develop the *Model Water Conditions for Coal Mines in the Fitzroy Basin* Guideline (Fitzroy Model Conditions) pursuant to the EP Act[51] which were subsequently incorporated into EAs. The Fitzroy Model Conditions' restriction on water release was found to be a contributing factor to mine flooding in 2011, as mines could not release water ahead of the rainy season. The Queensland government revised the Fitzroy Model Conditions after industry's and government's experience of the water release authorisation process in the 2011 floods, permitting a new regime of flood release.[52] There is a potential question whether authorised flood water releases might cause offsite rehabilitation issues, which we assume have been addressed in the authorisation of the amended Fitzroy Model Conditions regime and do not attempt to address them here.

Table 1 below provides a timeline of key events for the Ensham Mine, including tenement awards, key legislation and regulatory events, physical events (flooding) and scheduled mine closure.

Table 1: Ensham Mine Timeline

Decade	**Year**	**Event**
1990s	1993	Yongala ML 70049 issued
	1994	Ensham ML 7459 and Ensham 2 ML 7460 issued
	1996	MDL 217 and MDL 218 issued
2000s	2004	Ensham Central Project Initial Advice Statement published
	2005	White Hill ML 70326 issued
	2008	*Flooding*
	2009	Fitzroy Model Conditions developed
	2010	Dorrigo ML 70366, Volga ML 70367, Maria ML70365 issued
2010s	*Late 2010 – early 2011*	*Flooding*
	2012	Qld Floods Commission of Inquiry
	2016	(Mar) Ensham tenement holders submitted Rehabilitation Management Plan & Residual Void Management Plan to regulator, which rejected them and required the Residual Void Project (RVP)
	2017	(Feb) EA requiring RVP issued (Mar) RVP terms of reference due to regulator (May) RVP commences; Ensham Resources Rehabilitation Management Plan submitted to regulator, showing 25% of disturbed land has been progressively rehabilitated (Oct) First RVP Community Reference Group Meeting
	2018	RVP Community Reference Group Meetings (Nov) *MERFP Act* assent
	2019	(Feb) Final RVP Community Reference Group Meeting (Mar) Final report due to regulator (land outcome document) (Apr) *MERFP Act* commencement
	2020	(Sept) EA with residual void rehabilitation requirements issued

2020s	2021	(Apr) Life of Mine Extension Project Proposed; PRCP submission deadline (July) DES issued PRCP info request to Ensham

2.3 Rehabilitation Legal Reforms – PMLUs, NUMAs and Voids in Flood Plains

Among Queensland's legislative reforms[53] is the requirement that EA holders develop and implement a PRCP and PRCP Schedule. The PRCP Schedule must propose the post-mining land use(s) and non-use management area(s) (as applicable) and their milestones schedule, compliance with which will lead to the EA eventually being surrendered (and terminate the tenement holder's obligations and liabilities).[54]

A post-mining land use (PMLU) means "the purpose for which the land will be used after all relevant activities for the PRC Plan carried out on the land have ended".[55] The land must be rehabilitated to a stable condition that can support a viable use that is unrelated to mining and is appropriate for the region in that it is consistent with relevant land use planning schemes, and is either consistent with a previous permitted use or it delivers better environmental outcomes.[56] Some examples of PMLUs are native ecosystems, grazing, agriculture, land fill and water storage.[57]

A non-use management area (NUMA) is defined as an "area of land the subject of a PRC Plan that cannot be rehabilitated to a stable condition after all relevant activities for the PRC Plan carried out on the land have ended".[58] The intent of this is that "the areas are minimised to the extent possible, which includes, for example, minimising area, volume of materials and level and number [of] distinct areas. Each [NUMA] is expected to be located to prevent or minimise environmental harm."[59] Thus, a NUMA is excepted from rehabilitation requirements (because it cannot be rehabilitated to a stable condition) and will be "managed" instead through milestone improvements.[60]

The NUMA classification is available where the risk of environmental harm from non-rehabilitation is confined to the relevant tenement area and not rehabilitating the land is in the public interest.[61] However, by section 126D(3), the NUMA classification is *unavailable* for voids that are in flood plains. These voids (in whole or part) *must* be rehabilitated to a "stable condition".[62] Land rehabilitated to a "stable condition" must achieve three requirements: it must be (1) safe and structurally stable; (2) non-polluting; and (3) sustain a PMLU[63] [emphasis added].

As mentioned above in Part 1, Queensland's mine rehabilitation reforms have a grandfathering/ transitional scheme for pre-existing mines that can present a "land outcome document" under the EP Act's transitional provisions. Those pre-existing mines can utilise different (lesser) rehabilitation requirements for voids in flood plains than those required for new site-specific mines.

3 Rehabilitation Regulation and Voids—Ensham Mine Rehabilitation Planning

This part tells the story of the Ensham Mine rehabilitation planning process to provide context for the observations on that process set out in Part 4. It identifies the generic residual void risks and how the Ensham EA Holders navigated the rehabilitation reforms to present a land outcome document that entails the maintenance of residual mine voids in a floodplain.

3.1 Residual Void Risks

A four-page paper entitled "Rehabilitation of Final Voids" was included among information published by the Queensland Department of Environment and Science under a 2019 Right to Information request (not made by the authors of this article) that concerned the Ensham rehabilitation. While the report is not specific to Ensham, it describes risks associated with rehabilitation of final voids, such as those at the Ensham Mine, and is useful context for this case study.[64] Excerpts from this report are quoted in Box 1 and Box 2 below.

Box 1: Final Voids[65]

Rehabilitation of Final Voids

- Final voids present a significant potential danger to people, stock and wildlife, as well as being potential sources of environmental pollution (Department of Mines and Energy, Queensland 1995). Apart from important environmental considerations and in the interest of public safety, final voids require safety barriers to prevent inadvertent public access.
- Achieving acceptable rehabilitation outcomes for final voids in Queensland poses several unique challenges, including the following:
    1. Voids are deep and void lakes are typically stratified in terms of chemistry and dissolved oxygen concentration, affecting biological characteristics over time.
    2. Voids often have connectivity to saline groundwater.
    3. Evaporation exceeds rainfall, creating the potential for super-salinity to develop in shallow void lakes.
    4. Voids are highly visible to stakeholders and perceived as a risk to humans and the environment.
- Bowman (2002) assessed final void water quality at seven Queensland and two NSW coal mines, concluding salinity was the major issue with water chemistry dominated by sodium and sodium chloride. This ACARP study found that, in most situations, void water is derived from surface runoff and there is a link between void water salinity and suspended solid load in runoff water, indicating that erosion of overburden dumps is a significant contributor to void water salinity.
- Leading global practice in final void rehabilitation is complete backfilling and high wall elimination. Backfilling final voids can mitigate many of their social and environmental risks, and presents the opportunity to return land to a form that supports pre-mine use. In the United States, backfilling in coal mine final voids has been required by law since the 1970s.
- When final voids are not backfilled and extend below the groundwater table, pit/void lakes can form (Zhou et al. 2009). These lakes can (in some cases) draw down local groundwater aquifers and can take a significant time to fill with water (or reach equilibrium), often centuries. Water quality in these final void lakes is typically poor and will worsen over time.
- The Guideline – Rehabilitation requirements for mining projects (EM1122) [–] lists a hierarchy of possible strategies to achieve rehabilitation goals for domains involving final voids. Backfilling to original ground level is generally acceptable, construction of safety barriers may be acceptable in some cases, however the presence of hazardous materials and/or poor quality water is rarely acceptable.

Box 2: Floodplain Voids[66]

Rehabilitation of Voids in Floodplains:

- Flood plains are typically broad areas of alluvium around or near a river or creek that are subject to flooding (Macquarie, 2016).
- Floodplains are hydrologically important, environmentally sensitive, and ecologically productive areas that perform many natural functions, including:
    1. Cleaning floodwater by removing sediments, nutrients and other pollutants, protecting drinking water, recreational amenity and aquatic ecosystems. Floodplain vegetation also regulates water temperature through the provision of shaded areas.
    2. Providing habitat for plants, birds and freshwater aquatic species.
    3. Provide flood storage by taking on and storing excess water during flood events and allowing it to be released slowly back into the watercourse, overland and into groundwater.
    4. Groundwater recharge, which regulates the availability of water during dry periods.
- Coal mining operations located on floodplains pose a significant risk to water quality, groundwater flow regimes and geomorphological processes. The key risk remains the potential for inundation of the final void post mining, through extreme flood events, geomorphological processes such as meander migration, or geotechnical pit wall failure or piping failure. The potential impacts of pit inundation could have significant consequences and include:
    1. Loss of water from a stream system and downstream impacts on water dependent ecosystems;
    2. Downstream water quality impacts associated with efforts to pump out the flooded void; and
    3. Incision or scour between the pit and the existing water course. There are potential flow paths that could develop as a result of flood related pit inundation that represent a risk of incision and scour in the mining and post mining landscape. Such flow paths have potential to capture the alignment of the associated watercourse with resulting impacts on the community, agriculture and the environment.

4. There is also increased potential for erosion associated with constricting the floodplain (by levees and overburden emplacements) and increasing floodplain stream powers and sheer stress. Typically, mine sites located in Queensland contain highly dispersive soils, which increases the risk of erosion and scouring.
5. There are also potential cumulative impacts when considering existing operations located on floodplains, where a new project (or expansion of an existing project) may be located nearby.

- Alternatives involving the diversion of water into voids are not acceptable, for the following reasons:
  1. This activity represents a major take of water from any catchment area will affect the future security of supply to all water resource projects lower down in the basin.
  2. The impact of fresh water diversions into coal mine voids would have a measurable effect on the total quality of waters remaining in the system at points downstream.
  3. The scale of the impact on the quality of water supplies at points downstream of those diversions would be proportional to the number of mines which are engaged in the practice of diverting clean water into their voids.
  4. Abstractions that are to be continued and repeated in perpetuity are for no beneficial use.
  5. Statutory Plans cover the use of water resources in various Basins. Any proposal to harvest the very large volumes of water such as would be involved in any proposal to fill old mine voids with river water would likely affect the operation, if not the actual content of those various Water Plans.
  6. The proposal to divert water as inflow and/or outflow from a mining void may lead to "diversion structures" within a floodplain that require permanent monitoring and maintenance to ensure stability in their own right and not unduly impact the integrity and performance of impacted watercourses. Such management may ultimately fall back to the underlying tenure holder or the state who would then be burdened with the liability (managing the structures and outflow water quality) thus allowing the companies to disassociate themselves from any future obligations.

In summary, there are good reasons not to rehabilitate mine voids by making them into pit lakes, especially when the voids are located on flood plains.

3.2 Development of Residual Void Rehabilitation Criteria – Residual Void Project

The Ensham EA's "rehabilitation success criteria" for the Mine's residual voids were developed through a residual void study. This requirement was in the 28 February 2017 EA[67] and the 9 August 2018 EA[68] condition G20, which mandated that Ensham complete a Residual Void Project (RVP) by 31 March 2019. The RVP study commenced in May 2017.[69]

To inform the RVP study, Ensham established a community stakeholder group, the Ensham Residual Void Project Community Reference Group, to "create an open forum for discussion" on the rehabilitation options.[70] The Reference Group Charter set out the Group's objectives, membership, responsibilities and roles.[71] The membership comprised three neighbour representatives, two from the Central Highlands Regional Council, one from the Central Highlands Cotton Growers and Irrigators Association, one from Fitzroy Partnership for River Health, one from the water utility, Sun Water, and one "community representative", plus an independent chair and minutes secretary. Visitors and observers could be invited, subject to the approval of Ensham. There is no indication that the Shaw family or native title claimants (see Part 2.1 above) participated in the Reference Group. Some information was to be kept confidential, but meeting minutes were recorded and published for the seven meetings (the first was on 4 October 2017 and the last on 14 February 2019). These meeting minutes documented questions posed by attendees and Ensham's responses. They are available online[72] and provide insight into stakeholder concerns about management of residual voids, some of which we present here.

Three points of substance became apparent at the first meeting on 4 October 2017. First, the impetus for the RVP was that, in April 2017, the Queensland Department of Environment and Heritage Protection rejected the Rehabilitation Management Plan and Residual Void Management Plan submitted by Ensham in March 2016 because it did not include filling the mine voids. Ensham contended that the cost of filling the voids would put it "at a high risk of going out of business". The issue was "escalated" in business and government, resulting in the government's decision "to give a study period to gain scientific evidence and community feedback to come up with a solution". This suggests that there was a basis for at least some people in the community to expect that mine voids would be re-filled.

Second, as noted above, Ensham is predominantly owned by Idemitsu, a Japanese company. The Ensham representative mentioned that:

> Idemitsu is a Japanese company and are very sensitive to their reputation, especially when it comes to the environment as they don't want to leave a bad legacy. The study period will allow Ensham time to find out if there is science that can help Ensham consider appropriate alternates. This group is important and we are open to all thoughts, ideas and challenges.[73]

Idemitsu's vision for the proposed Ensham rehabilitation is documented in a conceptual video.[74]

Third, three rehabilitation options were being considered.

Option 1 was variously described as the levee backfill or landform option. Under Option 1, existing levees would be retained, and a permanent substantial landform created by backfilling behind and on top of the levee. This option would require annual inspections to ensure structural integrity.[75]

Option 2 was described as engineered flood mitigation and irrigation, combining flood management with beneficial water use. Under this option, flooding would be mitigated by directing water in flood events into pit voids. The pits could provide water to be used by the community such as through recreation or irrigation.[76] Flood mitigation and beneficial use encompassed all pits (A-Y), with Pits A, B, C and D to be used for water storage.[77] Water quality management was considered the significant issue for Option 2.[78]

Option 3 was to backfill all the voids in the floodplain up to the probable maximum flood level.[79] This was described as the baseline for the residual void study as it was the regulator's preferred option.[80] It was not Ensham's preferred option due to "associated cost with moving significant volumes of dirt"[81] and that "it would also require significant disturbance of areas already rehabilitated".[82] Ensham's representative at the 4 October 2017 meeting responded affirmatively to the question of whether "reluctance to fill the void [was] due to cost".[83]

A review of the meeting minutes suggests that these three options evolved and were refined as findings were made during the residual void study. For example, in a later meeting, Ensham explained that option 2 was not the regulators' preferred option, "as they do [not] feel they can approve a reservoir for the use of the land [as] [t]he current post-mining lease land use is grazing for low wall spoil". Ensham further explained that:

> We have 2 options with regards option 2 and how this is managed within the RVP – (i) argue with government and lodge an application with reservoir, which doesn't give anyone any certainty; or (ii) we push forward with Option 2 as the landform design and stay with grazing as post mining land use. This allows us to preserve the landform as a potential use of reservoir for the possible application for the use of a reservoir put forward at a later date.[84]

Regarding establishing the beneficial use, it was further explained:

> It is about 135 million [dollars] to get the irrigation set up. Idemitsu is not paying that and have been clear on this. There are other opportunities out there for funding assistance if the reservoir was supported. Idemitsu aren't walking away from this, it was always going to be this price for Option 2 and we are willing to work with people to help get this going. Government wants to lock in a land use and submit another application for water storage at a later date. What we have done is keep the land use for all options as grazing as post mining land use for now. The water holding capacity for Option 2 will remain the same, we just can't get water in or out.[85]

The social impact assessment, developed as part of the voluntary Environmental Impact Statement (EIS) under the EP Act, for the proposed life of mine extension project reveals that RVP community stakeholders were concerned about the social impact of water quality and flooding risk.[86] The EIS explained that "significant social impacts were not identified" with the exception of: Option 2 (flood mitigation and beneficial use), which was likely to positively impact water security in the region; and Option 3 (backfilling) with the increased flooding and sediment load risk, which was likely to negatively impact mental health of landholders downstream, but positively impact on the local landholders' "visual amenity".[87]

The three options of the residual void project were assessed using a triple bottom line method, which took account of environmental, social and economic factors. The final report for the Residual Void Project (which is not readily available but was found on Lock the Gate's website) recommended Option 2 on the basis that it was the only one of the three options that "passe[d] all 14 stage gate questions for Environment, Social and Economic considerations".[88] The recommended option 2 did

not have a post-mining beneficial land use for water; instead, the beneficial use would be grazing and a native bushland corridor. However, the final report also highlighted:

> Both the CRG [Community Reference Group] and Central Highlands Regional Council have provided feedback that in light of the future reservoir opportunity created by the retention of the design criteria … they support Option 2 as the final preferred option. There have been clear discussions that any future reservoir would be subject to a separate approval process to this option.[89]

The beneficial use change from water reservoir to grazing and instalment of a bushland corridor was questioned in the final Community Reference Group meeting. A questioner asked, "There is quite a material change as to what Option 2 is on the table right now, What do we call it now?" Ensham replied:

> [I]t is still beneficial use. The government is quite process based and it was always going to be a long shot for them to approve the irrigation straight away. It is important to preserve the landform for the potential use of the land as water storage.
>
> Are we walking away from the reservoir option, no. This is about how can we work effectively with the region to get this in motion. There is a lot of licensing and approvals for dams to be approved by government. They want certainty in the EA. The decision was made that we would keep Option 2 alive and recognise the government's barriers and either fight with them or work with them. We can morph the options as we move through the study, though if we changed names now we have problems in the Stage 4 report. The report has a full list of the options and lists any changes.[90]

The beneficial use change also prompted questions about the triple bottom line assessment at the final Community Reference Group meeting. The meeting minutes record that someone asked: "When entering and answering the questions in the TBL [triple bottom line assessment], was this done based on Option 2 landform only and not the reservoir"? Ensham responded, "Yes". A follow-up question asked: "Are you still claiming the social benefits of Option 2 with knowledge that this isn't going to be a reservoir"? Ensham responded, "The economic benefit based on the reservoir has been peeled out / removed" and "Option 1 would be similar to Option 2 when the area will be nearly the same for Option 1". Ensham agreed to "go back and check this report to ensure Option 2 is similar to Option 1 for the social impacts based on no longer having a reservoir in Option 2".[91] Ensham's proposed transitional PRCP describes the recommended option (and ultimate outcome) as "a modified Option 1 with potential future beneficial use and water storage".[92]

The RVP's social impact assessment suggests that the recommended option is inconsistent with community preferences (the relevance of this is discussed below in Part 4.3).

> [A]cross all stakeholder groups consulted (key stakeholders, local and regional community residents and Ensham employees), Preferred Option 2 emerged as the key option preference (92), followed by Preferred Option 3 (29) and Preferred Option 1 (12) … key stakeholders consulted were more divided in their option preferences between Preferred Option 2 – Beneficial Use (16) and Preferred Option 3 – Backfill to PMF (19); whereas, both local and regional community residents (42) and Ensham employees (34) were more likely to demonstrate a clear preference for Preferred Option 2.[93]

Idemitsu (as majority owner of the Ensham Mine) has been accused of "attempting to backflip on its original commitment to re-fill and rehabilitate [*sic*] 11 mining pit voids, including three on the Nogoa River floodplain".[94] However, Idemitsu has emphasised that these residual voids are not unrehabilitated. The Ensham Life of Mine Extension Project EIS submission responses register includes a response to a submission that "Ensham Mine has amended a previous EIS commitment to rehabilitate mine voids and is subsequently leaving an everlasting scar on the Nogoa River floodplain".[95] Idemitsu responded as follows.

> The rehabilitation outcomes for the Ensham mine were assessed and determined through the extensive and comprehensive scientific studies undertaken through the Residual Void Project (RVP) submitted in 2017 and the amendment to the Ensham Environmental Authority (EA) in 2020. The Ensham open-cut mine will not have unrehabilitated residual voids as a domain in the postmining landscape, rather, existing open-cut voids are to be partially backfilled and rehabilitated in accordance with the EA. The rehabilitation outcomes for the open-cut mine in the floodplain are specified in the EA.[96]

The outcome of the RVP is relevant as it determined the rehabilitation requirements for the Ensham residual voids under the "land outcome provisions" of the EP Act for pre-existing mines,[97] rather than the s 126D(3) rehabilitation obligation. This is discussed in Part 3.3 below. The RVP result also highlights a difference in community expectations versus rehabilitation requirements for voids situated wholly or partly in a flood plain. Some in the community had thought rehabilitation in this

situation meant re-filling of the voids. However, as discussed above at Part 2.3, "re-filling" is not, since the 2018 reforms, the section 126D(3) rehabilitation standard for voids in a flood plain; "stable condition" is. Nevertheless, as pointed out in Part 4.3 below, when misunderstandings about regulatory requirements are added to access to information issues, there can be challenges in community consultation addressing expectations.

3.3 Ensham as a Pre-Existing Mine under the Rehabilitation Reforms

Ensham's Residual Void Project and associated EA amendments occurred around the time of Queensland's mining rehabilitation reforms. The MERFP Act commenced 1 April 2019.[98] The transitional provisions of the MERFP Act (as applied to the EP Act) have created two classes of mine rehabilitation requirements – new mines and mines that existed at the effective date of the rehabilitation reforms on 1 April 2019. All mines, new and pre-existing, have become subject to the new closure planning regime but the transitional provisions have created a process to avoid retrospective application of certain new requirements where an existing mine has an approved mine rehabilitation outcome.

3.3.1 The Land Outcome Document

The final Ensham RVP report states: "This Residual Void Project report, including the Rehabilitation Management Plan is intended as a 'land outcome document' under the *Mineral and Energy Resource (Financial Provisioning) Act 2018*".[99] A land outcome document is also referred to as a "pre-existing NUMA".[100] The statutory definition of "land outcome document" is provided below in Box 3.

The transitional provisions of the EP Act (as amended by the MERFP Act) address the effect of land outcome documents in displacing the requirement for an Environmental Authority holder to give the administering authority a proposed PRC Plan that complies with section 126D(3).[101] Where a land outcome document is applied, it establishes the rehabilitation requirements for residual voids, including voids on floodplains, rather than the EP Act's section 126D(3) requirements.[102] A residual void can be an outcome for the land where that outcome under the land outcome document is "the same or substantially similar to a NUMA".[103] Thus, it appears that Idemitsu intended the final report of the RVP would determine the rehabilitation requirements for the residual voids rather than section 126D requirements of the EP Act.

Box 3: Definition of Land Outcome Document[104]

"Land outcome document", for land, means the following documents relating to the land—

(a) an environmental authority for a resource activity on the land;

(b) a document made under a condition of an environmental authority mentioned in paragraph (a), if—

  (i) the document relates to the management of a void within the meaning of section 126D on the land, or the rehabilitation of the land; and

  (ii) the document was received by the administering authority before the assent date; and

  (iii) the administering authority has not, within 20 business days after the assent date, given notice to the holder of the environmental authority that the document is insufficient in a material particular [sic] relevant to a matter mentioned in subparagraph (i); and

  (iv) before the assent date, the document had not been superseded;

(c) a document made under a condition of an environmental authority mentioned in paragraph (a), if—

  (i) the document relates to the management of a void within the meaning of section 126D on the land, or the rehabilitation of the land; and

  (ii) the environmental authority requires the document to be given to the administering authority on a stated day that is on or after the assent date, or does not state a day when the document must be given; and

  (iii) the document is received by the administering authority within 3 years after the assent date; and

  (iv) the administering authority does not, within 20 business days after receiving the document, give the holder of the environmental authority notice that the document is insufficient in a material particular [sic] relevant to a matter mentioned in subparagraph (i);

(d) a report evaluating an EIS under the State Development and Public Works Organisation Act 1971, section 34D;

(e) an EIS assessment report;

(f) a written agreement between the holder of an environmental authority mentioned in paragraph (a) and the State that is in force on the assent date."[105]

We suggest that the Ensham RVP final report was submitted as a pre-existing NUMA under subsection (b) of the "land outcome document" definition, as it was a required condition under the February 2017 Ensham EA. However, we note Ensham's proposed transitional PRCP (submitted to the regulator in June 2021) identifies the 3 September 2020 EA as the land outcome document under subsection (a) of the land outcome document definition.[106] This would be due to the EA having incorporated the outcome of the RVP final report.

The legislative history of the MERFP Act is clear that the land outcome document as a grandfathering tool was an intended option for existing mines:

> The new rehabilitation provisions [of the MERFP Act] do not impose retrospective requirements to rehabilitate as requirements to rehabilitate are included in existing conditions on environmental authorities… For existing mines, holders of an authority will be required to submit their PRC plan upon receiving a notice. In preparing their PRC plan, the holder will be asked to translate their authority rehabilitation conditions into milestones and milestone criteria. For example, if the proponent's authority sets out a proposed post mining land use and completion criteria for that land use, there will be no change to that commitment. The proponent will be required to reformat those commitments into the PRCP schedule which may include developing milestones to achieve that post mining land use. This also applies to non-use management areas.[107]

Rehabilitation concessions available to pre-existing mines that subscribe to the land outcome document scheme under section 754(2) of the EP Act are also emphasised in the PRC Plan Guideline.

> Where a NUMA has already been identified in a land outcome document and is able to be transitioned into the PRCP schedule, the applicant is not required to comply with sections 126C(1)(g) [*stating the reasons the NUMA cannot be rehabilitated to a stable condition*] or (h) [*requirement to provide copies of reports or other evidence relied upon for proposing the NUMA*] or 126D(2) [*conditions for an area to qualify as a NUMA in a PRCP schedule*] or (3) [*residual void wholly or partially in a flood plain must be rehabilitated to a stable condition*] of the EP Act.[108]

These exemptions are reflected in Ensham's proposed transitional PRCP. The proposed Ensham PRCP states, "[a]s NUMAs at Ensham have already been identified in a land outcome document, i.e., EA EPML00732813, this PRC Plan is not required to comply with sections 126C(1)(g) or (h) or 126(D)(2) or (3) of the EP Act". Furthermore, "[a]s the pre-approved NUMA locations have been specified in the EA … Ensham is not required to undertake floodplain modelling as part of this plan".[109]

3.3.2 Ensham's Residual Voids as NUMAs

Ensham's EA was updated following the Residual Void Project. The rehabilitation success criteria, in Appendix 3 of the 3 September 2020 Ensham EA, set out four goals for each rehabilitation feature – (1) safe, (2) non-polluting, (3) stable, and (4) land use – and specifies the objectives, indicators and completion criteria for these.[110] These goals should be compared with the EP Act's definition of "stable condition" (see Part 2.3 above). Under the present Ensham EA (dated 3 September 2020) and Ensham's proposed PRCP, several residual voids located in the Nogoa River floodplain will remain as NUMAs. This means they will be "rehabilitated" to be safe and stable and non-polluting (two of the three conditions required for "stable condition"); however, they will not have a post-mining land use. Therefore, they will not comply with the section 126D(3) obligation.

Ensham's approved NUMAs (residual voids) are highwalls and groundwater daylighting areas.[111] For example, rehabilitation success criteria under the Ensham EA for residual voids include highwalls for Pits A, B, C, D and E and a permanent, stable flood structure landform.[112] Residual voids must also "act as groundwater sinks to the receiving groundwater environment into perpetuity: (a) A Central pit; (b) A North pit; (c) B pit; (d) C pit; and (e) D pit".[113] The land use for these five pits is "no land use beyond containment of [groundwater daylighting] water".[114] According to Ensham's proposed transitional PRCP,[115] while Pits A Central, A North, B, C and D will be partially backfilled, they will be NUMAs as they will have groundwater daylighting areas (which is not a post-mine land use as defined in the EP Act), noting that "[g]roundwater in the coal seams is also saline and not suitable for stock water supply or irrigation".[116] In contrast, another four pits – Pits A South, E, F and Y – are not characterised as voids, as they "will be partially backfilled to support a final land use of grazing".[117] However, as the RVP meeting notes highlight, "Pit E will only be partially backfilled, there will still be a residual void in it".[118] This emphasises a technicality of the legislation – a void is not a void if it has a PMLU.

A diagram of the groundwater daylighting areas is provided in the Ensham proposed transitional PRCP.[119] The groundwater daylighting areas will cover 146 hectares.[120] The Ensham proposed transitional PRCP highlights that "[d]espite being pre-approved in land outcome documents, the area of NUMAs has been minimised and represents less than 5% of all disturbed lands".[121]

4 Observations

This part considers issues in Queensland's mine rehabilitation regulations raised in the Ensham case study.

4.1 Transitional Regulatory Design and "Land Outcome Documents"

The first transitional regulatory design challenge concerns the availability of NUMAs for voids in floodplains of pre-existing mines. Under section 126D(3) of the EP Act, where a residual void is in a floodplain, the land must be rehabilitated to a "stable condition"[122] and cannot be a NUMA.

Ensham's rehabilitation will result in voids in a floodplain (some of which are NUMAs and some which are PMLUs). Residual voids in floodplains may be allowed under a land outcome document (as transitioned into a PRCP and PRCP schedule). As the legislative history shows, the intent of this exception was to provide certainty to industry during regulatory reform. These transitional arrangements exist to protect investments made under one set of rules from regulatory risk necessary to comply with new legislative schemes. However, it could be deemed inconsistent with the spirit of regulatory reforms in creating two classes of rehabilitation schemes. It also raises a question about the application of the "stable condition" requirement that "there is no environmental harm being caused by anything on or in the land".[123] For NUMAs in flood plains, void conditions will evolve, which may present risks as noted previously in Part 3.1, Box 1 and Box 2.

In the case of Ensham, the voids will become increasingly saline, although they will be contained (and hence non-polluting in accordance with the EP Act).[124] The voids will remain long after Ensham (Idemitsu as the tenement holder) surrenders the mining leases, leaving future generations to manage the consequences. For example, a NUMA management milestone in the proposed Ensham PRCP to ensure safety is that the area will be "[b]unded, fenced and signed to exclude humans and stock".[125] This suggests it will be necessary for generations centuries in the future to maintain fencing and signage to exclude humans and stock. While Ensham and other existing EA holders have the right to pursue a "pre-existing NUMA" for residual voids in flood plains under the land outcome document provisions, which may be a preferred economic outcome for them, whether they should do so raises issues of social licence, sustainability and justice of future generations that are beyond the scope of this paper.[126]

Secondly, it is reasonable to assume that Ensham would not be the only pre-existing open-cut mine to avail itself of these provisions and seek to have void rehabilitation governed by a land outcome document under sections 750 and 754(3) of the EP Act.[127] It is unclear what, if any, cumulative risks/consequences these NUMAs in flood plains will have for Queensland.

Finally, management of the Ensham Mine's residual voids has been an issue of concern and interest for some stakeholders. It appears that, at the time the Ensham Central Project was proposed in the 2000s, the rehabilitation intention for voids was that those in the Nogoa flood plain would be filled, while those outside the flood plain would be residual. For example, in the Environmental Impact Statement (EIS) Assessment Report for the Ensham Central Project, among the Project's identified major impacts on land resources were: "an increase in the minimum width of the floodplain to 2.3 km in the post mining phase" and "final voids outside of floodplain areas remaining at the end-of-mine life".[128] In addition, in February 2017, the regulator (Department of Environment and Heritage Protection, the DES predecessor) advised Ensham that the regulator's position was that Ensham was to "reinstate the floodplain by backfilling any open-cut mining voids within the floodplain to approximately pre-mining area surface level, as outlined, agreed and committed to within the Environmental Impact Statement 2006 and Environmental Management Plan 2010".[129] These statements and plans may have contributed to an expectation by some in the community that voids would be re-filled, contrary to present rehabilitation requirements for the Ensham Mine. Again, while Ensham has the right (under the 2018 legislative reforms) to pursue the NUMA regime for rehabilitation, it may have done so contrary to some community preferences.

4.2 Progressive Rehabilitation and Pre-Existing Mines

The second challenge in Queensland's mine rehabilitation framework highlighted by the Ensham case study concerns progressive rehabilitation and mines already in existence at the time of the 2018 reforms. Progressive rehabilitation was subject to the recent Queensland mining rehabilitation reforms. An issue for concern is whether the reforms will improve rehabilitation outcomes of voids. In cases such as Ensham, slow rehabilitation of large, pre-existing mines may perpetuate residual voids in rehabilitation outcomes.

Progressive rehabilitation is a requirement of the Ensham EA: "Land significantly disturbed by mining activities must be progressively rehabilitated in accordance with the Rehabilitation Management Plan required by condition H3".[130] According to Ensham's proposed revised PRCP (in preparation December 2021), Ensham had rehabilitated a total of 1,647.4 hectares of land (to accord with PMLUs of cattle grazing, native bushland corridor and Boggy Creek diversion), of which 662.83 was certified (Ensham has not yet sought certification for 984.6 hectares of rehabilitated land). Ensham has 3,297.3 hectares of rehabilitation remaining (approximately 63% of this has a PMLU of cattle grazing).[131] The scale of remaining rehabilitation task likely generated, from an economic perspective, a residual void study recommending residual voids as a rehabilitation outcome.

By the time a mine enters its closure phase, "an ideal goal is to have the majority of the mine already progressively rehabilitated and [where relevant] geochemically rendered inactive"[132] (noting that not all mines, such as Ensham, are geochemically active). Ensham's December 2021 figures (quoted above) are several years before the scheduled cessation of Ensham's open-cut operations. Therefore, it is expected that Ensham will continue to progress rehabilitation over the next few years in accordance with its PRCP and Schedule. Some of the land that has been progressively rehabilitated may have to be re-disturbed during post-mine rehabilitation in order to partially backfill pits and re-establish grazing. Further research would be required to ascertain broader industry practice and attitudes in respect of this "ideal goal".

Finally, an obvious observation is that progressive rehabilitation assumes the mine is operating. Thus, Queensland's progressive rehabilitation reforms may not address the risk of residual voids where existing open-cut mines have had slow progressive rehabilitation to date. This risk is higher where mines can and do make use of the land outcome document "exception" discussed above. While there may be a reduction in risk for Ensham as it continues its progressive rehabilitation and approaches closure of the open-cut operations, this broader industry risk is highlighted by an observation Ensham made in its PRCP: "Following approval of the current application for certification of progressive rehabilitation in 2021, *Ensham will have more certified rehabilitation than any other opencut coal mine in Queensland*" [emphasis added].[133]

4.3 Transparency and Community Expectations

Information transparency is relevant to accountability and public confidence in processes and outcomes. Relevant information can form "part of an important regulatory process to ensure that significant mining projects are undertaken in compliance with the relevant environment protection legislation and regulations".[134] The Ensham case study highlights several issues of transparency and community expectations in Queensland's mine rehabilitation regulatory framework.[135]

4.3.1 Access to Information

The use of the *Right to Information Act 2009* (Qld) (RTI Act) has the potential to enhance equitable access to information within Queensland's regulatory framework for mine rehabilitation. The Queensland Department of Environment and Science makes information, the subject of these requests, publicly available. As an example, in the context of this study, information requested by Lock the Gate and the Wanditta Pastoral Company was made available online to the public, and it was relevant to the study's objectives.[136] The RTI Act serves to improve transparency unless, on balance, disclosure would "be contrary to the public interest".[137] However, mine rehabilitation reforms may hinder the usefulness of the RTI Act, specifically regarding contributions to the financial provisioning (assurance) scheme, effective 1 April 2019.[138]

Queensland's financial provisioning scheme is intended to incentivise progressive rehabilitation by setting the primary liability for an annual financial assurance contribution at a prescribed proportion of the current estimated rehabilitation cost up to $450,000,000,[139] and any cost beyond that must be

assured by posting a surety.[140] The amount of funds posted by an environmental authority holder as surety for the financial assurance for estimated rehabilitation cost *is exempted from public disclosure* under the RTI Act.[141] In addition to the RTI Act, public interest exclusion from disclosure (see above), information is exempt from disclosure if it falls within ss 80(2) or 82(2) of the MERFP Act. These sections of the MERFP Act address a duty of confidentiality for the scheme manager (s 80(2)) and very limited exceptions for disclosure of confidential information (for assisting certain government chief executives with the performance of legislated functions) (s 82). "Confidential information"[142] includes information about contributions or sureties paid under Part 3 of the MERFP Act (the financial assurance and estimated rehabilitation cost scheme).[143] Given the concerns raised above about progressive rehabilitation of mature mines and residual void risks, it seems this confidential information protection could reduce public accountability of the operation of this scheme as it concerns residual voids and mature mines.

Beyond the role of the RTI Act, there are concerns about the ease of third-party access to information generated in the administration of regulatory processes involving consultation about rehabilitation, such as the PRCP and Schedule. This information is held by and between the regulator and mining company (in this case study, Idemitsu). Access to rehabilitation information by third parties (such as community members) is hindered through processes/ways of doing business, such as in the way information disclosure is managed by the regulator. For example, when research on this study commenced in July 2021, PRCP information was only made publicly available by a person making a public register information request to the regulator. Currently, the response time is estimated to be "10–75 business days", depending on the size and complexity of the request.[144] While the regulator has recently made PRCPs available online, the previous process still applies to prior versions of environmental authorities.

Information access may also be hindered by informal arrangements. In the 13 December 2018 meeting of the Ensham Residual Void Study Community Reference Group, the local landholders inquired about how the regulator would review their concerns and response to Idemitsu's triple bottom line assessment.[145] The landholders were advised that discussions between various impacted neighbouring parties were confidential.[146]

Finally, under the EP Act, a proponent must detail the community consultation undertaken in the development of a PRCP and how that consultation regarding rehabilitation under the PRCP will be ongoing.[147] This includes compliance with the EP Act's public notification requirements.[148] However, the PRCP Guideline states that public notice is not required for pre-existing NUMAs: "The public notification requirements, under Chapter 5, Part 4 of the EP Act, do not apply to pre-approved PMLUs or NUMAs, or, where there is a pre-approved NUMA but the PRCP schedule has proposed the land as a PMLU instead (section 755B of the EP Act)".[149] This approach results in a reduced level of public transparency of the PRCP. Recall that Ensham submitted its PRCP to the regulator in 2021. It is understood by the authors of this case study that public notice of the PRCP was not provided, which would be consistent with the Guideline's EP Act interpretation.

4.3.2 Community Consultation and Expectations

Related to transparency, we make three observations which concern community consultation and management of community expectations. First, while the transitional provisions provide some exclusions to ss 126C and 126D of the EP Act, they do *not* exclude the requirement that the PRCP applicant must state the extent to which the proposed NUMA as identified in the proposed PRCP schedule "is consistent with the outcome of consultation with the community in developing the [PRCP]".[150] This means the PRCP applicant may need to demonstrate some level of community agreement/acceptance of the NUMA for it to be proposed. It is not clear that this was achieved in the Ensham land outcome document (where the land outcome document was the RVP final report) or in Ensham's proposed transitional PRCP.

The final report of the RVP (the originally intended land outcome document) describes community engagement, such as through the RVP Community Reference Group. [151] The proposed transitional PRCP also describes community engagement.[152] However, it is not clear that the RVP void rehabilitation recommendations are "consistent with the outcome of consultation with the community in developing the plan".[153] This notion is founded in some of the concerns reflected in the RVP Community Reference Group meeting minutes discussed above in Part 4.3.1, including a preference by some participants that the voids provide beneficial use through a reservoir or that they would be

rehabilitated by being re-filled. Also, as mentioned previously in Part 3.2, the social impact assessment for the RVP (included in Ensham's proposed PRCP) showed community preference for Options 2 and Options 3 over the recommended rehabilitation option.

Secondly, assuming Ensham's rehabilitation recommendations are consistent with the EP Act, this raises issues around the meaning and standards of "consultation" in the legislation, including quality of community consultation, whether and how such engagement is meaningful and how it is measured. It also raises issues concerning changes in community expectations over time and the interests of future generations (and their lack of consultation), particularly in cases where rehabilitation takes decades to achieve. Finally, in the case of Ensham, the RVP revealed government was not supportive of changing the PMLU to support the beneficial use of Option 2 in the RVP. This raises the question of government's role in facilitating a PRCP applicant's ability to propose a PRCP schedule that is consistent with community consultation outcomes.

Finally, the dynamic between community preferences and regulatory requirements for rehabilitation also raises another issue about establishing and managing community expectations. As mentioned above in Part 4.1, some members of the community had the expectation that "rehabilitation" meant "re-filling". Rehabilitation is an ambiguous term, which is subject to different interpretations and meanings. There are several approaches by which land can be "rehabilitated" and words to describe it (such as reclamation or restoration).[154] Not every mine site is suited for each of these, such as where the site has highly modified the landform or ecosystem, which may be the case in open-cut mines.[155] In some cases, community preferences may be technically or economically unachievable, which brings to question how mining companies and government should address this expectation-versus-reality mismatch.

5 Conclusion

The Ensham Mine has been in operation since 1993 and is approaching closure (although underground operations were extended in June 2023). The EA has been amended several times across this nearly 30-year history. These amendments reflect operational changes (such as project expansions with new mining leases and addition of underground mining operations), regulation (such as following the Queensland floods in 2008 and 2011) and project maturity (such as requirements to undertake the Residual Void Project and subsequent EA amendment to identify the rehabilitation success criteria consistent with the Residual Void Project's recommendations).

This review of Ensham's impending closure and rehabilitation standards highlights several challenges in Queensland's recently reformed regulatory framework for rehabilitation of open-cut mines. In the case of Ensham, the transitional provisions perpetuate existing rehabilitation plan outcomes with residual voids that would otherwise be disallowed under the MERFP Act. It may be that insufficient or slow progressive rehabilitation of other mature mines may also perpetuate these outcomes. Finally, concerns with community consultation and transparency in the operation of the regulatory framework may further impair the fulfillment of the rehabilitation reforms.

There are many issues of mine rehabilitation for large complex mines with a long history. While this case study reviewed Ensham, it is not likely to be the only mine in Queensland facing void rehabilitation issues. However, this study reveals that the regulatory reforms may not address certain risks faced/created by existing mines. It is not clear that sections of the community concur with the regulatory outcomes and are confident of the post-mine future. While pre-existing mines have the legal right to pursue the NUMA classification for residual voids in flood plains under the transitional provisions of the rehabilitation reforms, it is questioned whether and why such should be pursued in the face of opposition or different preferred post-mining land use of the voids by sections of the community. If there really is such uncertainty, it may be better to resolve it before Ensham prepares a final rehabilitation report addressing residual risk management in support of an application to surrender its mining leases.[156]

Issues identified in this case study suggest areas for future research. One is understanding the cumulative impacts of the transitional provisions and pre-existing NUMAs as they apply to residual voids in flood plains. Second is further consideration of community and individual rights and infringement of these rights arising from lack of transparency in the regulatory framework and how these rights may influence the social licence of individual mines and the industry more broadly in Queensland. This would include further research to articulate the policy reasons for the enactment

of the statutory exemption from disclosure of the financial assurance scheme contributions and its operation. Third is the meaning and scope of community consultation and its operation in the pre-existing NUMA process and post-mining risk management in eventually achieving relinquishment of the EA.

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1 The terms “Ensham Mine”, “Mine” and “Ensham” are used interchangeably in this paper to refer to the Ensham thermal coal mine.

2 *Environmental Protection Act 1994* (Qld), s 126D(2).

3 Above n 2, s 126D(3).

4 This is the author’s designation of the obligation for the purpose of this article.

5 Queensland Government, *Non-Use Management Areas, Information Sheet, Environmental Protection Act* (ESR/2019/4954, 11 March 2020), 2.

6 Above n 2, EP Act, s 750.

7 *Mineral and Energy Resources (Financial Provisioning) Bill 2018* (3rd Reading, Explanatory Notes, Amdmt 39, 17.

8 James Purtill, Emma J Gagen, Bryce Hamilton, “A Brief History of Mine Rehabilitation Reforms in Queensland” (2022) 39(1) *Environmental and Planning Law Journal*, 64, 69.

9 Above n 8, 70, citing Queensland Government, *Progress Report on Government Election Commitments* (June 2016).

10 Above n 8, 71, citing Queensland Treasury Corporation (QTC), *Review of Queensland’s Financial Assurance Framework* (2017).

11 Above n 7, MERFP Bill 2018 Explanatory Notes, 1.

12 Ensham Resources, Idemitsu Australia Resources, Proposed Transitional *Progressive Rehabilitation and Closure Plan,* 14 June 2021, (Doc # EIMP.06.00.04), 23. The Ensham PRCP (PRCP-EPML00732813-V2, version 5) was approved in mid-2022, effective from 23/08/2022. Our references here are to the Proposed Transitional PRCP, 14 June 2021.

13 Above n 12, Ensham Proposed Transitional PRCP.

14 The mine is now owned by Sungela. See also Global Energy Monitor Wiki, Ensham Mine.

15 Australian Bureau of Statistics, Emerald (Qld), 2016 Census All Persons Quickstats.

16 Above n 15, ABS, Blackwater, 2016 Census All Persons QuickStats.

17 Australian Government, Department of Climate Change, Energy, the Environment and Water, Notification of approval: Ensham Life of Mine Extension Project, Queensland (EPBC ref 2020/8669), signed 30 June 2023.

18 Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, *IESC Advice to Decision Maker on Ensham Life of Mine Extension Project – IESC 2021-123: Ensham Life of Mine Extension Project (EPBC 2020/8669) - Expansion*, 2; AECOM for Idemitsu Australia Resources, *Ensham Life of Mine Extension – Project Overview* (report prepared by AECOM for Idemitsu Australia Resources, July 2020), 31.

19 See Part 2.2.2, Table 1; above n 18, *Ensham LME - Project Overview*.

20 Ensham Resources, *Residual Void Project Stage 5: Final Residual Void Report* (final for lodgement with Queensland Department of Environment and Science, 27 March 2019), 11.

21 Order of Evans H in Western Kangoulu People (Federal Court of Australia, QUD229/13, NNTT QC2013/002) 13 June 2013). See also above n 18, *Ensham LME - Project Overview*

22 Elliott Whiteing, *Ensham Life of Mine Extension Project: Social Impact Assessment Technical Report*, 21, [2.2.2].

23 Queensland Department of Environment and Science, Environmental Authority EPML00732813 (ESR/2016/3415 Version 2.06, 16 August 2021).

24 A comprehensive listing is beyond the scope of this Case Study.

25 Above n 23, Ensham EA.

26 Idemitsu Australia Resources, Chapter 1, Introduction, *Ensham Life of Mine Extension Project Environmental Impact Statement*, 13 August 2021, [1.2].

27 Above n 18, Ensham LME - Project Overview.

28 See Ensham Resources Pty Limited, Company Summary, Australian Securities and Investments Commission.

29 Above n 18, Ensham LME - Project Overview, vii.

30 Idemitsu web pages, Committed to a Sustainable Resource Future; Investor Relations*;* Stock Information.

31 Above n 18, Ensham LME – Project Overview, 1.

32 Above n 20, Final Residual Void Report.

33 AECOM for Ensham Resources, *EPBC Self Assessment Report*: *Ensham Life of Mine Extension Project* (29 April 2020), 4, [2.2].

34 Idemitsu Australia Resources, *Chapter 9, Rehabilitation and Closure, Ensham Life of Mine Extension Project Environmental Impact Statement* (13 August 2021) [9.4.3.1] 9-7. A search of the tenement register reveals that the tenements are held by Idemitsu Australia Pty Ltd.

35 *Mineral Resources Act 1989* (Qld), s 286. The applications would be made by the tenement holder.

36 Above n 35, s 286(5).

37 Above n 33, EPBC Self Assessment Report*,* 4.

38 Above n 12, Ensham Proposed Transitional PRCP, [1.2], 23.

39 Above n 17*,* Ensham Life of Mine Extension Project, 16.

40 Above n 17, Ensham Life of Mine Extension Project, 16.

41 Above n 18, Ensham LME – Project Overview*,* 27.

42 Above n 18, Ensham LME – Project Overview, 27.

43 Queensland Floods Commission of Inquiry, *Final Report* (16 March 2012).

44 43Above n 43, Floods Commission Report, 357. See also Megan Lewis, "Ensham Mine Avoids Repeat of Disastrous 2008 Floods", *ABC News*, 1, December 2010).

45 Above n 43, Floods Commission Report, 358.

46 Above n 43, Floods Commission Report, 358.

47 43Above n 43, Floods Commission Report. See also Queensland Floods Commission of Inquiry, Statement of Andrew Brier (Ensham Coal Mine), Exhibit 748 (6 October 2011), 14 [81]. See e.g., Steve Gray, "Coal Mine Blamed for Causing Diarrhoea", *Sydney Morning Herald* (9 January 2009).

48 Above n 18, Ensham LME – Project Overview, 26 [5.2.3.7].

49 Above n 20, Final Residual Void Report, 11.

50 Above n 43, Floods Commission Report, 355.

51 See Queensland Department of Environment and Science, *Guideline: Model Water Conditions for Coal Mines in the Fitzroy Basin: Resource Activity – Mining,* (ESR/2015/1561, Version 3.01, 31 March 2013).

52 Above n 43, Floods Commission Report, 359.

53 Above n 8, A Brief History of Mine Rehabilitation Reforms in Queensland, 64.

54 Above n 2, EP Act, ss 126B-126D(1)(a)(i), (b)(i)-(ii); Queensland Department of Environment and *Science, Guideline: Progressive Rehabilitation and Closure Plans* (ESR/2019/4964, Version 3.00, 4 April 2021), 38-43, 46.

55 Above n 2, EP Act, s 112.

56 *Environmental Protection (Rehabilitation Reform) Amendment Regulation 2019* (Qld) Explanatory Notes, 3.

57 Above n 54, PRC Plans Guideline, 20.

58 Above n 2, EP Act, s 112.

59 Above n 56, Environmental Protection (RR) Amendment Regulation, Explanatory Notes, 4.

60 Above n 2, EP Act, ss 126C(1)(g)-(i), 126D(1)(a)(ii), (c)(i)-(ii); *Environmental Protection Regulation 2019* (Qld), s 41B, sch 8A.

61 Above n 2, EP Act, s 126D(2)(b).

62 Above n 2, EP Act, s 126D(3).

63 Above n 2, EP Act, s 111A.

64 Queensland Department of Environment and Science, *Mined Land Rehabilitation Policy*: Documents in Relation to the Rehabilitation Management Plan Administered by the Department Pursuant to EPML00732813, for the period 1 January 2017 to 20 December 2018, requested by Wanditta Pastoral Company (Attachment A, DES-RTI 18-258a, 9 January 2019).

65 Above n 64, 19-20.

66 Above n 64, 20–21.

67 Queensland Department of Environment and Science, Disclosure Log Requests, DES-RTI 18-259, 9 January 2019, 33-99, Documents in Relation to the Ensham Residual Void Project Administered by the Department Pursuant to EPML00732813 for the period 1 January 2017 to 20 December 2018 requested by Wanditta Pastoral Company.

68 Department of Climate Change, Energy, the Environment and Water, EPBC Referral for the Ensham Life of Mine Extension. See EPBC Referral 2020/8669, Invitation for Public Comment on Referral (Notice, 28 May 2020).

69 Ensham Residual Void Study, Community Reference Group, *Ensham Residual Void Study Community Reference Group Charter*, 3.

70 Above n 69, Ensham Community Reference Group Charter.

71 Above n 69, Ensham Community Reference Group Charter, 3-4.

72 For further exchanges between Ensham and stakeholders, see minutes of seven meetings of Ensham Residual Void Study Project: Community Reference Group, Minutes 04.10.2017, Minutes 07.12.2017, Minutes 26.03.2018, Minutes 04.06.2018, Minutes 10.10.2018, Minutes 13.12.2018, Minutes 14.02.2019.

73 Above n 72, Minutes 04.10.2017, 3.

74 Vimeo, "Ensham Rehabilitation Study" (video, 12 December 2019).

75 Above n 72, Minutes 04.10.2017, 4.

76 Above n 72, Minutes 07.12.2017, 3.
77 Above n 72, Minutes 04.10.2017, 26.03. 2018, 10.10.2018.
78 Above n 72, Minutes 04.10.2017, 4.
79 Above n 72, Minutes 04.10.2017, 4.
80 Above n 72, Minutes 04.10.2017, 4.
81 Above n 72, Minutes 04.10.2017, 4.
82 Above n 72, Minutes 04.10.2017, 4.
83 Above n 72, Minutes 04.10.2017, 3.
84 Above n 72, Minutes 14.02.2019, 3.
85 Above n 72, Minutes 14.02.2019, 3.
86 Above n 22, Ensham Social Impact Assessment, 24.
87 Above n 22, Ensham Social Impact Assessment, 24.
88 Above n 20, Final Residual Void Report, 36.
89 Above n 20, Final Residual Void Report, 34.
90 Above n 72, Minutes 14.02.2019, 3.
91 Above n 72, Minutes 14.02.2019, 4.
92 Above n 12, Ensham Proposed Transitional PRCP, 52.
93 Umwelt, *Social Impact Assessment: Ensham Residual Void Project* (February 2019), 80.
94 "Mine Dodging Bill, Group Claims" *The Morning Bulletin* (Rockhampton Qld, 23 November 2019).
95 Idemitsu Australia Resources, *Ensham Life of Mine Extension Project: Environmental Impact Statement, Chapter 28 - Submission Register* (13 August 2021), 9.
96 Above n 95, Ensham LME Project: EIS Submission Register, 9.
97 Above n 2, EP Act, ss 750, 754(3).
98 See, e.g., *Environmental Protection (Financial Provisioning) (Transitional) Regulation 2019* (Qld), reg 2.
99 Above n 20, Final Residual Void Report, 8.
100 Above n 54, PRC Plans Guideline, 26. The 2023 Version 3 of this Guideline explains the process for transitioning a land outcome document with a pre-approved outcome for a void, but no longer uses this term.
101 Above n 2, EP Act, ss 754(1)-(3).
102 Above n 2, EP Act, s 126(D) requires the rehabilitation of a residual void (wholly or partially) in a flood plain to a stable condition and such a void cannot be classified as a non-use management area.
103 Above n 54, PRC Plans Guideline, s 6.3.2. See also above n 2, EP Act, s 754(3).
104 Above n 2, EP Act, s 750.
105 Above n 2, EP Act, s 750.
106 Above n 12, Ensham Proposed Transitional PRCP.
107 Above n 7, MERFP Bill 2018, 8.
108 Above n 54, PRC Plans Guideline, 25.
109 Above n 12, Ensham Proposed Transitional PRCP, 67.
110 Above n 2, EP Act, (n 2) ss 11A, 126D(3); above n 7, MERFP Bill 2018, 37; above n 8, History of Mine Rehab, 64.
111 Queensland Department of Environment and Science, *Environmental Impact Statement (EIS) Assessment Report for the Ensham Life of Mine Extension Project: Ensham Life of Mine Extension, Proposed by Ensham Joint Venture,* November 2021, 203-204.
112 Above n 111, Ensham EIS Assessment Report, 204.
113 Above n 111, Ensham EIS Assessment Report, 163.
114 Above n 111, Ensham EIS Assessment Report, 204.
115 This proposed PRCP is available online through the DES at Environmental Protection Act 1994 Public Register: Progressive Rehabilitation and Closure Plans (PRC Plans): Details for the PRC Plan PRCP-EPML00732813-V3.
116 Above n 12, Ensham Proposed Transitional PRCP, 35.
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137 *Right to Information Act 2009* (Qld), s 49, sch 4; Queensland Department of Environment and Science, *Right to information and Information Privacy*.

138 The financial provisioning scheme was established by the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (Qld), ss 2, 24, and Proclamation 15 of 2019 (MERFP Act). See also above n 8, Brief History of Mine Rehabilitation, 72-3, for a summary of the scheme's operation.

139 Above n 138, MERFP Act, ss 8, 11, 46, 47, 49.

140 These amounts are calculated in accordance with the Queensland Government Guideline, *Financial Assurance under the Environmental Protection Act 1994* (ESR/2015/1758 Version 3.05, 4 April 2023).

141 See above n 137, RTI Act, Sch 3, s 12(1). See also Laura Gartry, "Mining Rehabilitation Fund Details to Remain Secret after Qld Government to Ban RTI Requests", *ABC News* (14 September 2018).

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ARTICLE

PILBARA IRON ORE STATE AGREEMENTS AND MINE CLOSURE REGULATION

Dr Natalie Brown

Lecturer, University of Western Australia Law School

The research presented in this article was supported by CRC TiME. The content of the article is a revised version of a report for the CRC. The support of the Australian Government through the Cooperative Research Centre Program is acknowledged. The article is current to August 2023.

This article discusses mine closure regulation under the Western Australian State agreement regime; specifically, Pilbara iron ore mines authorised by State agreements. Not all Pilbara agreement mines are subject to Western Australia's legislative mine closure requirements. Pilbara agreement mines are only subject to mine closure planning requirements in three situations: if the Environment Minister has imposed an implementation condition following an environmental impact assessment under Part IV of the Environmental Protection Act 1986 *(WA); the* Mining Act 1978 *(WA) applies to the mine; or an agreement term imposes an obligation to do so. Some Pilbara mines slip through these regulatory gaps because of the unique interaction of State agreements with other legislation. While the focus of this article is on the Pilbara agreement mines, the same propositions apply to all mines authorised by State agreements in Western Australia.*

1 Introduction

The regulation of mine closure planning in the Pilbara iron ore mining industry is largely ad-hoc because the statutes that regulate mine closure, the *Mining Act 1978* (WA) (Mining Act) and the *Environmental Protection Act 1986* (WA) (EP Act) do not apply consistently to Pilbara iron ore mines authorised by State agreements (Pilbara agreements, Pilbara mines). Generally, the Mining Act mine closure planning and financial security requirements do not apply to State agreement mines. However, post-1972 Pilbara agreement mines since 1986 and pre-1972 Pilbara agreement mines since 2003 are prospectively subject to environmental impact assessment under Part IV of the EP Act if there is a proposal for a new or expanded mining operation and may, therefore, become subject to Part IV implementation conditions (implementation conditions) requiring mine closure planning. How did this situation arise, and does it matter?

The Pilbara agreements are significant because they authorise and regulate 98% of iron mining in the Pilbara region, which accounts for 93% of Australia's iron ore production.[1] Western Australia (WA) is the largest iron ore supplier in the world, providing 38% of the global supply in 2022.[2] The Pilbara has been described as the nation's "engine room" and "China's quarry",[3] and thus far its economic value has dominated its significant cultural and ecological attributes. A significant environmental issue is the effect on water post-mining through acid mine drainage and pit lake formation.[4] The region is extremely important to Australia's Traditional Custodians, and home to unique features such as the Karijini Gorge and the Fortescue Marsh.[5] The Pilbara is home to twelve Indigenous language groups and more than a thousand sites of importance.[6] The relatively late introduction of infrastructure in the Pilbara during the mid-1960s means that culture and tradition remain strong and visible in the region.[7] Understanding, accommodation, and protection of that culture is a significant challenge,[8] as demonstrated by the destruction of the Juukan Gorge due to mining.[9]

At the current rate of production, Pilbara iron ore mining is sustainable for another 56 years.[10] As the iron ore is exhausted, the efficacy of mine closure plans in the region will be tested. Many Pilbara mines are scheduled for closure between 2031 and 2067.[11] This article discusses the current state of mine closure planning in the Pilbara and suggests ways uniform mine closure requirements or regional planning may be achieved to ensure the best practice post-mining outcomes.

Since the 1960s, successive WA State Governments have used an evolving model of State agreements to facilitate the Pilbara iron ore industry. Each era of Pilbara agreement imposes different environmental obligations depending on when the Pilbara mine commenced operation. Generally, mines that submitted a proposal post 2010 are subject to an EP Act Part IV implementation condition that requires compliance with the mine closure guidelines formulated under the Mining Act (mine closure guidelines). An implementation condition may also require provision of financial assurance.[12] Pilbara mines approved prior to 2010 have variable mine closure requirements depending on the time of the approval. Importantly, some operating Pilbara mines developed in the 1960s, such as Mount Whaleback (Whaleback), the largest open pit iron ore mine in the world,[13] are not subject to any Part IV implementation conditions requiring mine closure planning or financial assurance for mine closure. Additionally, Pilbara mines that ceased operating prior to commencement of the EP Act in 1986 are not required to comply with that Act because it operates prospectively. These mines slip through the gaps created by the unique interaction between the Pilbara agreements and the regulating Acts. The State must then rely on the proponent company voluntarily developing mine closure plans as a demonstration of their social license to operate.[14] Consequently, the Pilbara agreements create a regime that applies mine closure planning requirements inconsistently, or in some cases, not at all.[15]

Pilbara agreements post 2000, the Fortescue Metals Group (FMG) and Mineralogy agreements,[16] are subject to the Mining Act, and consequently not part of this discussion, which focuses on Pilbara agreements enacted between 1960 and 1996: Rio Tinto Ltd (operating as Hamersley Iron, Rio Tinto) or BHP Billiton Ltd (BHP) are the proponents of these agreements.[17]

In contrast, the requirement for mine closure planning was inserted into the Mining Act on 30 June 2010.[18] Thus, a mine authorised by the Mining Act (a non-State agreement mine) is subject to mandatory mine closure planning regardless of when the mine was approved and is required under the *Mining Rehabilitation Fund Act 2012* (WA) (Mining Fund Act) to contribute to a mining rehabilitation fund to safeguard the State against liability for rehabilitation failures.[19] Importantly, the Mining Act mine closure plan provision applies retrospectively because it includes operating and closed mines located on live tenements.[20] The provision requires mining lease holders to submit for approval mine closure plans in accordance with the Department of Mines, Industry Regulation and Safety (DMIRS) mine closure guidelines[21] for new and existing mines situated on all mining leases.[22] It does not apply to sites that have been closed, rehabilitated and “relinquished”; that is, DMIRS has accepted the rehabilitation.[23]

The important distinctions between the two regimes are that mining lease holders under the Mining Act are subject to retrospective and uniform application of mine closure planning requirements, and financial contributions under the Mining Fund Act.[24] In comparison, under the Pilbara agreement regime some mines are required to comply with the DMIRS closure guidelines, while others comply with various individual implementation conditions, and some may not have implementation conditions at all.

The Department of Jobs, Tourism, Science and Innovation (JTSI) manages Pilbara mines generally,[25] and stores their information.[26] A facet of the Pilbara agreement system that has been criticised is the lack of transparency.[27] Unlike DMIRS, JTSI does not, and is not required to, publicly release information about State agreement mines because the information is commercially confidential,[28] a reason that is also subject to criticism.[29] Consequently mine closure plans or requirements managed by JSTI are not accessible, so for mines such as Whaleback it is not possible to determine if a mine closure plan is sufficient or even exists.[30]

The limited public access to information limits public and stakeholder engagement and understanding of ecosystems. Information access is necessary to achieve best practice post-mining outcomes such as management of cumulative impacts or repurposed land use.[31] Public information is also important for proponents because the *Competition and Consumer Act 2010* (Cth) may limit the proponents’ capacity to share data,[32] which inhibits collaborative planning. For example, in some areas, closure plans of mines owned by different companies may overlap in the management of affected groundwater resources.[33]

To understand the complexity of mine closure regulation under the Pilbara agreements and suggest ways to promote a uniform approach, this article:

- explains the operation of State agreements generally, and their interaction with the mining and environmental legislation, and compares the application of the Mining Act and the Mining Fund Act to non-State agreement mines;
- analyses the Pilbara agreements chronologically, identifying three categories of agreements that have similar terms that affect mine closure planning requirements: the 1960s, the 1970s and 1990s agreements; and
- explores the EP Act Part III statutory policy provisions' capacity to provide uniform mine closure planning or a regional plan.

Other legislation that may regulate aspects of mine closure planning include the *Native Title Act 1993* (Cth) land use agreements, the EP Act Pt V licensing that controls clearing of native vegetation and water or waste discharge, the *Contaminated Sites Act 2003* (WA)[34] (Contaminated Sites Act) , the heritage Acts and the Pilbara agreement terms that may impose conditions relevant to mine closure.[35] These procedures are not within the scope of this article because the regimes cannot impose uniform mine closure planning. For example, the Contaminated Sites Act can impose remediation requirements after contamination occurs but not prospective closure planning to prevent or mitigate impacts such as acid rock drainage.

2 What Are State Agreements?

Pilbara agreements facilitate the region's iron ore industry by modifying other State legislation that would normally apply. State agreements are used for all types of State projects including major mining projects to facilitate the development of infrastructure,[36] such as water, roads, railways, ports or mining towns.

In short, State agreements are contracts between the State and mining company that are scheduled to, and ratified by, an Act of Parliament. The effect of ratifying the contract is that the contract terms have the force of law.[37] The *Government Agreements Act 1979* (WA) (Government Agreements Act) further enforces the capacity of State agreements to modify other laws.[38] Further, the Government Agreements Act clarifies that the proponent's development proposals are part of the State agreement.[39] Consequently, after the JTSI Minister approves the proposal, those terms also have the capacity to modify other laws.

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 JTSI,[40] and that department scopes out the key issues relative to other State departments. After the study is complete and the negotiation finalised, the Government introduces the Bill with the scheduled agreement.[41] Importantly, the Parliament cannot propose amendments to the agreement because the terms are the result of private commercial negotiations; likewise, the agreement negotiations are private and cannot be scrutinised by the Parliament or the public.[42]

The agreement development proposal is also a private document. After the agreement ratification, the agreement's proposal clause allows the proponent to submit the detailed project development plan (development proposal) for approval by the JTSI Minister. The Minister's approval of the proposal finalises the agreement and obliges the parties to perform the contract.[43] The development proposal is an important instrument because it confirms and clarifies the rights and obligations of the parties and can modify other laws.[44]

Compliance with the EP Act is commonly required as a precondition to the JTSI Minister's approval of the development proposal.[45] Under the current approval procedure, the Part IV procedure acts as an umbrella for other departments to engage with the environmental review.[46] Consequently, the Environment Minister may impose implementation conditions that require compliance with the Mining Act mine closure guidelines.[47]

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. If the agreement includes an additional proposal clause, the proponent may request changes to the existing development proposal or initiate a new project under the same agreement. The agreement's development proposal clause applies 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.[48] If a new mining proposal or change to an existing development proposal falls outside the agreement terms the parties will need to negotiate a supplementary agreement.[49] The Parliament amends the ratifying Act and appends the supplementary agreement as a new schedule.

Until 2010, 1960s agreements did not have an additional proposals clause and relied on supplementary agreements. For example, the 1963 Hamersley principal agreement parties negotiated supplementary agreements to authorise the Paraburdoo mine in 1968 and the Marandoo and Brockman 2 mines in the 1990s.[50] Since the enactment of the *Iron Ore Agreements Legislation Amendment Act 2010 (No 2)* (WA) (Integration Act), all Pilbara agreements have included an additional proposals clause.[51] As a result, it is likely the Western Turner Syncline mine authorised under the Hamersley agreement did not require a supplementary agreement because the JTSI Minister could approve the project as an additional proposal.[52] The development or additional proposal submission is important because it enlivens the EP Act 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 and future mine closure guidelines. The potential for this type of legislative action is commonly referred to as "sovereign risk". The risk that the State Parliament may pass a subsequent Act that changes the contract terms unilaterally without negotiation or consent of the other party.

Until very recently, WA governments from both sides of politics promoted WA as a safe place to invest by adhering to a "sovereign risk policy". In short, the government would not amend State agreements without the proponents' consent. The 1960s–1990s Pilbara agreements have been sacrosanct,[53] despite the failure of proponents to deliver their side of the bargain and develop a steel industry.[54] The State became reliant on iron ore income as production increased from 180 million tonnes (mt) in 2000–2001 to 844 mt in 2021–2022,[55] representing 29% of the States gross domestic product, and 55% of its exports value.[56] In 2022, the industry accounted for 85% of the States royalty revenue, and 25% of its general revenue.[57] The largest producer is Rio Tinto (322 mt in 2022) followed by BHP (283 mt).[58] The importance of the sovereign risk policy that underpins the relationship between the State government and these companies cannot be overestimated. WA is in a different position to other jurisdictions where abandoning the sovereign risk policy may have less political fallout.[59]

Modest proposed changes to terms of Pilbara agreements, such as requiring mining lease rents equivalent to the Mining Act requirements, have met with resistance and political consequences. Brendan Grylls (MLA) lost his seat for floating the idea, after a concerted campaign by the mining lobby.[60] The WA government had never diverged from the sovereign risk policy until 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 a 2002 Pilbara agreement.[61] The WA Parliament unilaterally amended the agreement to nullify the proponents' rights to damages.[62] The High Court confirmed the State's sovereign rights when the agreement proponents challenged validity of the legislation.[63] However, this was a critical issue threatening the State's economy, and the amendment did not affect the proponents right to mine, only the right to damages under the arbitration award.[64] Mineralogy and Clive Palmer are new in the Pilbara in comparison to Rio Tinto and BHP, who established the industry with the earlier 1960s–1990s agreements. Palmer is the only proponent to initiate the arbitration clause in his agreement,[65] or directly litigate with the State.[66] Rio Tinto and BHP have

maintained the status quo – negotiation not arbitration or litigation. Due to the past resistance from the mining lobby and the long relationship establishing negotiation, there may not be the political appetite to diverge from the sovereign risk policy and impose uniform mine closure requirements on Rio Tinto and BHP without the consent of those proponents.

3 Pilbara Agreements' Interaction with Other Legislation

State agreements can modify existing laws, but later legislation may expressly or impliedly modify earlier State agreement terms. Later Acts commonly preserve State agreement rights (or other laws and rights) by including application and savings provisions.[67] For example, an Act's application provision states that the Act will only apply when consistent with the terms of State agreements,[68] or an Act may exclude State agreements from a definition to which a provision applies.[69] Savings provisions protect pre-existing rights or accrued rights by providing that the legislation operates prospectively,[70] or that the legislation does not intend to disturb existing rights.[71]

The application and saving provisions of the Mining Act and the EP Act and the interaction of those Acts with the Pilbara agreement terms determine whether the mine is subject to those Acts.

3.1 Pilbara Agreements' Interaction with Mining Legislation

When a project is not authorised by a State agreement, the Mining Act imposes statutory covenants on the mining lease that are requirements of the mining proposal submitted for approval to the DMIRS Minister (Mines Minister).[72] A Pilbara agreement complies with a different proposal regime that is administered by JTSI and its Minister. 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 does not apply to 1960s–1990s Pilbara agreements because its application provision allows that nothing in that Act affects State agreements and protects the proponents' past and future rights.[73] Consequently, the mine closure guidelines only apply to Pilbara mines if an EP Act Part IV implementation condition specifically requires the proponent to do so.

3.2 Pilbara Agreements' Interaction with Environmental Legislation

Most Pilbara agreement mines, by their own terms and the provisions of the EP Act, are required to comply with that Act. The EP Act is often referred to as the "paramount Act" because it prevails over the Mining Act and State agreement Acts.[74] However, anomalies arise because the Parliament passed some agreements prior to the enactment of the EP Act and its predecessor the *Environmental Protection Act 1971* (WA) (EP Act 1971). The 2010 Integration Act, addressed some, but not all, of these anomalies. The prospective operation of the EP Act results in some Pilbara mines not being subject to implementation conditions because they have not enlivened a Part IV review by submitting a proposal.[75]

The EP Act 1971 had negligible effect on Pilbara agreements because it did not apply to State agreements,[76] and did not impose environmental review procedures.[77] Its replacement in 1986, the EP Act, did impose environmental review under Part IV, however, the Act did not apply to State agreements enacted before 1972 (the 1960s agreements) until 2003.[78] In 2003, with the consent of State agreement proponents, Parliament amended the application provision. Section 5 now states that the EP Act and its statutory policies prevail over any inconsistent laws, including State agreements.[79] However, because the Act operates prospectively, the Part IV review did not, and will not, apply to mines that are continuing an operation previously authorised, unless the proponent is required to submit a new proposal for that mine.

The EP Act expressly confirms its prospective operation, and preservation of pre-existing rights in its savings provision (s 128), which exempts projects previously subject to the EP Act 1971 from Part IV review (projects commenced prior to 1986). There is no Parliamentary guidance or judicial commentary on the operation section 128, however the *Land Administration Act 1997* (WA) has an equivalent savings provision,[80] its purpose being to confirm that any act done or being done in accordance with 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.[81] Section 128 confirms the prospective operation of the EP Act: the proponent may continue to do what the agreement authorised. The mine will only engage Part IV environmental review if the agreement requires the proponent to submit a subsequent proposal for changes to that mine.

3.2.1 The Effect of the 2010 Integration Act

In 2010, the proponents of the 1960s–1990s Pilbara agreements (Rio Tinto and BHP) sought the support of the State to amend the Pilbara agreements to allow for a merger of their iron ore companies.[82] During those negotiations the proponents agreed to include a definition in all the Pilbara agreements (including the principal agreements) that 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).[83] Basically, the agreement's own terms require that it is construed in compliance with EP Act provisions, that is, if there is a conflict between the Pilbara agreement term and the EP Act term, the agreement term is read down, that is, the term is construed in a way that is consistent with the EP Act to avoid invalidity. In addition, all the Pilbara agreements now have "additional proposal" terms that require the proponents to comply with the EP Act Part IV when submitting an additional proposal.[84]

3.2.2 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.[85] The EP Act allows for JTSI or the proponent to notify the Environmental Protection Authority (EPA) of a proposed project.[86] The EPA may require the proponent to submit an Environmental Impact Statement (EIS),[87] which is subject to public review.[88] The EPA reviews the EIS and recommends the implementation conditions that the Environment Minister should impose on the project.[89] The Environment Minister has a broad discretion to allow or refuse the project, and/or impose implementation conditions (regardless of the EPA recommendation).[90] Except in rare instances,[91] the Minister has imposed the implementation conditions as recommended by the EPA. In the Pilbara agreement context, when the proposal term requires compliance with the EP Act, the approval of the Environment Minister is a condition precedent to the JTSI Minister's approval of the development proposal.

Pilbara mines that engaged Part IV prior to 2010 received implementation conditions that did not impose the current Mining Act mine closure guidelines.[92] So these mines have various implementation conditions regarding closure, mitigation, or rehabilitation,[93] and early approvals may not include mine closure planning at all. The 1960s Pilbara mines that are not required to submit a proposal have not, and will not, initiate the Part IV procedure, thus do not have implementation conditions.

3.2.3 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.[94] In theory, the Minister could ensure the implementation conditions consistently apply the DMIRS closure guidelines by amending them. However, to date, the Environment Minister has not utilised their authority for this purpose in the Pilbara agreement context.[95] In any event, the Ministers' authority would only affect mines that have implementation conditions as a result of engaging a Part IV review. So, 1960s mines, such as Whaleback, simply do not have a condition for the Minister to amend.

3.2.4 EP Act 1986 Part III Policies

Importantly, in 2003, the Pilbara agreement proponents agreed to be subject to the EP Act statutory Part III policies (Part III policy) when the EP Act s 5 was amended in 2003,[96] and again in 2010 when the proponents agreed to include the EP Act clause in the principal agreements, which included the 1960s agreements.[97] Therefore, Part III policies imposing statutory plans would not encroach on the WA government's sovereign risk policy.

A Part III policy is a statutory instrument that has the force of law.[98] The EPA may prepare a Part III policy[99] which is subject to the Environment Minister's refusal, approval, or amendments, and to Parliamentary disallowance.[100]

Section 128 must be considered because the EP Act terms prevail over the Pilbara agreements so that provision still applies. On review of past Part III policies,[101] the author considers it is unlikely that such policies are confined to a prospective operation or abrogate rights for the purposes of s 128. In this context, mine closure plans do not impede the right to mine or abstract groundwater – they require prospective plans for remediation following the exercise of rights to mine conferred by the agreement.

In contrast to a Part IV review, a Part III policy does not require a proposal submission to initiate the process, so does not encounter the same anomalies as a Part IV review. A Part III policy could apply uniform mine closure planning requirements to all mining projects in the Pilbara,[102] including mines that have not engaged Part IV or have insufficient implementation conditions.

4 Mine Closure Regulation in Western Australia

The State regulates mine closure in two ways. First, mine closure planning is imposed by the Mining Act or by an implementation condition under the EP Act. Second, since 2012, under the Mining Fund Act, the State requires contributions to the Mine Rehabilitation Fund (Rehabilitation Fund) to insulate the State from incurring the costs and liabilities if the proponent cannot, or does not sufficiently, remediate the mine site, or other unforeseen issues that arise after the mine closure is complete. Mines authorised under the Mining Act (non-State agreement mines) are subject to mandatory contributions to the Rehabilitation Fund. In contrast, the Mining Fund Act does not apply to mines authorised by State agreements.

4.1 Mine Closure Planning Requirements under the Mining Act 1978

In 2010, amendments to the Mining Act introduced compulsory mine closure planning.[103] Importantly, the mine closure guidelines apply to "existing" as well as operating mines authorised under the Mining Act.[104] All mining project applications received after 30 June 2011 must include mine closure plans for approval and, retrospectively, all existing mines previously authorised were required to submit closure plans by 30 June 2014.[105] 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.[106] The Mining Act covenants apply to all live mining leases.[107] Therefore, all mines on all these leases, whether operating or not, are required to have a plan that satisfies the current mine closure requirements.[108]

DMIRS does not review Pilbara agreement mining proposals because these mining projects are managed by JTSI and its Minister.[109] A mining proposal approved by JTSI is deemed approved by DMIRS,[110] therefore, the Mining Act covenants do not apply to these proposals.[111] The covenants only apply if the State agreement terms require compliance with the Mining Act 1978.[112] If the Pilbara mine does not have EP Act implementation conditions, the proponent may voluntarily submit a mine closure to JTSI.[113]

In 2015, the EPA and DMIRS issued joint mine closure guidelines so the same requirements are imposed under both avenues of approval, the EP Act Part IV and the Pilbara agreement (EPA and JTSI) or the Mining Act (DMIRS).[114] The key distinction between the two regimes is that the Mining Act provisions apply retrospectively to non-operating mines applying uniform mine closure plan requirements to all mines on the lease. In contrast, the EP Act regime applies prospectively to Pilbara mines on the submission of a proposal.[115]

4.2 Rehabilitation Fund Contributions

Since 2014, mines authorised under the Mining Act 1978 have been required to make mandatory contributions to the Rehabilitation Fund under the Mining Fund Act,[116] which limits the State's liability for remediation.[117] Conversely, 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".[118] Some proponents' mine closure information indicates that sufficient

funding is allocated for rehabilitation. However, this information is generalised and does not identify specific site costs – for instance, a global sum of $15.8 billion for closure, and management over 90 legacy assets in nine countries.[119] Therefore, the State does not have legally binding financial protection if proponents fail to rehabilitate mines authorised under its State agreements.[120]

State agreement proponents may voluntarily opt in to the scheme. However, in 2014, the Auditor General's report on the Rehabilitation Fund noted that no State agreement proponents had chosen to do so.[121] The report recommended that government and agencies should work towards bringing the State agreement projects under the same arrangements.[122]

5 Pilbara Agreements and Mine Closure Plans

Figure 5.1: Operating and closed Pilbara iron ore mines in 2016 [123]

Whether a Pilbara agreement mine is subject to an EP Act Part IV implementation condition that requires compliance with the mine closure guidelines depends on two factors. First, did the mine project engage a Part IV review by submitting a development or additional proposal after 1986? Second, if the mine did submit a proposal to the EPA, did that Part IV review occur before or after 2010, when the EPA began to recommend compliance with the mine closure guidelines as a standard implementation condition?

After 2010, the EPA adopted as a standard practice that approved mines must develop closure plans consistent with the mine closure guidelines. Reflecting the Mining Act regime, implementation conditions allow for any updates to that guideline to automatically apply and require a plan review every three years.[124] The proponent is responsible for compliance reporting and public availability of environmental data, except for confidential or commercially sensitive information.[125]

Prior to 2010, the Environment Minister imposed Part IV implementation conditions that required various mine closure planning requirements. In 2019, a review of 277 mining project ministerial statements (from 1987 to 2018) found that 85% of the projects had closure or rehabilitation requirements imposed by implementation conditions.[126] 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.[127] During 2005–2013 (the WA iron ore mining boom), there was a significantly lower requirement for research and development or rehabilitation trials for Pilbara mines.[128]

In short, the prospective operation of Part IV prevents the application of uniform mine closure requirements to Pilbara mines. The implementation condition requirements for each project will reflect the EPA's standard practice at the time of the Part IV approval. The earlier the approval, the less onerous the requirements.[129] The Part IV system of applying contemporary mine closure obligations on a case-by-case basis has created inconsistent mine closure requirements across the Pilbara iron ore industry. In comparison, the Mining Act regime applies uniformly to all mines – mines must comply with the current closure guidelines regardless of when the mine commenced, or its proposal was approved.

To demonstrate the breadth and variety of imposed conditions the following section discusses:

- mine projects developed under three eras of agreements: the 1960s, the 1970s and the 1990s (Pilbara principal agreements, or supplementary agreements from the relevant era);
- legacy mines; and
- the EP Act Part III policy provisions and models for regional planning.

5.1 A Chronology of Pilbara Agreement Mine Closure Plan Obligations

The terms of a Pilbara agreement were affected by the times' prevalent political and social mores. Broadly, the 1960s agreements conferred extensive rights and concessions in exchange for proponents' obligation to develop a steel industry,[130] the 1970s agreements reflect the public expectation that the government would assume greater responsibility for environmental protection,[131] and the 1990s agreements illustrate a winding back of the proponents' rights and concessions as it became clear a steel industry was unlikely to eventuate.[132]

5.1.1 The 1960s Pilbara Agreements

Some Pilbara mines that commenced in the 1960s have not engaged Part IV review at all.[133] The 1963–1964 Pilbara agreements were the first to facilitate and authorise iron ore mining in the Pilbara. These agreements authorised mines that commenced operation in the 1960s – for example, Mount Tom Price (Tom Price**),** Paraburdoo, Whaleback, Pannawonica, and Mount Goldsworthy (Goldsworthy) mines (1960s mines).[134] Reflecting the State's sovereign risk policy, the EP Act as enacted in 1986 did not abrogate the proponents' mining rights because it exempted agreements enacted prior to 1972.[135]

In 2003, with the agreement of the proponents, the EP Act was amended so that it applied prospectively to all State agreements.[136] 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.[137] In 2010, during the Integration Act negotiations, the proponents of the 1960s mines agreed to amend the relevant principal Pilbara agreements to include the EP Act clause and an additional proposal clause.[138] Prima facie, these clauses should capture expansions of the 1960s mines and therefore subject them to the Part IV review, but that can only occur if those mines are required to submit a proposal. The 1960s agreements did not impose limits on iron ore production, so a 1960s mine is not required to submit a proposal for increases in production.

Even a very significant production expansion of an existing 1960s mine did not, and will not, trigger a Part IV review.[139] For example, Whaleback, the world's largest iron mine and one of the few 1960s mines still producing, operates without implementation conditions because it commenced prior to the EP Act, and there is no limit on production quantities.[140] In 1977 Whaleback expanded from 40 million tonnes per annum (mtpa) to 70 mtpa, well beyond the agreement's contemplated 5 mtpa.[141] The government's attempt to renegotiate terms was refused by the proponent.[142] The Crown Solicitor

advised the government they had "missed the boat" because the 1960s agreement terms did not impose limits on production expansion.[143] Occasionally a 1960s mine may be included in closure plans when new pits are developed near the original mine site. For example, the Greater Paraburdoo Iron Ore Hub includes the contemporary Eastern and Western Range and the original 1960s Paraburdoo mine pit (identified as West Pit 4).[144] 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 subsuming the original Whaleback mine.[145]

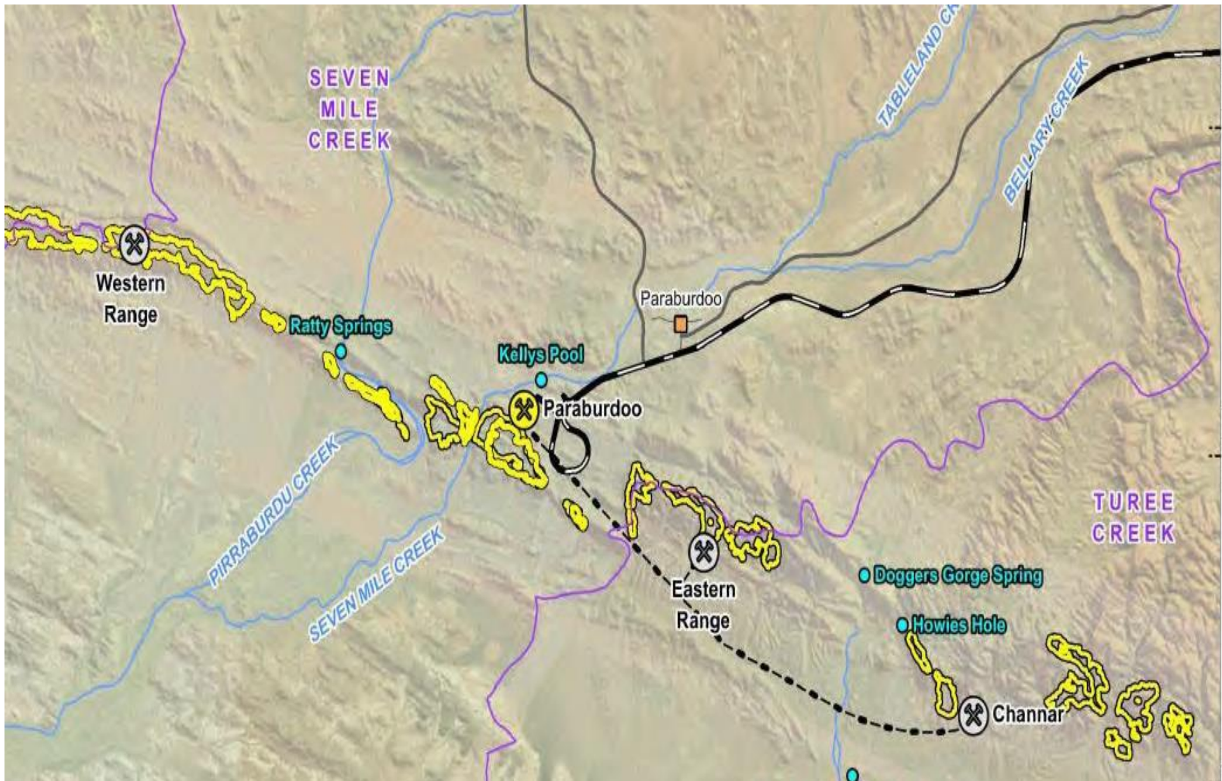

Figure 5.2: Paraburdoo and greater Eastern Range hub, map extract Part IV review EIS [146]

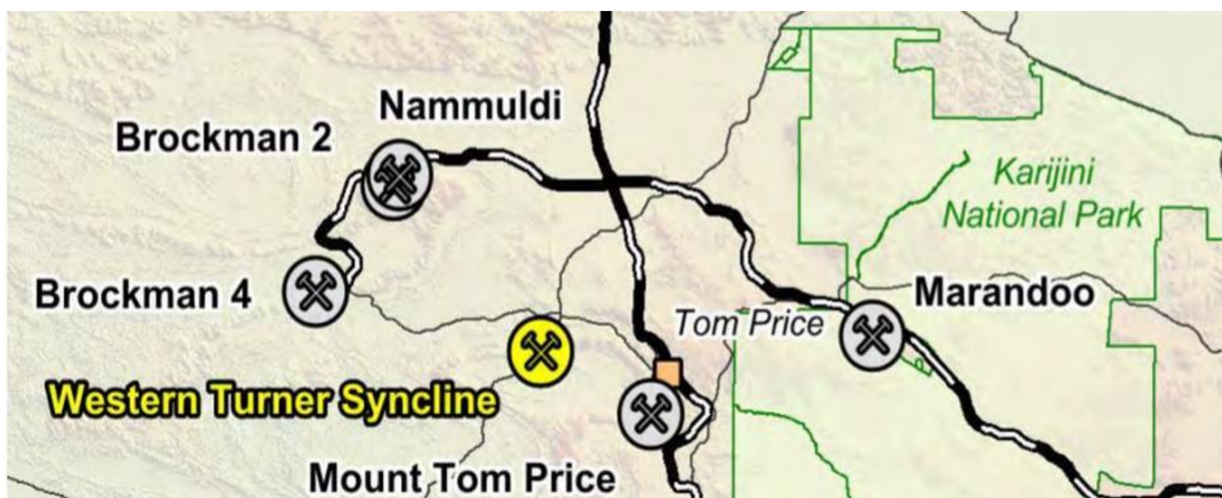

Figure 5.3: Tom Price town, Mount Tom Price mine and Western Turner Syncline location [147]

Mines that commenced during the 1960s and have ceased operation will also not engage Part IV review. Voluntary plan arrangements with JTSI are not verifiable because JTSI manages that information. An example of voluntary remediation occurred when BHP became aware of potential acid drainage from the Billygoat tailings dump around 1994. The tailings dump was situated on a lease subject to 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,[148] but the proponent voluntarily did so "out of a sense of environmental and industrial responsibility".[149] Since 2006, the Contaminated Sites Act, which applies to all contaminated sites, could regulate this aspect post mine closure remediation, but only after the issue has occurred.[150]

In summary, whether the development of a mine closure plan is imposed by an implementation condition or relies on the proponent's social licence 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.

In 2010, the parties agreed to amend the original agreements by inserting additional proposal and EP Act clauses (the Integration Act amendments).[151] The additional proposal clause does not require a proposal submission for a mine that continues to operate in accordance with the agreement terms.[152] However, a consequence of these amendments is that 1960s mines are subject to the EP Act Part III policy provisions that do not require a proposal submissions.

5.1.2 The 1970s Pilbara Agreements

In contrast to other Pilbara agreements the 1970s agreements included an environmental clause that requires the proponent to comply with "any" environmental legislation (environmental clause). In the 1970s, the EP Act 1971 was the relevant legislation and that Act exempted State agreements.[153] However, the 1970s agreements' environmental clause prevailed over that exemption.[154] This was of little consequence because the 1971 Act was advisory,[155] and the iron ore market slump meant that only a few mines commenced before 1986.[156] Accordingly, the inclusion of the environmental clause meant that the 1970s agreements were not exempt from the current EP Act enacted in 1986.[157]

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.[158] This had the effect of engaging the EP Act Part IV review each time the mine expanded. So, in contrast to the 1960s agreement mines, the 1970s agreement mines additional proposals clause ensured there was continued review of mine expansions and revised implementation conditions. However, as with the 1960s mines, 1970s mines that are non-operational or ceased prior to 1986 do not engage Part IV.[159]

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

> 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.[160]

The clause requires compliance with "any requirement in connection with the protection of the environment … pursuant to any Act … in force". The Mining Act and Mining Fund Act are discussed here to illustrate the complex application of the environmental clause.[161]

The State agreement regime is designed to ensure that the agreement terms prevail over the provisions in other Acts (except for the EP Act). The Government Agreements Act confirms the primacy of State agreement terms over other legislation by stating that such terms shall be deemed to operate and take effect "notwithstanding any other Act or Law".[162] The Act operates retrospectively, and presumably it also operates prospectively.[163] The prospective operation of the Act confirms the capacity of the 1970s agreements' environmental clause to take effect[164] despite provisions in other legislation that purport to exempt State agreements.[165]

The broad wording of the clause suggests that mines operating under 1970s agreements could be required to comply with all 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 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.[166] The strong wording of the Mining Act saving provision maintains 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.[167] This leads to an unexpected consequence in that, prima facie, the environmental clause in a Pilbara agreement prevails over, and requires compliance with, the environmental terms in the Mining Act.

The Mining Act saving provision ensures State agreement terms prevail, or if the relevant mining lease was granted under the Mining Act 1904, then that Act applies.[168] Importantly, this provision does not negate the operation of the environmental clause. The Mining Act must be construed consistent with State agreements terms – therefore, it cannot exempt the mine from the applicable provisions in the Mining Act by prevailing over the environmental clause. Hypothetically, if the Mining Act included a term broadly requiring all mines to comply with the mine closure requirements, then the Pilbara agreement environmental clause would prevail, and that term would require compliance with the Mining Act provision.

So, how does the environmental clause actually interact with the Mining Act and Mining Fund Act? As Justice Parker noted, State agreement terms do not necessarily operate as the parties intend.[169]

The Mining Fund Act and Mining 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 Fund Act requires contributions to the Rehabilitation Fund,[170] and the Mining Act requires plans compliant with the mine closure guidelines.[171]

To avoid their being applied to State agreements, the Mining Fund Act and the Mining Act include definitions that impliedly or expressly exclude State agreements.[172] The Mining Fund Act expressly excludes State agreements from its definition of "mining authority".[173] Arguably, this express exclusion avoids the environmental clause because it does not engage the State agreement terms, so the terms are not required to be read in conjunction with the Act.[174] In contrast, the Mining Act may impliedly exclude State agreement proposals from the definition of "mining proposal" and "relevant mining proposal".[175] The interaction of the environmental clause with the Mining Act provisions is not clear cut because the Act's mining proposal definitions do not expressly exclude State agreement proposals.

The Mining Act closure provisions apply to a submission of a "mining proposal" or a "relevant mining proposal".[176] To avoid the application of the environmental clause, the definitions of "mining proposal" or "relevant proposal" need to be interpreted to exclude State agreement mine proposals. A "relevant mining proposal" is narrowly defined to include pre-existing mines, while a "mining proposal" is more broadly defined to include new mines.[177] 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".[178] A "mining proposal" is simply defined as a proposal in the form prescribed by the DMIRS guidelines (Division 3 mining leases), and containing a mine closure plan.[179]

On the one hand, the JTSI Minister approves the State agreement development proposal (not the Mines Minister), which may mean 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, the Mines Minister's grant of a mining lease "as of right" may require the proponent to submit the proposal approved by the JTSI Minister under the Mining Act, which may satisfy the definition of relevant proposal or mining proposal.[180]

Possibly, for the purposes of consistent administration, the Pilbara agreement parties have agreed how the terms apply and 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. However, a key distinction between the 1970s agreements and other eras of State

agreements is that the scheduled contracts were ratified as legislation. Can the Government apply a policy that the environmental clause only engages the EP Act? This is problematic because the 1970s agreements are statute not contracts, therefore subject to judicial review.

The 1970s agreements commonly ratified the contract as legislation by stating the contract terms take effect as if "enacted in this Act".[181] In practical terms, this means that the contract terms (unlike an ordinary contract that is subject to the doctrine of privity)[182] are vulnerable to judicial review. 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 State agreements, the parties to the contract may agree on how a term operates and the government (as a party to the contract) may apply a policy that reflects that understanding.[183] 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.[184] 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 but exempts compliance with environmental requirements in other Acts.[185]

The parties may, of course, resolve this issue of statutory interpretation by agreeing to introduce legislation to amend or remove the environmental clause. However, the environmental clause was not removed or amended by the 2010 Integration Act,[186] which inserted the EP Act clause into the 1970s agreements.[187] This means the environmental clause operates in addition to the EP Act clause. How the 1970s agreements' environmental clause interacts with environmental terms in other legislation will determine whether a 1970s agreement mine needs to comply with that legislation. The environmental clause opens the door for third parties to challenge 1970s agreements that do not comply with environmental requirements in other Acts.[188]

5.1.3 The Post-1986 Pilbara Agreements

The post-1986 agreements include principal agreements, such as Hope Downs and Yandicoogina, and supplementary agreements, for example, the Brockman 2 and Marandoo mines.[189] Post 1986, Pilbara agreements included EP Act clauses and additional proposal clauses that apply the EP Act clause *mutatis mutandis*, and specifically refer to increased production.[190]

A proponent needs to submit an additional proposal for significant modifications or production increases that are not provided for in the original approved proposal.[191] Consequently, any significant mine expansions post 2010, or future developments, would have undergone, or will undergo, a Part IV review that can impose an implementation condition requiring compliance with the current and future mine closure guidelines.[192] Mines that have not submitted an additional proposal post 2010 may operate with mine closure plans or rehabilitation strategies that satisfy that mine's implementation conditions.

The EPA's evolving standard practice means that implementation conditions reflect the best practice of that time. Post 2000, implementation conditions imposing mine closure or rehabilitation requirements became more prevalent, in contrast to the 1986–1999 era that imposed less onerous conditions.[193] 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 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,[194] a change in 2009 imposed more specific requirements on some pits,[195] and a further change in 2012 applied the same conditions,[196] but the 2012 proposal does not appear to include the original Brockman 2 mine site, possibly because the mine temporarily closed during the 2008 global financial crisis.[197]

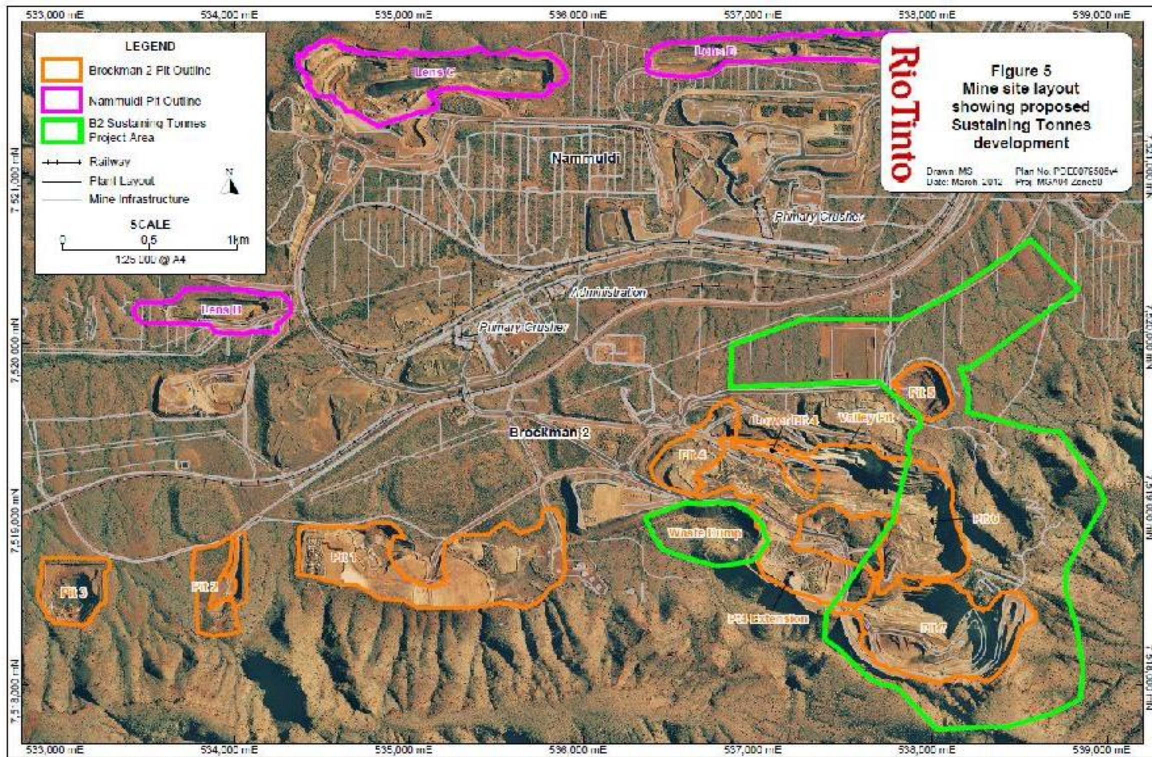

Figure 5.4: Brockman 2 mine expansion, map extract, Part IV Ministerial Statement [198]

There was a further expansion of Brockman in 2013. The Environment Minister imposed similar implementation conditions to other post-2010 approvals – the conditions did not require compliance with the mine closure guidelines, but did require compliance with JTSI's acid mine drainage guideline.[199] In contrast to later closure conditions, these implementation conditions require the public availability of data (by the proponent) for the life of the proposal with no exclusion of commercially confidential information.[200]

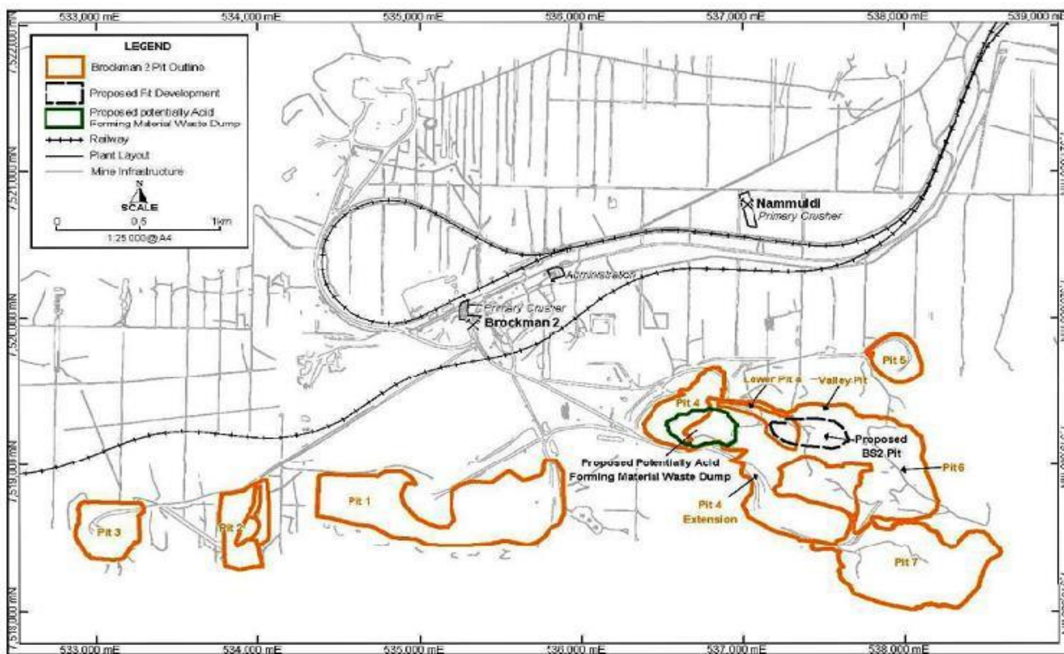

Figure 5.5: Brockman 2 mine expansion, map extract, Part IV Ministerial Statement [201]

This example demonstrates the variety of implementation conditions applying to different parts of a mine site. It depends on what parts of the mine site are encompassed by the proposal,[202] and the time the proposal was submitted to the EPA for review. Implementation conditions can be amended

by the Minister, but this authority has not been exercised to standardise implementation conditions.[203] This demonstrates the inherent inconsistency in the Part IV review system due to the prospective application of the EP Act on a case-by-case basis. This type of inconsistency does not occur under the Mining Act regime because the current uniform mine closure plan requirements apply to both new and existing mines on all mining leases.

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[204]	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 (Act repealed)	Yes (enacted)	YES (enacted)	NO	YES	YES

5.2 Legacy Mines

Legacy mines are abandoned mines that do not have a proponent that is responsible for their rehabilitation – across the State there are more than 11,000 abandoned mines.[205] A key distinction between the Mining Act and EP Act regime is the Mining Act's retrospective application to existing mines. DMIRS assesses mine closure plans on live tenure granted under the Mining Act regardless of whether the site is operating or suspended (in care and maintenance).[206] This assists the prevention of potential legacy mines after the lease is surrendered.[207] Existing mines on current Mining Act tenements were required to have developed closure plans by 2014.[208] In addition, the interest on the mandatory contributions to the Rehabilitation Fund provides a source of funding for the rehabilitation of legacy mines.[209] The Auditor General noted in the follow-up report in 2014 that one issue that has not advanced is the place of State agreements.[210] The report stated that the absence of the large scale mines operating under State agreements considerably lessens the Rehabilitation Fund and consequently the interest available to rehabilitate legacy mines.[211] Additionally, because site disturbance is not included in DMIRS monitoring reports, the State loses the information and knowledge available about large sites.[212]

Pilbara agreements can potentially create legacy issues because mines that have ceased operation prior to 2010 will not be subject to the mine closure guidelines.[213] Further, State agreement mines do not contribute to the Rehabilitation Fund so there is no requirement to contribute to the rehabilitation of legacy mines. An example of a potential legacy Pilbara mine is the Goldsworthy mine that ceased in 1982.[214] The mine rehabilitation (1982–1992)[215] left the pit open as was the standard practice.[216] However, acid mine drainage was a subsequent problem with an estimated clean-up cost of $100 million.[217] In 2013, the proponent intended to sell the Goldsworthy site and to be released from any further environmental obligations.[218] The WA government halted the sale and refused to relinquish the site.[219] In contrast, the same mine, if under the Mining Act regime, would have required a closure plan compliant with the guidelines whether operational or non-operational. This demonstrates the capacity of a Pilbara mine to potentially become a legacy mine[220] by the transfer of an expensive problem by sale to new proponents without similarly deep pockets.[221]

5.3 The EP Act Part III Policy and Regional Planning

An EP Act statutory Part III policy could provide for uniform mine closure planning or a Pilbara regional plan.[222] The benefits of utilising a Part III policy are that the mechanism already exists, and it would not encroach on the sovereign risk policy because it does not require amendments to the Pilbara agreements. The proponents of the 1960s–1990s agreements agreed to abide by Part III policy when they agreed to the amendments of the EP Act s 5 in 2003 and the amendment to the agreements in 2010 Integration Act.

A Part III policy potentially provides a legal mechanism that can require the Pilbara agreement mines to comply with the mine closure guidelines and defray costs by allowing the EPA to delegate the management to DMIRS or JTSI.[223] DMIRS already has the facilities because it manages mine closure planning for all other mining projects, so this option may be relatively easy to implement.

Alternatively, regional plans can better manage cumulative impacts, protection of cultural heritage, land use after mine closure and diversifying the economy.[224] A regional plan requires a statutory structure to streamline regulation and oversight, and the plan also needs to provide for flexible content that allows for adaptive management as conditions change or best practice standards evolve. A regional plan could allow for more progressive outcomes such as land repurposing.[225] For example, the Genex Pumped Hydro Electric project at the Queensland Kidston Goldmine (Genex) (the Kidston mine closed in 2001).[226]

Practical limitations for introducing a Part III policy regional plan for the Pilbara region include the funding for the plan's management[227] and the constraints in the EP Act in relation to EPA's purview of "environmental protection"[228] which may not allow the agency to consider economic and social outcomes or benefits. For example, the EPA may not be able to consider, or advise on, social and economic benefits,[229] which may mean repurposing projects, such as Genex, are not within the scope of the EPA's authority. However, the Environment Minister is not constrained and can amend the policy.[230] Therefore, a Part III policy regional plan for the Pilbara could include a broad range of objectives.[231]

The greatest weakness of a Part III policy is that it can be revoked by the Minister, not the Parliament.[232] If there was the political appetite to introduce a Part III policy, rather than submit to a potentially unstable policy, the proponents may agree to legislation which is not subject to Ministerial revocation, that implements a specific and stable regional plan (such as Alberta's oil sand regional plan described below). Specific legislation may be a preferrable option, but a Part III policy also has the capacity to go beyond mine closure plan requirements and implement a regional plan that incorporates mine closure with broader social and economic post mining outcomes.

Regional plans need to be devised, implemented and managed, so they are not without cost. There are Australian and international models for establishing regional planning, data sharing and knowledge databases, and user-pays models. Aspects of these models may be transferrable to the Pilbara.

Regional plans have proved successful in other jurisdictions for major resource industries within confined regions and can facilitate cumulative impact management during and after mining.[233] An international example is Athabasca oil sands regional plan. In 2009, the Government of the Alberta Province (Canada) enacted statute to facilitate shared-stewardship collaborative planning in the Athabasca region's oil sand mining industry.[234] A central theme of the framework is to move from case-by-case approvals to regional planning.[235] Alberta's Integrated Resource Plans are place-based plans that identify long term objectives for specific areas,[236] which includes continuing consultation and collaboration with multidisciplinary experts, stakeholders and the community.[237] Some aspects of Canada's resources management regime have informed the Mineral Council of Australia's "Towards Sustainable Mining" framework.[238]

To complement the Athabasca oil sands regional plan there is a comprehensive knowledge database – 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.[239] 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.[240] The site also provides

hyperlinks to other relevant datasets, such as yearly technical reports on regional aquatics monitoring.[241] A similar knowledge database for the Pilbara could assist management of cumulative impacts, and interim or long-term planning.

An Australian example of a regional plan is the Latrobe Valley regional rehabilitation strategy,[242] for the coal mining industry. Similar to the Pilbara iron ore mining, one of the key issues of coal mining in Victoria is the industry's long term impact on groundwater resources. By implementing a regional plan, the Victorian Government is taking a proactive approach to mitigation during the life of the industry and remediation as coal is phased out.[243]

The cost of managing knowledge databases can impede the development of these models. User-pays models can mitigate funding issues that impede the effectiveness of government agencies,[244] or the payment can be used to fund an independent agency to perform those functions. 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.[245]

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 database, facilitating data sharing, regional groundwater modelling, and advising government and industry (for example, advice on cumulative impacts).[246] The OGIA has also created a system that allows public access to information 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.[247]

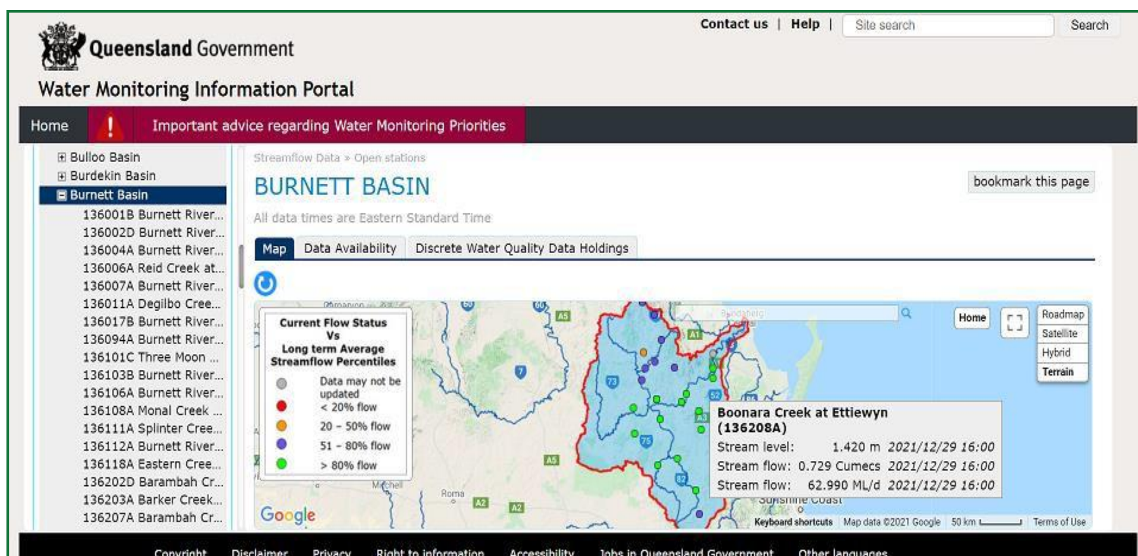

Figure 5.8: Queensland Government, Water Monitoring Portal [248]

Elements of these models could assist proponents, stakeholders and government regulators develop a Pilbara regional plan.

6 Conclusion

The current EP Act regime does not provide uniform mine closure planning regulation for Pilbara agreement mines. The main distinctions between mine closure plan requirements imposed by the Mining Act or EP Act Part IV implementation conditions are as follows.

Under the Mining Act:

1. Mandatory closure planning compliant with the current mine closure guidelines applies to new and existing mines.
2. Proponents are subject to mandatory contributions to the Rehabilitation Fund.
3. Historical and current development and planning information is publicly available. In comparison:

(i) Pilbara mines may or may not be subject to a Part IV implementation condition requiring mine closure planning compliant with the mine closure guidelines (the EPA standard practice post 2010). Mines not subject to such implementation conditions 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, or have not required a Part IV review, post 2010.

(ii) State agreement proponents are not required to contribute to the Rehabilitation Fund and have not voluntarily opted in.[249]

In summary, due to the legal interaction of the State agreements with the prospective operation of the EP Act Part IV, that regime cannot consistently require compliance with the mine closure guidelines or impose uniform mine closure plan requirements.[250] Further, if the current standard practice did change,[251] it could lead to further inconsistency when a new model is imposed by future implementation conditions.

The EP Act Part III policy provisions provide a legal mechanism to impose uniform mine closure planning requirements on Pilbara mines. From a legal perspective, a Part III policy does not engage the sovereign risk policy because the Pilbara agreement terms (since 2010) and the EP Act (since 2003) have required compliance with those provisions. If the political appetite exists, a statutory policy could go further and develop a regional plan. A regional plan could streamline management and regulation of mine closure, consider cumulative impacts on ground water, protect cultural sites, plan for repurposing and post-mining land use, and provide a knowledge database which leads to better economic and social benefits. The Canadian Athabasca plan that engages First Nation advisors and stakeholders could provide a good model for the Pilbara.

The legal mechanism for innovative change that benefits the industry and the community exists. The legal destruction of the Juukan Gorge indicates the need for oversight that a regional plan could provide.[252] In September 2023, despite the public backlash after the Juukan Gorge in 2020, Rio Tinto again damaged a rock shelter by blasting at the Nammuldi mine only 150 metres away from the cultural site.[253] The blasting was undertaken despite notification of the sites' significance by the Traditional Owners.[254] There are a further 87 rock shelter sites under Rio Tinto's blast management.[255] Warren Entsch (deputy chair of select committee who lead the inquiry into the Juukan Gorge destruction) made the following comment:[256]

> I wonder what they [Rio Tinto] have learnt.… If they were concerned about it, they wouldn't have blasted anywhere near it. They can't just say 'sorry we didn't know'. I am very, very disappointed that this has occurred and quite frankly, there is no excuse. Clearly it shows they're not working [sic] from their mistakes.

Relying on the Pilbara agreement proponents exercising their social licence does not provide best practice management. Regional planning could conserve the Pilbara during and post mining and provide benefits to proponents and stakeholders. However, the industry would have to embrace transparency by providing the information required to develop a regional plan. The industry's resistance to transparency is a well-known bone of contention for commentators and Parliament, and a subject of the Auditor General's comments on more than one occasion.[257] To apply a uniform regional mine closure planning regime to all Pilbara mines, the government would need the political will, and the industry would need to embrace change.

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7 Benedict Scambary, *My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia* (Australian National University Press, Centre for Aboriginal Economic Policy Research Monograph 33, 2013) 47–48, 159.

8 Above n 7, 165–166.

9 Rio Tinto, *Juukan Gorge*; Parliament of Australia, *Juukan Gorge Enquiry Hears from Key Stakeholders* (Media Release, 9 October 2020).

10 Above n 2, WA DJTSI, 3.

11 Mining Technology, *The Ten Biggest Surface Mines in Oceania*. Predicted closure dates: Whaleback (Mt Newman, BHP) 2036; Christmas Creek (FMG) 2031; Jimblebar Hub (BHP) 2060; Yandicoogina (Rio Tinto) 2039; Sino Iron Ore (CITIC, Mineralogy) 2042; Area C (BHP) 2067; West Angelas (Rio Tinto) 2023; Hope Downs (Rio Tinto) 2031.

12 *Environmental Protection Act 1986* (WA), ss 86A and 86B(1). After extensive research the author is not aware of an implementation condition imposing a financial assurance condition on a Pilbara mine.

13 BHP, *Mt Whaleback Mine (Newman West)*.

14 Presumably, these plans are submitted to JTSI, the department responsible for State agreements, and the proponent receives assistance from other relevant government departments. This article does not comment on the policy, Pilbara agreement obligations, or administrative arrangements between the proponent and JTSI because this information is not publicly available (email from Eliza Ryan, Project Manager Project Facilitation, Department of Jobs, Tourism, Science and Innovation, 25 May 2022). The author emailed JTSI on 29 October 2021, 27 November 2021 and 24 May 2022. JTSI confirmed this is the Department's position.

15 Natalie Brown, 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.

16 *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA). The *Mining Act 1978* (WA) applies to the mining lease tenements (Pt 3, div 2, cl 10(1)) although there are some concessions regarding expenditure (Pt 3, div 2, cl 10(3)); *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006* (WA), sch 1, cl 4(4)(a). See also note at n 112.

17 WA Hansard, Parliamentary Debates, Legislative Assembly, 18 November 2010, 9163b–9165a (Colin Barnett); *Iron Ore Agreements Legislation Amendment Act 2010 (No 2)* (WA). For further explanation see below n 51.

18 *Approvals and Related Reforms (No. 2) (Mining) Act 2010* (WA) (No 12 of 2010).

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

20 *Mining Act 1978* (WA), ss 82(1)(ga), 84AA. See explanation of the operation in this article at Part 0. DMIRS has confirmed this how the department applies the provision. Response to the author's email enquiry, Emily Safe, Senior Policy Officer, DMIRS Resource and Environmental Compliance Division (29 October 2021).

21 Above n 20, Mining Act, ss 70O, 82(1)(f), 84AA.

22 Above n 20, Safe.

23 Above n 20, Safe.

24 Above n 19, Mining Fund Act, s 4(2).

25 WA Department of Jobs, Tourism, Science and Innovation, *State Agreements* (updated 16 November 2020).

26 Social licence mines or social licence plans refer to Pilbara mines that have not submitted a proposal that engaged the EP Act Part IV review therefore the Environment Minister cannot impose implementation conditions that require mine closure plans. The State then relies on the mining company to exercise their social licence and develop the plan voluntarily.

27 WA Hansard, *Parliamentary Debates,* Legislative Council, 11 August 2011, 5631–5632 (Jon Ford); Auditor General (WA), *Performance Examination Developing the State: The Management of State Agreement Acts* (Report 5, June 2004) 26–27 (Auditor General 2004); Auditor General (WA), *Ensuring Compliance with Conditions on Mining* (Report 8, September 2011) (Auditor General 2011); Auditor General (WA), *Ensuring Compliance with Conditions on Mining – Follow-up* (Report 20, November 2014) (Auditor General 2014); Standing Committee on Estimates and Financial Operations, Parliament of Western Australia, *Provision of Information to Parliament Report 62* (2016) (Standing Committee**)** [4.17]; Paul Cleary, *Mine Field The Dark Side of Australia's Resources Rush* (2012) 190–191; Anne Fitzgerald, *Mining Agreements, Negotiated Frameworks in the Australian Minerals Sector* (2001) 3; Richard Hillman "The Future Role for State Agreements in Western Australia" (2006) 25 *Australian Resources and*

Energy Law Journal 293, 299, 306,307; Michael Keating, "Review of Project Development Approvals System" (Government of Western Australia Independent Review Committee, April 2002) 101 [5.6]; John Southalan. et al, *Parliaments and Mining Agreements: Reviving the Numbed Arm of Government* (University of Western Australia, International Mining for Development Centre, 6 April 2015) 3, 8–11, 21–22.

28 Regarding documents related to State agreement development proposals, Application by author, Department of State Development, Section 30 Notice of Decision under Freedom of Information Act 1992, application S0025/201501 (6 May 2015).

29 WA Hansard, *Parliamentary Debates,* Legislative Council, 2 December 2010, 9784 (Robin Chapple); WA Hansard, *Parliamentary Debates,* Legislative Council, 11 August 2011, 5632–5633 (Jon Ford); above n 27, Standing Committee, [2.6], [4.17]–[4.20].

30 JTSI currently manages State agreements. The Department has had various names over the years and, in older documentation, may be referred to as, for instance, the Department of State Development. See above n 14, Eliza Ryan, email.

31 For an example of repurposing see Genex Power, *Kidston Storage Hydro Project,* Financial Close Report, August 2021, and this article at Part 0.

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

33 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.

34 *Contaminated Sites Act 2003* (WA), s 27. Note the regulations under this Act were imposed in 2006. *Contaminated Sites Regulations 2006* (WA). The Act regulates aspects of remediation but does not impose closure plans.

35 See, e.g., rehabilitation requirements in *Iron Ore (Mount Newman) Agreement Act 1964* (WA), sch 4, cl 3(8), inserts cl 9A(3)(k), 12(a)–(b).

36 Above n 25, JTSI, *State Agreements*; WA Government, *List of State Agreements* (updated 16 November 2020).

37 See, e.g., the *Iron ore (Yandicoogina) Agreement Act 1996* (WA) s 4(3).

38 The *Government Agreements Act 1979* (WA), s 3(b), 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.

39 Above n 38, s 2(c), broadly defines State agreements to include "any document or instrument", or "any other thing made, executed, issued, or obtained for the purposes of that agreement or its implementation", despite these documents not being scheduled to the ratifying Act.

40 Above n 25, JTSI, *State Agreements.* 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.

41 Above n 40, Barnett, 24, app 1.

42 Above n 27, Michael Keating, 101 [5.6].

43 *Commissioner of State Revenue v Oz Minerals Ltd* (2013) WASCA 239, 46 WAR 156 [183]. Consequently, the authorising Act and the scheduled agreement commence at different times. See, e.g., *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.

44 Above n 38, Government Agreements Act*,* s 2(c).

45 See, e.g., the *Iron ore (Yandicoogina) Agreement Act 1996* (WA), s 7(1).

46 WA Government, *Lead Agency Framework* (24 August 2021). For example, departments such as such as Department of Water and Environmental Regulation may advise the proponents and contribute to the EPA recommendations to the Environment Minister. Note, DWER was previously the Department of Water and Department of Environmental Conservation. The Part IV review system encompasses other departments 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 (above n 27, Michael Keating). DMIRS is a lead agency as opposed to a support agency such as the EPA. See above n 4, Brown, 186 [3.3.1]; WA Department of Premier and Cabinet, "Lead Agency Framework, A guidance note for implementation" (March 2011), 9, 29; Auditor General's Report, "Improving Resource Project Approvals" (Report 5, October 2008).

47 Above n 46. 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.

48 *Mineralogy Pty Ltd v The State of Western Australia* [2005] WASCA 69, [67]–[69]; above n 16, Mineralogy Agreement Act*,* sch 1, cl 8(1).

49 See, e.g., *Mineralogy Pty Ltd v The State of Western Australia* [2004] WASC 275, [20]–[22]; above n 16, Mineralogy Agreement Act, sch 1, cl 32.

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

51 *Iron Ore Agreements Legislation Amendment Act (No. 2) 2010* (WA) (Integration Act); WA Hansard, *Parliamentary Debates*, Legislative Council, 2 December 2010, p 9784b-9828a, 14 (Wendy Duncan). Only above n 43, the 1972 Rhodes Ridge agreement was not amended, however, this agreement has equivalent provisions (see sch 1 cl 7.01). For ease of reference, above n 50, the Hamersley Agreement Act and above n 35, the Newman Agreement Act. The Integration Act amended agreements that did not previously have additional proposal clauses. The Integration Act, Part 2, s 6, inserts sch 12, cl 4(2) inserts cl 8A into above n 50, the Hamersley Agreement Act

principal agreement, Tom Price (sch 1); s 6 inserts sch 13, s 4(2) inserts cl 5A into the 1963 Hamersley Agreement Act, Paraburdoo (sch 3); Part 7, s 29, inserts sch 7, cl 4(3) inserts 7A into above n 35, 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). The amendment included principal and supplementary agreements, 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). The Integration Act, 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).

52 The Western Turner Syncline (WTS) is situated on the principal agreements' Mount Tom Price mining lease (only 10 km 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).

53 Above n 27, Hillman, 295–296; WA Hansard, *Parliamentary Debates*, Legislative Assembly, 14 November 1972, 5141 (Mr Graham); WA Hansard, *Parliamentary Debates,* Legislative Assembly, 26 August 2004, 5754 [522] (C M Brown); WA Hansard, *Parliamentary Debates*, Legislative Assembly, 16 May 2002, 10555–10570, 13–14 (C M Brown); WA Hansard, *Parliamentary Debates,* Legislative Assembly, 14 November 1972, 5141 (Herbert Graham).

54 Above n 4, Brown, 180–181.

55 Above n 2, JTSI, 4.

56 Above n 2, JTSI, 4.

57 Above n 2, JTSI, 4.

58 Above n 2, JTSI, 5.

59 For examples of sovereign risk affecting the resources sector in Australia see Peter Turner, "Sovereign Risk Revisited", (2021) 40 *Australian Resources and Energy Law Journal*, 21.

60 Andrew Burrell, "WA Election: Miners Campaign Put Paid to Brendan Grylls", *The Australian* (online, March 15, 2017); Andrew O'Connor, "WA Nationals Mining Tax Plan Labelled 'Crazy-brave' by Treasurer", *ABC News* (online, 15 August 2016); Andrew O'Connor, "WA Election: Mining Lobby Advertising Avalanche Set to Blast Nationals' Brendon Grylls out of Parliament" *ABC News* (14 March 2017).

61 Above n 16, Mineralogy Agreement Act.

62 The State Government enacted above n 16, the Mineralogy Agreement Act (also referred to as the Palmer Act), that comprehensively nullified the rights of the Mineralogy agreement proponents (Palmer and Mineralogy Pty Ltd) to seek damages in relation to the arbitration decision. The Mineralogy Act abolishes the rights of specific 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).

63 *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).

64 Above n 59, Turner, 22.

65 The Mineralogy agreement proponent sought arbitration in 2014: see WA Hansard, *Parliamentary Debates,* Legislative Assembly, 10 June 2014, 3573, Question Without Notice No. 375, Mr BS Byatt, Minister responding C.J. Barnett; Leigh Warnick, "State Agreements" (1988) 62 *The Australian Law Journal* 878, 905.

66 Above n 49, Mineralogy v WA [2004] WASC 275; above n 48, Mineralogy v WA [2005] WASCA 69.

67 DC Pearce, RS Geddes, *Statutory Interpretation in Australia* (8th edn, 2014) [4.38], [6.15], Lexis Nexis.

68 For example, see *Biodiversity Conservation Act 2016* (WA), ss 7(1)(f); 7(2)(a)(i); *Environmental Protection Act 1971* (WA) (repealed), s 7; EP Act (No 87 of 1986), as passed, s 5; above n 20, Mining Act, s 5; *Rights in Water and Irrigation Act 1914* (WA), s 26K; *Wildlife Conservation Act 1950* (WA) (repealed), s 9(3); *National Parks Authority Act 1976* (WA) (repealed), s 5(3).

69 For example, above n 19, the Mining Fund Act, s 4, defines the term "authority" to exclude authorisations subject to above n 38, the Government Agreements Act.

70 These types of provisions generally reflect the statutory interpretation presumptions regarding the prospective operation of the Act and the abrogation of rights, both requiring a clear statement in the legislation. For example, a clear statement is required to indicate legislation operates retrospectively. See *Singh v the Commonwealth* [2004] 222 CLR 322 [19]; see also above n 67, Pearce and Geddes, 397. See, e.g., Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (2014), 193, Lawbook Co.; *Maxwell v Murphy* [1957] HCA 7, 96 CLR 261, 267, Dixon CJ, "the intention appears with reasonable certainty"; and *Rodway v the Queen* (1990) 169 CLR 515, 518, Mason CJ, Dawson, Toohey, Gaudron, McHugh JJ, a "necessary implication"; *Interpretation Act 1984* (WA), s 3(1).

71 Above n 67, Pearce and Geddes, 402 [10.6], 414–416; above n 70, Herzfeld and Prince, 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] HCA 37, 234 CLR 1 [113].

72 Above n 20, Mining Act, s 70O(1), definition of "mine closure plan", and "mining proposal", which includes a "mine closure plan" at (c). 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.

73 Above n 20, Mining Act, s 5(1). Pilbara agreements prior to 1982 (the commencement date of the Mining Act) had their mining and occupation rights granted under the *Mining Act 1904* (WA), see, e.g., above n 50, Hamersley Agreement Act, sch cll 1, 2(a), 9(1)(c); *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA), cll 1, 3, 5. The Mining Act, s 5(2), preserves these rights as though the 1904 Act remains in force.

74 Above n 20, Mining Act, s 6(1) defers to above n 12, the EP Act, that is, the Mining Act only applies consistently with the EP Act.

75 DER (WA), EP Act, Amendment to Licence Conditions, L4792/1973/13 Premises: Greater Tom Price Mine (File No. DER2013/001057) 7 [1.4.1] states the Tom Price mine has not been subject to Environmental Protection Authority assessment due to its construction in the 1960s.

76 Above n 68, EP Act 1971, s 7(1)-(2). Section 7(1) stated the Act prevailed over other inconsistent provisions in all other legislation, but section 7(2) allowed that section 7(1) did not apply to State agreements. Section 7(2) states that s 7(1) has "no application to Acts ratifying agreements to which the State is a party". On this point, see the discussion in Part 5.1.2 of this article on the 1970s agreements' environmental clause – this era of agreement also had terms requiring environmental management plans. For example, above 73, McCamey's Monster Act, sch 1, cll 7(2), 6(1)(i).

77 The role of the department administering the Act was merely advisory, see Brown, above n 4, 146–149 [3.2].

78 Above n 68, EP Act (No 87 of 1986), as passed, s 5.

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

80 *Land Administration Act 1997* (WA), s 282.

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

82 WA Hansard, *Parliamentary Debates*, Legislative Assembly, 18 November 2010, p9163b–9165a (Colin Barnett); above n 51, Integration Act,; Talek Harris, *Rio Tinto, BHP Billiton Axe Iron Ore Merger* (Sydney Morning Herald, 18 October 2010).

83 For example, above n 50, Hamersley Agreement Act, sch 12, cl 4(1) inserts cl 1(l)(a) into the principal agreement (sch 1).

84 Above n 51, Integration Act; WA Hansard, *Parliamentary Debates*, Legislative Council, 2 December 2010, p 9784b-9828a, 14 (Wendy Duncan). Only above n 43, the 1972 Rhodes Ridge agreement, was not amended, however, this agreement has equivalent provisions see sch 1 cl 7.01. The Integration Act amended agreements that did not previously have additional proposal clauses. Above n 51, Integration Act, Part 2, s 6, inserts sch 12, cl 4(2) inserts cl 8A into above n 50, 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 above n 35, 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). The amendment included principal and supplementary agreements, 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). Above n 51, Integration Act, 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). See also this article Part 0.

85 Above n 68, EP Act, ss 37B, 38(1)–(3). See also definition of proposal in s 3.

86 Above n 68, s 38.

87 An EIS is currently referred to on the EPA website as an Environmental Review. Herein, EIS is the term used to avoid confusion with the term Part IV environmental review, used in this article to refer to the whole procedure.

88 Above n 68, EP Act, ss 40–44.

89 Above n 68, EP Act, s 44.

90 Above n 68, EP Act, s 45.

91 Above n 4, Brown, 240–243 [4.2] regarding Windarling Ridge EPA recommendations.

92 The Environment Minister may initiate changes to the implementation conditions pursuant to above n 68, EP Act, s 46, but as yet has not done so for this purpose. See below nn 95, 203 for references.

93 ME Kragt, A Manero, J Hawkins, C Lison, *Review of Mine Rehabilitation Condition Setting in Western Australia* (2019), WA Biodiversity Science Institute, 7–9, [3.1]. The percentage calculation is based on the figure 87 out of 277 reviewed projects.

94 Above n 68, EP Act, ss 45C, 46.

95 In general, implementation conditions are amended on the request of the proponent. See, Brown above n 4, 189; see n 137 for the list of s 45C requests for amendments that supports this point; or this article at n 203. The Minister has rarely utilised s 46 to initiate an inquiry by the EPA to amend Pilbara agreement implementation conditions, see for example an inquiry into the time frame for commencement of a project, Environmental Protection Authority, Report and Recommendation, Marillana Iron Ore Project – inquiry under section 46 of the Environmental Protection Act 1986 to amend Ministerial Statement 855, Report 1589 (December 2016), Ministerial Statement 1055 (25 January 2017). The Minister has made many minor changes to implementation conditions under s 46C, which they may do to correct clerical errors, standardise conditions across the project, or if the change does not alter the

proponents' obligations (NB s 45C was repealed in 2020, *Environmental Protection Amendment Act 2020* (WA) (no 40 of 2020)). For example, under s 46C(1)(b)(i) for a clerical error Environmental Protection Authority, West Angelas Iron-Ore Project –Revised Proposal, Ministerial Statement 113 (2 September 2019) att 1, further s 46C change in att 2 on 4 January 2021. See also, Brockman Syncline 4 – Revised Proposal, Ministerial Statement 1000 (23 April 2015), Western Turner Syncline Iron Ore Project – Revised Proposal, Ministerial Statement 1031 (4 January 2021). For further examples see Environmental Protection Authority, "S46C changes to conditions".

96 Above n 68, EP Act, Part III, ss 26, 35. See, e.g., Environmental Protection Authority, *Environmental Protection (Peel Inlet- Harvey Estuary) Policy 1992* (current) *Environmental Protection (Gnangara Mound Crown Land) Policy Approval Order 1992* (WA 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).

97 See this article Part 0.

98 Above n 68, EP Act, ss 5, 33(1).

99 EPA, *Framework for Environmental Protection Policies and Associated Regulations*.

100 Above n 12, EP Act, ss 31(d), 34; above n 70, Interpretation Act, s 42. 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 Minister must consult with other public authorities or persons who may be affected by the policy unless the EPA has already done so (above n 12, EP Act, s 30(1), (3)(b)), e.g., JTSI and Pilbara agreement proponents. The Environment Minister may also revoke the policy (s 33(2)).

101 EPA (WA , *Environmental Protection (Peel Inlet- Harvey Estuary) Policy 1992* (current); *Environmental Protection (Gnangara Mound Crown Land) Policy Approval Order 1992*; above n 96, *Environmental Protection (Gnangara Mound Crown Land) Policy 1992* (revoked).

102 Above n 101; above n 12, EP Act, Part III, ss 26, 35; above n 96, see examples.

103 Above n 20, Mining Act, ss 70O, 82(1)(ga), 84A, 84AA; see also above n 27, Auditor General (2011), 33.

104 Above n 27, Auditor General (2011), 33.

105 EPA (WA), *Guidelines for Preparing Mine Closure Plans* (June 2011), 7, [2.3]. See also above n 27, Auditor General (2011), 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 EP Act, s 40 (current Environmental Review procedure).

106 Above n 20, Mining Act, s 82(ga), 84AA. Note, provisions do not apply to State agreements, s 82(1b) because s 5(1) defers to State agreement terms.

107 Above n 20, Mining Act, s 82(1). All mining leases are "deemed to be granted" subject to the prescribed conditions.

108 Above n 20, Mining Act, 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).

109 Above n 27, Auditor General (2011), 16, 31.

110 Above n 20, Mining Act, 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.

111 Above n 27, Auditor General (2011), 33.

112 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 article. See, e.g., *Iron Ore FMG Chichester Agreement 2006* (WA), 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, *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 of s 82(1) requiring a mine closure plan as defined by s 70O.

113 Above n 20, Safe. Due to the lack of accessible information, it is not possible to determine if this has ever occurred.

114 Above n 4, Guidelines Mine Closure Plans, published jointly by the EPA and DMIRS in 2015. See also, Environmental Protection Authority, *Mine Closure Plans*. The guidelines were revised and republished by DMIRS in 2020, DMIRS, *Statutory Guideline for Mine Closure Plans* and *Mine Closure Plan Guidance – How to Prepare in Accordance with the Statutory Guidelines* (2020).

115 The Minister could exercise their authority under above n 12, EP Act, s 46, to amend the implementation conditions (providing the project has engaged Part IV and implementation conditions have been imposed in the past).

116 Above n 19, Mining Fund Act, s 11, see also s 4 definition of "mining authorisation"; above n 27, Auditor General (2014), 5–6.

117 Above n 19, Mining Fund Act, 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]; above n 27, Auditor General (2014), 10.

118 Above n 19, Mining Fund Act, ss 4(2), 11. The levy only applies to "mining authorisations".

119 Rio Tinto has also partnered with a non-profit named RESOLVE to rehabilitate legacy and former mine sites, investing $2 million in rehabilitation. Rio Tinto, "Closure, A Start-up to Support Habitat Restoration".

120 Above n 117, Marsden Jacob Associates, [2.3]; Auditor General (2014) above n 27, 6.

121 Above n 117, Marsden Jacob Associates, [2.4], citing above n 27, Auditor General (2014), 10 (see also, above n 27, Auditor General (2014), 7, 19).

122 Above n 27, Auditor General (2014), 10.

123 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.

124 For example, EPA (WA), Ministerial Statement 1000, Brockman Syncline 4 Iron Ore Revised Proposal (11 March 2015), 4. Cl 7.2 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”. Cl 7.3 requires a plan review within three years.

125 Above n 124, cll 3–4.

126 Above n 93, Kragt, et al., 7.

127 Above n 93, Kragt, et al., 7–9, [3.1]. The percentage is calculated based on 87 out of 277 reviewed projects.

128 Above n 93, Kragt, et al., 9 [3.1]. The review notes this as a comparative distinction between Pilbara agreement mines’ implementation conditions and other mining approvals. The review states that 1% of Pilbara mine implementation conditions imposed this requirement as opposed to a 6% average.

129 Above n 93, Kragt, et al., 8–9 [3.1].

130 Above n 4, Brown, 99–101 [2.2].

131 Above n 4, Brown, 141–143.

132 Above n 4, Brown, 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].

133 See, e.g., above n 75, 7 [1.4.1], 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.

134 This article does not attempt to identify all mines commenced in the Pilbara during the 1960s; e.g., there is also the *Iron Ore Nimingarra Agreement 1967* (WA) that ceased in 1991.

135 Above n 68, EP Act (No 87 of 1986), as passed, s 5.

136 Above n 79, EP Amendment Act 2003, s 123; above n 12, EP Act, s 5; WA Hansard, *Parliamentary Debates*, Legislative Assembly, 16 September 2003, question 1692 (BK Masters, CM Brown). All State agreement proponents agreed to the amendment except for Amcor Pty Ltd, *Paper Mill Agreement Act 1960* (WA).

137 Above n 15, Brown and Gardner, 11–12.

138 See this article Part 0, e.g., *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) sch 12, cl 4(1) inserts cl 1(l)(a) into the principal agreement (sch 1).

139 Above n 4, Brown, Ch 3, Pt 5, 120–128.

140 State Records Office (WA), *Iron Ore (Mt Newman Agreement) Newman Project Proposals* (item 1977 082 volume 1, consignment 6582, Department of Industrial Development) 86, 106, 111–112. See above n 4, Brown, Ch 3, 115–117.

141 Above n 140.

142 Above n 140.

143 State Records Office (WA), *Iron Ore (Mt Newman Agreement) Newman Project Proposals* (item 1977 082 volume 1, consignment 6582, Department of Industrial Development) 101, 105; State Records Office, Hamersley Iron – Expansion Proposals (item 1976 142, consignment 6582, Department of Industrial Development) Crown Law advice, 128, Crown Law response to question 4, 132–133.

144 Rio Tinto, Hamersley Iron Pty Ltd, *Paraburdoo Closure Plan 2019: Mineral Field 47 – West Pilbara*, [3.3], in EPA, Greater Paraburdoo Iron Ore Hub Proposal, Environmental Review Documentation (May 2020).

145 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. See map Figure 5.1 for location of Whaleback mine in relation to satellite Orebodies, Mt Newman Township and Jimblebar hub.

146 Above n 144, Rio Tinto, [11.1], [11.2], [22].

147 EPA, “Western Turner Syncline Iron Ore Project - Revised Proposal”, Report and Recommendation 1565 (April 2016) 4.

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

149 Above n 148, Westover v BHP Billiton, [25].

150 Above n 34, Contaminated Sites Act; Contaminated Sites Regulations. See also above n 20, Mining Act, s 6(2)(3).

151 Additional proposal clauses allow for new developments under the same terms as the principal agreement. 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.

152 For example, there is no indication Whaleback has ever submitted a proposal. This may be because the mine production remains the same or less than in 2010, or a production limit is not imposed by the agreement. For further discussion on this point see above n 4, Brown, 127, specifically, and Part 5.3 generally.

153 See this article Part 3.2.

154 The 1970s State agreements were subject to above n 68, the EP Act 1971, and other environmental legislation, according to the agreement terms. The EP Act 1971, s 7, provision did not prevent the State agreement legislation making the ratified agreements subject to the environmental legislation. The EP 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.

155 Above n 68, EP Act 1971. 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 that the EPA 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.

156 Above n 4, Brown, 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); WA Hansard, *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).

157 Above n 68, EP Act 1986, (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 above n 12, the EP Act, 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 above n 15, Brown and Gardner, 150; Mark Gerus, "Mining and Water Resources" in RH Bartlett, A Gardner, B Humphries, *Water Resources Law and Management in Western Australia* (1996) 31, UWA.

158 A proposal submitted to the Department of State Development (now JTSI) is referred by the department or the proponent to the EPA. See this article at Parts 1 and 0.

159 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 licence to operate. DMIRS, Minedex, Project Goldsworthy Iron Ore (J00479).

160 *Iron Ore (Goldsworthy-Nimingarra) Agreement Act 1972* (WA), sch 1, cl 23; above 73, McCamey's Monster Act, 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; above n 43, the Rhodes Ridge Agreement Act, 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 above n 68, the EP Act 1971 "or any other Act".

161 Above n 20, Mining Act, Mining Fund Act. 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 article to analyse all legislation that may impose relevant environmental requirements.

162 Above n 38, Government Agreements Act, s 3. 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: *Cazaly Iron Ore Pty Ltd v Hamersley Resources* Ltd [2009] WAMW 9, [158]; WA Hansard, *Parliamentary Debates,* Legislative Assembly, 4 December 1979, 5705, 5846-5847 (Mr Mensaros, Minister for Industrial Development). The Government Agreements Act, 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].

163 Retrospective application requires clear words of intent, as opposed to prospective application that is presumed. On presumed prospective application see above n 67, 414–416, Pearce and Geddes; above n 70, Herzfeld and Prince, 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].
On retrospective application see *Singh v the Commonwealth* [2004] 222 CLR 322 [19]; above n 67, Pearce and Geddes, 397; see, e.g., above n 70, Herzfeld and Prince, 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 above n 70, Interpretation Act, s 3(1).

164 For judicial commentary on above n 38, *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].

165 Above n 16, the FMG and Mineralogy agreements, e.g., prevail over the Mining Act exemptions requiring compliance with that Act.

166 *South Australia v Tanner* [1989] HCA 3, 17–21, 166 CLR 161, 171, Wilson, Dawson, Toohey and Gaudron JJ quoting *Butler v Attorney General* (Vic) (1961), 106 CLR 268, 275-276, Fullagar J.

167 Above n 20, Mining Act, s 5.

168 Above n 20, s 5(1)–(2).

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

170 Above n 19, Mining Fund Act, s 9A; see also Mining Rehabilitation Fund Regulations 2006 (WA).

171 Above n 20, Mining Act, 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.

172 See explanation of "application provisions" above at Part 3 of this article.

173 Above n 19, Mining Fund Act, s 4, 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.

174 Above n 19, Mining Fund Act, 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; …"

(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.

175 Above n 20, Mining Act, s 70O(1), 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. A relevant mining proposal is 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".

176 Above n 20, Mining Act, s 70O.

177 Above n 20, Mining Act, s 70O(1). 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". The recent 2022 amendments to the Mining Act (*Mining Amendment Act 2022* (WA), (as passed, no 31 of 2022), ss 25–30) do not appear to change this position.

178 Above n 20, Mining Act, s 82A(2)(b), referred to at (b) in the definition of "relevant mining proposal" 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.

179 Above n 20, Mining Act, 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."

180 Without access to the documents that facilitate the grant of mining leases by the Mines Minister for State agreement mining projects it was not possible to form an opinion on this point.

181 See, e.g., above 73, McCamey's Monster Act, s 3(1); above n 43, Rhodes Ridge Agreement Act, s 3.

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

183 This will depend on all the circumstances of the case, e.g., the State agreement reviewed in above 169, Michael; Ex Parte WMC Resources, was a contract-type agreement.

184 *Green v Daniels* [1977] HCA 18, 51 ALJR 463.

185 For discussion of inflexible application of policy (a ground of judicial review) see *Minister for Immigration and Ethnic Affairs v Tagle*, [1983] FCA 166, 67 FLR 164. Legislation may be challenged if a policy is unlawful (does not come within the subject matter, scope and purpose 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 unlawful or applied inflexibly – that is, the merits of each case and the rights and interests of third parties must be considered.

186 See, e.g., above 73, McCamey's Monster Act, sch 5 cl 4(2) inserts sub-cl 2(4) into the principal agreement.

187 See this article at Part 0.

188 For example, the *Rights in Water and Irrigation Act 1914* (WA) that has environmental objectives.

189 *Iron Ore (Channar Joint Venture) Agreement Act 1987* (WA); *Iron Ore (Marillana Creek) Agreement Act 1991* (WA); *Iron Ore (Hope Downs) Agreement Act 1992* (WA); *Iron Ore (Yandicoogina) Agreement Act 1996* (WA); supplementary agreements authorising the Brockman 2 and Marandoo mines enacted in 1990 and 1992 respectively, above n 50, Hamersley Agreement Act, ss 3I–3J, schs 10, 11. See also, "additional areas", above

n 35, Newman Agreement Act, sch 4, cl 3(8) inserts cl 9A; WA Hansard, 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 – above n 20, the Mining Act, applies.

190 For example, above n 189, Hope Downs Agreement Act, sch 1, cll 7(1), 8(1)(6), 10(2). Other common issues requiring an additional proposal include increased groundwater abstraction or expansion lower into the water table, increased footprint, and so forth.

191 For example, above n 189, Hope Downs Agreement Act, sch 1, cl 10(2). Recent development proposals and additional proposals are not publicly available. The public cannot access State agreement documents from the State Records Office archive for 25 years (*State Records Act 2000* (WA), s 45). For example, any proposals for mine expansions after 1998 are not available from the archive.

192 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. EPA 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. See above n 12, EP Act, ss 39B, 40B for the definition of derived and strategic proposals .

193 Above n 93, Kragt, 7–9.

194 EPA, Brockman No. 2 Detrital Iron ore Mine, Ministerial Statement 131 (1991), condition 5 and undertaking 6.

195 Above n 194, Brockman Ministerial Statement, Pits I, 4, 4 Extension, 5, and 6. A closure condition requiring partial backfill of mine voids, 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.

196 Above n 194, Brockman Ministerial Statement, attachment 5 (2009), attachment 6 (2012).

197 See the map, figure 5.4 (extracted from the Part IV review documents). John Garnaut, "Sinosteel Losses Shut Rio Mine", *Sydney Morning Herald,* 12 December 2008; Karma Barndon, "A Pilbara History: a Potted History of the Pilbara", *Australia's Mining Monthly*, 19 February 2016.

198 Above n 194, Brockman Ministerial Statement, attachment 6 (2012).

199 EPA, Brockman 2 Detrital Iron Ore Mine Extension Phase 2B, Ministerial Statement 867 (2013), conditions 9–10.

200 Above n 199, Brockman Phase 2B, Ministerial Statement, condition 5. The proposal applies to Pit 4, the Pit 4 extension, Pit 6 and the valley Pit. As can be seen in the map, Figure 5.5, this may mean that other parts of the mine site (Pits 5 and 7 for example) may be subject to the prior implementation conditions.

201 Above n 199, Brockman Phase 2B, Ministerial Statement, Figure 1.

202 For example, above n 144, Paraburdoo Closure Plan: the Paraburdoo mining hub (under above n 50, Hamersley Agreement Act) encompasses all mines on the hub.

203 *Environmental Protection Act 1986* (WA) ss 45C, 46. The proponent may request s 46 amendment under s 45C or, the Environment Minister may request an amendment on their own initiative, while the Minister has rarely exercised this authority, the proponents have requested amendments for various reasons. For further explanation see above n 95. For example, see the proponents request under s 46 to supplement the Weeli Wolli spring. Environmental Protection Authority (WA), Report and Recommendations of the Environmental Protection Authority, Hope Downs Iron Ore Mine, 75km North-West if Newman, Pilbara Region – Change to Conditions of Ministerial Statement 584 under s46 of the EP Act (Report 1424, 15 December 2011) 2. The EPA records indicate that the Minister has not used utilised this authority for this purpose. Brown, above n 4, 179. Amendments or removals: Report and recommendations of the Environmental Protection Authority, Hope Downs 4 Iron Ore Project – inquiry under s46 of the Environmental Protection Act 1986 to delete conditions 8-2, 9-2 and 10-2 and amend conditions 5-1 and 8-3 of Ministerial Statement 854 (Report 1465) 2; Report and recommendations of the Environmental Protection Authority, Hope Downs Iron Ore Mine, 75 Kilometres North-West of Newman, Pilbara Region - Change to Conditions of Ministerial Statement 584 Under S46 of the EP Act (Report 1484, 15 December 2012) 2; Report and recommendations of the Environmental Protection Authority, Jack Hills Iron Ore Mine Project (Ministerial Statement 727) Proposed Change to Environmental Conditions under s46 of The EP Act (Report 1300 August 2008) 2; Report and recommendations of the Environmental Protection Authority, Ministerial Statements 805 and 806 – Karara Mining Ltd s46 condition changes (Report 1436, March 2012) 3/8; Report and recommendations of the Environmental Protection Authority, Mt Gibson Iron Ore Mine and Infrastructure Project, Shire of Yalgoo - Proposal Under s46 of the EP Act to Amend Condition 13 Fauna Management Along the Services Corridor, and Condition 15 Performance Bond (Ministerial Statement 753) 3; Report and recommendations of the Environmental Protection Authority, Roy Hill 1 Iron Ore Mining Project Stage 1–Section 46 Change to Condition 9 of Ministerial Statement 824 – Short Range Endemic Invertebrates (Report 1439 June 2012) 2/6; Report and recommendations of the Environmental Protection Authority, West Angelas Iron Ore Project – Inquiry under s46 of The Environmental Protection Act 1986 To Amend Implementation Conditions of Ministerial Statement 514 (Assessment No. 1914) (Report 1508, April 2014) 1-2. Expansions: Report and recommendations of the Environmental Protection Authority, Carina Iron Ore Mine – s46 request for amendments to Ministerial Statement 852 (Report 1494 November 2013) 2; Report and recommendations of the Environmental Protection Authority, Expansion of Ewington Coal Mine, Ewington II, Collie - proposed change to environmental conditions The Griffin Coal Mining Company Pty Limited (Report 1448, December 1994) (i), 1; Report and recommendations of the Environmental Protection Authority, Jimblebar rationalisation and planned expansion, (formerly McCamey's Monster Iron Ore mining proposal) BHP Iron Ore (Jimblebar} Pty Ltd Proposed changes to environmental conditions (Report 1452, March 1995) (i). Requests: Environmental Protection Authority, Weekly record of determinations for S38 Referrals, S16 and/or S46 Advice, Carina Iron Ore Mine. approximately 60 kilometres north-east of Koolyanobbing, Shire of Yilgarn - section Determination: 46 request to amend condition 5 – Ministerial Statement 852 (assessment no 1985, 22 October 2013); Environmental Protection Authority, Weekly record of determinations for S38 Referrals, S16 and/or S46

Advice, Ministerial Statement 824 - Roy Hill Iron Ore Mining Project - S46 request to change Condition 9 - Determination: Short-Range Endemic Invertebrates (assessment no 1923, 18 April 2012); Environmental Protection Authority, Weekly record of determinations for S38 Referrals, S16 and/or S46 Advice, Ministerial Statement 854 - Hope Downs 4 Iron Ore Project - section 46 request to change conditions 5-1, 8-2, 8-3, 9 and 10-2 (assessment no 1936, 8 July 2012); Environmental Protection Authority, Weekly record of determinations for S38 Referrals, S16 and/or S46 Advice, Solomon Iron Ore Project - section 46 request for changes to Condition 11 – Ministerial Statement 862 (assessment no 1981, 17 September 2013).

204 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 above n 4, Brown, (Part 2) 381–385, appendix [4.4].

205 Above n 27, Auditor General (2011), 33.

206 Response to author's email enquiry, Danielle Risbey, DMIRS A/General Manager Mine Closure and Environmental Services Resource and Environmental Compliance Division (11 December 2023).

207 Above n 20, Mining Act, s 114.

208 Above n 27, Auditor General (2011), 33; Above n 27, Safe.

209 Above n 27, Auditor General (2014), 6; DMIRS, Abandoned Mines Program; Mining Legacies, "Images and Impacts from Mining in Australia, WA".

210 Above n 27, Auditor General (2014), 12.

211 Above n 27, Auditor General (2014), 12.

212 Above n 27, Auditor General (2014), 19.

213 Ceased mines under the 1970s agreements, which are subject to the environmental clause and other environmental planning obligations may be an exception because these mines may have mine closure plan obligations imposed by the agreement, presumably managed by JTSI. Above 73, McCamey's Monster Act, sch 1, cll 7(2), 6(1)(i); Dr D Kelly, "State Agreement Acts", 64, K Webster, Assessment from the User Viewpoint (Government Sector), 153, Environmental Assessment Workshop Proceedings, Conservation and Environment Dept, WA, 20-23 July 1976.

214 AusIMM, P Smith, "BHP Iron Ore Pty Ltd Protocol for Mine Closure Goldsworthy, Western Australia" (Conference, "Managing Risk", Perth, September 1994). For examples of other potential legacy mines (mines operating under Pilbara agreements that have closed) see above nn 156, 159.

215 Mining Legacies, Images and Impacts from Mining in Australia, Goldsworthy. >

216 Above n 4, Johnson and Wright, Mine Void Water Resource Issues, 19 [4.1].

217 Above n 215, Mining Legacies. A 2003 study noted there was limited monitoring of the site, and that the proponent had recently initiated monitoring to comply with their corporate environmental responsibility (social licence). See above n 4, Johnson and Wright, Mine Void Water Resource Issues, 6 [2.2.1], 43. However, it is likely that post 2006, the Goldsworthy mine came within the ambit of the *Contaminated Sites Act 2006* (WA), see above n 215, Mining Legacies.

218 Australian Mining, BHP Mine Sale Halted by Acid Contamination (19 August 2013).

219 Above n 218.

220 Above n 119, Rio Tinto, "Closure, What Are Legacy Sites?" Rio Tinto has over 90 legacy assets in nine countries and states, "We manage a number of historic sites – known as legacy sites – some we did not operate but acquired through corporate acquisitions after they were closed. Where required, we rehabilitate these sites and, where and when we can, transfer them to local authorities or third parties for future land use."

221 For further discussion of legacy issues, see above n 4, Brown, 226–227.

222 Above n 12, EP Act, Part III, see also s 5 for application of policies as statute. See further above n 4, Brown, 232.

223 Above n 12, EP Act, ss 18–20. NB, s 86B: if a Part III policy required review of mine closure plans under Part IV, financial assurance conditions could be applied.

224 See above n 4, Brown, Chapter 5 [2.1], 179, 234, for discussion of cumulative impacts in the Pilbara; see 177 for discussion of current alternative agricultural land use to manage mine dewater such as Rio Tinto's HAP project. On the need to diversify the Pilbara economy see OECD, *Policy Highlights, Pilbara Australia, OECD Mining Regions and Cities* (2023.

225 Julia Keenan, Sarah Holcombe, "Mining as a Temporary Land Use: A Global Stocktake of Post Mining Transitions and Repurposing" (2021) 8(3) *The Extractive Industries and Society*, 1, 4–8.

226 Above n 31, Genex Power.

227 Above n 4, Brown, 247–250.

228 Above n 12, EP Act, ss 26, 35.

229 *Conservation Council of WA v Minister for Environment; Disability Services* [2019] WASCA 102 [92] citing *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority* (1996) 90 LGERA 136. While these cases discuss 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.

230 *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority* (1996) 90 LGERA 136, 140, 147–148; *Conservation Council of Western Australia (Inc) v The Honourable Stephen Dawson MLC* [2018] WASC 34, [87]; Peter Quinlan, EM Heenan and SU Govinnage, *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the Environmental Protection Act 1986*

(6 May 2016) [3.63]. These cases relate to Part IV, however, there is no indication that the Environment Minister's considerations and discretion would be different in relation to Part III policies.

231 *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 4, 237 [4.1].

232 Above n 12, EP Act, ss 26–32, 33(2). See, e.g., WA Government Gazette, 20/11/2015, Pt 2, 4715, Jacob (Minister for the Environment), EV 402, *Environmental Protection Act 1986, Environmental Protection (Swan Coastal Plain Lakes) Policy Revocation Order 2015,* approval under s 31(d) revoked under s 33(2).

233 Deloitte Access Economics, "2015–2025 Western Australian Resources Sector Outlook" (Chamber of Minerals and Energy of Western Australia, 2014).

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

235 Above n 4, Brown, 308; Nigel Bankes, Sharon Mascher, Martin Olszynski, "Can Environmental Laws Fulfil Their Promise? Stories from Canada" (2014) *Sustainability* 6024, 6027.

236 Alberta Government, *Integrated Resource Plans*, 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.

237 For Collaborative Stewardship Reports, see Alberta Government, Open Government Program, Oil Sands Monitoring Program: Integration Workshop Reports, Parts 1 and 2 (2019).

238 Minerals Council of Australia, *Towards Sustainable Mining*. See link to Mining Association of Canada, TSM.

239 Alberta Government, Alberta Oil Sands Information Portal, Interactive Map.

240 Above n 239, Data Library.

241 Above n 239, Data Library, Reporting Source: Athabasca Oil Corporation, Athabasca Oil Hangingstone Industrial Waste Water Reports: 2012, 2013. Further resources, RAMP, Region Aquatic Monitoring Program.

242 *Mineral Resources (Sustainable Development) Act 1990* (Vic); Resources Victoria, "Latrobe Valley Regional Rehabilitation Strategy" (2023).

243 Alex Gardner, et al., *Rehabilitation of the Latrobe Valley Coal Mines – Integrating Regulation of Mine Tehabilitation and Planning for Land and Water Use* (CRC TiME Ltd, Project 1.3, December 2022) 23 [2] https://crctime.com.au/research/projects/project1c/.

244 See above n 27, Auditor General (2011), 15–17, 25, for an example of the EPA's capacity to oversee and audit compliance. See further, above n 4, Brown, 247, [4.4].

245 NOPSEMA, Australia's Offshore Energy Regulator, Industry Levies and Fees.

246 *Water Act 2000* (Qld), ss 3A, 479; Queensland Government, *Office of Groundwater Impact Assessment*. For knowledge database example see Queensland Government, Water Monitoring Information Portal. See also above n 4, Brown, 286–288.

247 Above n 4, Brown, 287 [4.2].

248 Above n 246, Qld Water Monitoring Information Portal.

249 See this article Part 0. The proponents indicate that sufficient funding is allocated for this purpose. However, this information is generalised and does not identify specific site costs: for example, above n 119, Rio Tinto, Closure, Sustainability Reporting,

250 Above n 177, Mining Amendment Act (as passed, 31 of 2022), ss 103AR–103AT. Note the recent amendments to the Mining Act closure plan requirements do not affect Pilbara mines.

251 The current practice is that the EPA and DMIRS jointly develop the closure guidelines and the DMIRS closure guidelines are applied as a standard implementation condition.

252 The *Aboriginal Heritage Act 1972* (WA) in conjunction with the State agreement rights allowed for the legal destruction of the 46,000-year-old Juukan Gorge: see ANTAR, "The Destruction of the Juukan Gorge". The WA Government amended the Act to prevent a recurrence: see "Laws Overturned: Aboriginal Cultural Heritage Legislation Replaced", Media Release, 8 August 2023.

253 Nicholas Perpitch and Charlie Mills, "Rio Tinto Say Ancient Aboriginal Rock Shelter near Tom Price Suffered No Major Damage During Blast", ABC News, 9 October 2023; Sarah Collard, "Traditional Owners Left to Pick Up the Pieces after Sacred Rock Shelter Damaged in Rio Tinto Blast", *The Guardian*, 25 September 2023; Garrett Mundy and Rachel Pupazzoni, "Rio Tinto Blast Damages Ancient Rock Shelter near Iron Ore Mine in WA's Pilbara", ABC News, 22 September 2023.

254 Above n 253, Mundy and Pupazzoni.

255 Above n 253, Perpitch and Mills.

256 Above n 253, Mundy and Pupazzoni..

257 WA Hansard, *Parliamentary Debates,* Legislative Council, 11 August 2011, 5631–5632 (Jon Ford); above n 27, Auditor General (2004), 26–27; above n 27, Auditor General (2011); above n 27, Auditor General (2014); above n 27, Standing Committee4.17]; above n 27, Cleary, 190–191; above n 27, Fitzgerald, 3; above n 27, Hillman, 299, 306, 307; above n 27, Keating, 101 [5.6]; above n 27, Southalan et al, 3, 8–11, 21–22.

RECENT DEVELOPMENT

POWERING CONSUMER PROTECTIONS: WHY DECENTRALISED AND DISTRIBUTED ENERGY RESOURCES WARRANT A NEW LENS ON CONSUMER PROTECTION REGULATIONS

Rhea Rachel

Environmental Engineer and Master of Environmental Law candidate at Sydney Law School.
The author, an employee of a NSW Government Agency, has produced this article in an individual capacity: it does not represent the views of the author's employer.

Recent years have seen distributed energy resources usher in a new era of self-generation and reduced reliance on traditional centralised energy networks. Australian customers are increasingly enabled to access unconventional "behind the meter" energy sources and contribute to a two-way flow of energy back to the grid. Simply put, these services are altering the very landscape of electricity generation and distribution upon which Australia's energy consumer protection laws have been designed to date. Against this backdrop of a changing energy landscape, this paper examines why new energy technologies warrant a new lens on Australia's consumer protection regulations, calling for a new definition of "energy supply", and for the future-proofing of Australia's customer frameworks so that further technological advances do not render existing frameworks redundant. It discusses the challenges in applying existing policy frameworks to new energy services, and the need for a suite of rules and regulations to fill potential gaps in policies and promote competition in the new energy environment.

1 INTRODUCTION

Recent years have seen a rapid increase in the development and implementation of new decentralised energy technologies and distributed energy resources (DERs) in Australia. These services (including load aggregation, virtual power plants and shared hot water systems) each offer novel energy services for customers during a period of drastic energy transition across Australia. Australian customers are increasingly enabled to access unconventional "behind the meter" energy sources and contribute to a two-way flow of energy back to the grid. These services, alongside the growing uptake of residential solar battery storages, are gradually ushering in a new era of self-generation and reduced reliance on centralised electricity networks. In other words, DERs are beginning to alter the very landscape of electricity generation and distribution upon which the majority of Australia's energy consumer protection laws have, to date, been designed.

In light of the growing uptake in DERs, government agencies, regulators, and consumer advocacy groups alike have become increasingly vocal about the need for new consumer protections. In April 2019, the Clean Energy Council, the Australian Energy Council, the Smart Energy Council and Energy Consumers Australia submitted an application to the Australian Competition and Consumer Commission (ACCC) for a voluntary New Energy Tech Consumer Code (NETCC) – a set of minimum standards for consumer protection in new energy technology.[1] In April 2022, the Australian Energy Regulator (AER) commenced its review of consumer protections for future energy services, with the aim of assessing the applicability of the National Energy Customer Framework (NECF) in the current transitioning energy market.[2] Similarly, in November 2022, the Victorian Department of Environment, Land, Water and Planning (DELWP)[3] released a consultation paper on the protections for consumers of DERs [4], and, within New South Wales, the Independent Pricing and Regulatory Tribunal (IPART) is expected to commence a review of the future of embedded networks in 2023.[5] Suffice it to say there is currently considerable regulatory attention towards the policy implications of new energy technologies across Australia.

Within this backdrop of a changing energy landscape, this paper aims to examine why DERs warrant a new lens on consumer protections in Australia. Overall, there appear to be two key themes within regulatory discourse on this issue this far: first, the fundamental and overarching uncertainties in relation to the application of existing regulatory frameworks to DERs, and, second, the need for a suite of technical rules and regulations to fill potential gaps in DER consumer protections.

2 Regulatory Uncertainties with the Application of Existing Consumer Protection Frameworks to DERs

Most consumer protections in Australia are governed by the Australian Consumer Law (ACL), which consists primarily of the *Competition and Consumer Act 2010* (Cth)[6], and the *Competition and Consumer Regulations 2010* (Cth). This legislation sets the framework for a single national consumer law, creates a national legislative scheme for statutory consumer protections, and incorporates minimum fair trading and consumer protection provisions.[7] While the ACL applies to virtually all Australian consumer products, energy services are acknowledged as requiring an additional set of consumer protections because of the essential nature of energy supply (i.e., its "essentiality").[8] Therefore, consumer protections for traditional energy services are governed by an additional set of regulations under the NECF[9]. The NECF is administered by the AER, applies solely to entities "selling energy to customers at premises", and hinges upon the principle that the essentiality of energy warrants additional protections to consumers.[10]

Within this context, regulatory uncertainties arise as to how and where DERs fit into the existing ACL and NECF frameworks. For the purposes of this paper, these issues are considered overarching and are discussed separately from the technical issues outlined in Part 3.

2.1 Uncertainties in the Definition of the Essentiality of New Energy Services

One of the key issues with distributed energy resources is whether they meet the NECF's definition of an essential energy service. For example, households and retail customers are being offered novel energy services, such as energy management software, that allow remote control of customer's energy consumption and provide energy aggregation services that can temporarily reduce or stop a customer's energy supply. These services, while not essential themselves, certainly impact the supply of otherwise essential electricity and gas services to customers.

Given these developments, it is currently unclear whether new energy services, such as virtual power plants and load aggregation, meet the definition of essentiality, and, consequently, whether customers of these services should be granted the same NECF consumer protections that would otherwise be available under the traditional models of retailer-supplied energy services. However, many energy regulators have identified that the new definition of essentiality will be a major consideration in the future regulatory reform of the NECF, and that there is a high likelihood that the essential nature of energy products and services will change as a result.[11]

2.2 Consumer Confusion Surrounding Applicability of the ACL and NECF for Bundled Energy Services

As pointed out by the AER, the distinction between NECF-protected services, and non-NECF-protected services is becoming increasingly blurred with the introduction of new bundled energy services.[12] Consequently, there is growing consumer confusion regarding their rights under the NECF versus the ACL for different aspects of their energy services. For example, many households with solar photovoltaic (PV) installations and battery storages also utilise, to some degree, retailer-supplied electricity from the grid. In this instance, their energy services are regulated under two separate consumer protection frameworks, namely, the ACL for the supply of the battery and solar PV systems, and the NECF for the supply of electricity from the grid.[13] This selectivity of consumer protection has been shown to lead to greater confusion regarding consumer rights and protections, as pointed out in a recent study on consumer complaints by the Water and Energy Ombudsman NSW.[14]

2.3 Regulatory Loopholes in the Definition of "Supply of Energy" within the Context of New Energy Services

Under the Retail Law (the governing legislation of the NECF) a retailer authorisation is required when the activity involves "selling energy to a person for premises".[15] Increasingly, however, new energy technologies, including shared or community water heaters, appear to fall outside this definition of "energy", while arguably still meeting the requirement of essentiality as discussed in Part 2.1. For example, newer models of community or shared water heaters (seen typically in high-density apartment blocks) calculate usage based on the volume of heated water supplied to each customer (i.e., in litres). This differs from traditional household-level water heaters, which measure usage via the volume of energy consumed in the heating of water (i.e., in megajoules).

Customers who are supplied heated water through these newer technologies are therefore afforded fewer consumer protections than would otherwise be the case for traditional energy services. This is because the sale of heated water through embedded networks, when charged per litre, reveals two significant regulatory loopholes:

- First, that the NECF does not apply because the National Energy Retail Law defines energy as "electricity or gas or both", and therefore implicitly excludes heated water services from its scope.[16]
- Second, that the sellers of heated or chilled water services are exempt from obtaining a licence under the *Water Industry Competition Act 2006* (NSW), meaning that any specific consumer protections for water supply services also do not apply to community heated water systems.[17]

In 2020, the Water and Energy Ombudsman NSW found that 29% of gas-related complaints from customers in apartments or strata scheme complexes pertained to community hot water services, with many customers lodging complaints regarding inaccurate billing.[18] This highlights a demonstrable issue in the way that the National Energy Retail Law and the NECF define energy services going forward.

3 Filling the Gaps in DER Consumer Protections

Aside from the overarching regulatory uncertainties discussed above, there is additionally a suite of technical rules and regulations to fill in the consumer protection gaps created by DERs and associated energy technologies. A few of these key issues are discussed in the sections that follow.

3.1 Retailer of Last Resort Provisions

Retailer of last resort (RoLR) provisions are a key feature of the NECF, and form the fundamental regulatory tool to ensure the continuation of energy supply to customers in the event of retailer failures[19]. Under the RoLR scheme, the AER makes arrangements to transfer customers of failed retailers to other retailers in order to maintain a constant supply of electricity or gas.[20] The RoLR provisions are an integral component to protecting the essentiality of energy supply and ensuring that customers are not disadvantaged due to retailer failures.

DERs that do not fall under the scope of the NECF (for example, those that do not meet the criteria of "essentiality" or a "supply of energy" as discussed in Part 2 above) do not provide any RoLR protections for customers. As a result, customers of some DERs (such as battery storage devices) are left at risk of losing access to their energy without notice, in the event that their retailer's business fails. As highlighted in the AER's recent review of customer protections for future energy services, ensuring that the RoLR framework is expanded to encompass any potential changes to the definition of "supply of energy" under the NECF will be critical for ensuring suitable protections for DER customers.[21] As an added benefit, expanding RoLR provisions to encompass DERs can be reasonably expected to drive customer trust in, and therefore demand for, DER services and products themselves.

3.2 Retail Price Controls for Customers in Embedded Networks

Another significant regulatory issue that arises for customers of embedded networks is the frequency of tariff variations and insufficient price controls. Under the National Energy Retail Rules (NERR), traditional energy retailers are prohibited from charging customers more than the AER's standing

offer price cap. In other words, regulated retailers are legally obliged to offer customers, at most, the standing offer price cap.[22]

In its 2019 review of regulatory frameworks for embedded networks, the AEMC found that some customers in embedded networks were being charged more than the permitted maximum price for customers in traditional energy networks.[23] These findings were also supported by a recent NSW Parliamentary Committee study into the regulatory frameworks for embedded networks.[24] In light of this, the AEMC recommended that a new regulatory framework be adopted to provide greater access to retail competition for customers in embedded networks. It additionally recommended that the NERR be amended to provide greater clarity regarding the AER's power to set a price cap for embedded networks that is lower than or equal to the standing offer.[25] While there has been considerable regulatory attention recently on the expansion of the standing offer to embedded networks[26], to date this rule change is yet to be implemented.

It should be noted, however, that the AER's standing offer price cap is representative of a pre-determined maximum price – meaning that, in many instances, this price can be reasonably higher than the market offer price. As a result, even with the potential implementation of the price cap to embedded networks, many on-sellers within embedded networks may have no incentive to acquire energy at a more cost-efficient market rate to pass on to their customers. Regulators and policy makers should therefore consider whether further regulatory reform is warranted to ensure that embedded network operators are afforded the right incentives to provide embedded networks customers the efficient price of energy.

3.3 Dispute Resolution Avenues

Numerous recent national and jurisdictional-level policy enquiries have found that customers of new energy services are not provided the same access to independent and specialised dispute resolution services as customers of traditional energy services. This poses a significant risk of customers of new energy technologies not realising their customer rights, and new energy retailers not being subject to the same consumer protection regulations as retailers of otherwise traditional services.

In light of this issue, the AEMC's 20 review of regulatory frameworks for embedded networks recommended that the jurisdiction of energy Ombudsman schemes be extended for new energy technologies and services – including those not currently covered by the NECF.[27] Similarly, the 2020 report on the future of Ombudsman schemes (commissioned by the Australian and New Zealand Energy and Water Ombudsman Network), recommended that Australian Ombudsmen consider extending their jurisdiction to the *"sale or supply of energy, or that may otherwise interrupt the supply of energy or impact upon the sale or supply of it"*.[28] While there has been no widespread expansion of Ombudsman jurisdictions as yet, the NETCC includes provisions to allow providers of new energy services to utilise local Ombudsman schemes for their dispute resolution processes.[29] Importantly, however, this code remains voluntary in nature and relies upon the initiative of service providers to become signatories to the code.

3.4 Access to Competition and Creation of Implicit Monopolies

One of the key issues associated with some embedded networks is the removal of customers' access to market competition. For example, meters at customer connection points within embedded networks are currently not registered within AEMO's retail market system – meaning that competing retailers are unable to locate customer data to provide quotations for services, or to transfer customers between retailers.[30] This creates a significant practical barrier for embedded network customers accessing competition and switching providers with relative ease, and has the negative effect of creating an implicit monopoly on energy supply.

Lowering barriers to entry and facilitating customer movement between energy retailers are both fundamental metrics of a well-functioning competitive market. Accordingly, considerable regulatory attention should be drawn to improving access to competition for embedded networks customers by integrating embedded networks data within AEMO's systems. To this end, the AEMC's 2019 review of embedded networks recommended a new framework to ensure that off-market retailers appoint metering coordinators responsible for registering customer connection points with the AEMO.[31] While this recommendation would substantially lower the barriers to competition, considerable

monitoring and verification may be warranted to ensure that customers in existing or legacy embedded networks also benefit from these rule changes.

4 Conclusion

The regulatory issues discussed here are by no means an exhaustive list of the challenges currently faced in providing consumer protections for customers of DERs. Rather, this paper simply points out the key reasons why DERs warrant a reconsideration of Australia's consumer protection frameworks that have been designed to date with a traditional energy supply model in mind.

Overall, it is evident that the growth and uptake of new energy technologies has occurred at a pace far more rapid than policy and regulatory developments, consequently yielding some consumer protection loopholes and unfavorable outcomes for retail competition. Accordingly, there is a critical need to ensure that the NECF is future-proofed so that further advances in technology do not cause existing customer frameworks to become redundant. Regulators and policy makers should consider reforming the NECF to be robust in its consumer protections, yet flexible in its definition of energy supply going forward. And, as highlighted aptly by the AEMC, "consumer protections should be driven by the needs of consumers, rather than the business model of the supplier".[32]

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1 Clean Energy Council, Australian Energy Council, Smart Energy Council, Energy Consumers Australia, Application for ACCC Authorisation - New Energy Tech Consumer Code, April 2019.

2 AER, *Review of Consumer Protections for Future Energy Services*, October 2022.

3 Now the Department of Energy, Environment and Climate Action (DEECA), Victoria.

4 Department of Environment, Land, Water and Planning (Vic), *Protections for Consumers of Distributed Energy Resources Consultation Paper*, November 2022.

5 IPART, Terms of Reference, The Future of Embedded Networks in NSW, 5 June 2023.

6 See Competition and Consumer Act 2010, vol. 4, sch. 2, for a full text of the Australian Consumer Law.

7 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth), 3.

8 AEMC, *Non-traditional Energy Services and Products*.

9 The NECF applies to all Australian States and Territories, with the exception of Victoria (where it applies only in part), Western Australia and the Northern Territory.

10 AER, *Retailer Authorisation and Exemption Review: Issues Paper, April 2022*, 13, 22.

11 Above n 2, AER, 7.

12 Above n 2, AER. 7.

13 Above n 8, AEMC.

14 Energy & Water Ombudsman NSW, *Consumer Protections Failing Thousands of Renewable Energy Customers*, 31 May 2022.

15 *National Energy Retail Law (NSW) No 37a of 2012*, s 88(1)

16 Energy & Water Ombudsman NSW, *Hot Water Embedded Networks*, March 2021.

17 Above n 16, Energy & Water Ombudsman NSW.

18 Above n 16, Energy & Water Ombudsman NSW.

19 In this instance, a retailer failure refers to those events resulting in a "RoLR event", as defined in above n 15, *National Energy Retail Law,* s 122.

20 AER, *Retailer of Last Resort Plan*, July 2015, 4.

21 Above n 2, AER, 16.

22 *National Energy Retail Rules (17.08.2023)*, Rule 152(4).

23 AEMC, *Updating the Regulatory Frameworks for Embedded Networks*, Final Report, 20 June 2019, iv-v.

24 NSW Parliament Committee on Law and Safety, *Embedded Networks in New South Wales*, November 2022, 16-17.

25 Above n 23, AEMC, 94.

26 See for example, Department of Climate Change, Energy, the Environment and Water, *Consultation on Implementation of 2022 Default Market Offer Review Outcomes*.

27 AEMC, *2020 Retail Energy Competition Review – Final Report*, 30 June 2020, 257-258

28 University of Sydney, *What Will Energy Consumers Expect of an Energy and Water Ombudsman Scheme in 2020, 2025, 2030?*, 15 October 2019, 5.

29 Above n 27, AEMC, 258.

30 Above n 23, AEMC, iii.

31 Above n 23, AEMC, x-xi.

32 Above n 23, AEMC, iv.

RECENT DEVELOPMENT

SANTOS V TIPAKALIPPA: JUDICIAL GUIDANCE ON THE REQUIREMENTS FOR OFFSHORE PETROLEUM EP CONSULTATION

Tom Barrett

Special Counsel, Energy & Resources, Johnson Winter Slattery

In the Santos v Tipakalippa decision, the Full Federal Court has given guidance to offshore petroleum titleholders in respect of the consultation obligations that they need to satisfy in order to obtain NOPSEMA's acceptance of environment plans that they submit for the purposes of conducting their respective petroleum activities. The Full Federal Court's decision may, however, have wider impacts, including on the consultation that may be required to be undertaken by a project proponent under the Commonwealth Offshore Electricity Infrastructure legislation in order to develop an offshore renewable energy project.

1 Introduction

The Full Court of the Federal Court of Australia handed down its decision in *Santos NA Barossa Pty Ltd v Tipakalippa and Another*[1] (the Tipakalippa Decision) on 2 December 2022.

The Tipakalippa Decision gives judicial guidance to holders of petroleum and greenhouse gas titles under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (the Act) in respect of the consultation obligations that they need to satisfy in order to obtain the National Offshore Petroleum Safety and Environmental Management Authority's (NOPSEMA) acceptance of environment plans that they submit for the purposes of conducting their respective petroleum or greenhouse gas activities.[2]

The Tipakalippa Decision, and the first instance decision of *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)*[3] (the First Instance Decision), have been handed down in the context of increased public scrutiny of, and concern for, the effects of oil and gas projects in Australia on climate change and Australia's ability to meet its net-zero emissions target.

2 Background

At the time of the First Instance Decision and the Tipakalippa Decision, Santos NA Barossa Pty Ltd (Santos) and its joint venture partners were, and still are, the holders of petroleum production licence NT/L1 under the Act and proposing to undertake the project known as the "Barossa Project". That project involves the recovery of natural gas and condensate from the Barossa Field located within the NT/L1 licence area. The Barossa Field is located approximately 300 km north of Darwin and 138 km north of the Tiwi Islands.[4]

In order to recover natural gas and condensate from the Barossa Field, Santos proposed to drill and complete up to 8 production wells within the NT/L1 licence area.[5] As a pre-requisite to undertaking those activities, Santos and its joint venture partners were (and still are) required by the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (the Regulations) to have an environment plan for those activities that is in force.[6] Under the Regulations, an environment plan is in force if the plan has been accepted by NOPSEMA, that acceptance has not been withdrawn and the operation of that plan has not ended.[7]

On 6 October 2021, Santos submitted to NOPSEMA, in accordance with the Regulations, an environment plan in respect of the drilling and completion of up to 8 production wells within an area described in the plan as the "Operational Area" (being an area within the NT/L1 licence area).[8]

Between 6 October 2021 and 14 February 2022, Santos and NOPSEMA corresponded in relation to NOPSEMA's acceptance of Santos's environment plan. That correspondence involved requests by NOPSEMA for additional information and the provision by Santos of revised versions of its environment plan.[9] On 14 February 2022, Santos submitted to NOPSEMA "Revision 3" of its environment plan that was dated 11 February 2022 (Drilling EP) and, on 14 March 2022, NOPSEMA's delegate accepted the Drilling EP for the purposes of the Regulations.[10]

Mr Dennis Murphy Tipakalippa is an elder, senior law man and traditional owner of the Munupi clan, who lives, and has always lived, on the Tiwi Islands and within Munupi country.[11] The Munupi clan is one of the 8 clans that comprise the traditional owners of the Tiwi Islands.[12] The traditional land of the Munupi clan is the geographically closest land to the Operational Area.[13]

Mr Tipakalippa sought judicial review of the decision of NOPSEMA's delegate to accept the Drilling EP pursuant to s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). That application for judicial review resulted in the First Instance Decision.

The primary claim under Mr Tipakalippa's judicial review application was that he, the other Munupi clan members and the other Tiwi Islands traditional owners were not consulted by Santos in the course of its preparation of the Drilling EP, contrary to the requirements of the Regulations. Mr Tipakalippa argued that the Regulations required Santos to consult with him, the other Munupi clan members and the other Tiwi Islands traditional owners because they have "sea country" in the Timor Sea, including the parts of the Timor Sea in which the Operational Area was located, which meant that they had "interests" for the purposes of the consultation requirements of the Regulations.

In essence, Mr Tipakalippa argued in his primary claim that such failure by Santos to consult with him, the other the Munupi clan members and the other Tiwi Islands traditional owners meant that NOPSEMA could not have been reasonably satisfied that the Drilling EP demonstrated that the consultation required by the Regulations had been carried out by Santos.

In the First Instance Decision, Bromberg J ultimately accepted Mr Tipakalippa's primary claim and found that NOPSEMA could not have been reasonably satisfied that the Drilling EP demonstrated that Santos had undertaken the consultation required by the Regulations.[14] Accordingly, Bromberg J set aside the decision of NOPSEMA's delegate to accept the Drilling EP.

Santos appealed the decision of Bromberg J in the First Instance Decision and NOPSEMA (the second respondent in the Tipakalippa Decision) supported that appeal.

3 The Tipakalippa Decision

As mentioned, the Tipakalippa Decision concerned Santos's appeal of the decision of Bromberg J at first instance. The primary issue in the Tipakalippa Decision was the meaning of "functions, interests or activities" within reg 11A(1)(d) and whether Mr Tipakalippa and the other Munupi clan members had "interests" within the meaning of that regulation such that Santos was required to consult with them in preparing the Drilling EP.

Kenny and Mortimer JJ gave a joint judgment in the Tipakalippa Decision, with Lee J giving separate reasons. All justices dismissed Santos's appeal and upheld Bromberg J's orders in the First Instance Decision.

3.1 Relevant Legislative Provisions

Before discussing the decision of the Full Court in the Tipakalippa Decision, it is pertinent to set out the relevant provisions of the Regulations.

While the Regulations are in force as at the time of writing,[15] the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth) (the 2023 Regulations) have been made and are set to commence and replace the Regulations on and from 10 January 2024. Set out at the end of this article is a table detailing the relevant provisions of the Regulations and the corresponding provisions in the 2023 Regulations. While the drafting of the corresponding provisions of the 2023 Regulations has been amended in certain respects, those provisions have substantially the same effect as the relevant provisions of the Regulations.

Regulation 3 sets out the objects of the Regulations, which include ensuring that any petroleum activity is carried out in a manner consistent with the principles of ecologically sustainable development set out in s 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act). Section 3A of the EPBC Act provides that the principles of ecologically sustainable development include that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations and the principle of intergenerational equity.

Regulation 4 defines "environment" to include ecosystems and their constituent parts, including people and communities, the heritage value of places, and social, economic and cultural features.

Regulation 6 provides that a petroleum titleholder commits an offence of strict liability if it undertakes a petroleum activity and there is no environment plan in force for that activity.[16]

At the time of the First Instance Decision and the Tipakalippa Decision, Santos and its joint venture partners were "petroleum titleholders" (being the holders of NT/L1), and the drilling and completion activities the subject of the Drilling EP were "petroleum activities", in each case within the meaning of the Regulations.

Regulation 9(1) provides that, before a petroleum titleholder commences a petroleum activity, it must submit an environment plan for that activity to NOPSEMA.

Once an environment plan has been submitted by a petroleum titleholder to NOPSEMA, reg 10 requires and entitles NOPSEMA and the petroleum titleholder to undertake certain steps before NOPSEMA is ultimately required to accept (whether in whole or part or subject to limitations or conditions) or reject the environment plan (including as may have been re-submitted by the petroleum titleholder).

Under reg 10, in order for NOPSEMA to accept an environment plan in full and without such acceptance being subject to any limitations or conditions, NOPSEMA must be reasonably satisfied that the environment plan meets the criteria set out in reg 10A.[17]

The criteria set out in reg 10A(g) are that the environment plan must demonstrate that:

(i) the petroleum titleholder has carried out the consultations required by reg 11A; and
(ii) the measures (if any) that the petroleum titleholder has adopted, or proposes to adopt, because of the consultations are appropriate.

Regulation 11A(1) in effect requires a petroleum titleholder to, in the course of preparing an environment plan, consult each person who is a "relevant person". Regulation 11A(1)(d) has the effect that a person or organisation whose "functions, interests or activities" may be affected by the activities to be carried out under the relevant environment plan is a "relevant person".

Regulation 11A also provides that a petroleum titleholder must, in relation to its consultation with a relevant person:

(i) give the relevant person sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the applicable petroleum activities on the relevant person's functions, interests or activities; and
(ii) allow the relevant person a reasonable period for the consultation.[18]

3.2 The Meaning of "Functions, Interests or Activities"

At the outset of their reasons on the proper meaning of "functions, interests or activities" in reg 11A(1)(d), Kenny and Mortimer JJ stated that, because the Regulations establish a substitute decision-making process for the purposes of the EPBC Act, the Regulations must be construed consistently with the EPBC Act.[19] This finding is important given there is currently a dearth of case law considering the interpretation of the Regulations and it gives some guidance in the event of future issues in respect of the interpretation of the Regulations.

Kenny and Mortimer JJ opined that the phrase "functions, interests or activities" in reg 11A(1)(d) should be construed broadly, as such a construction best promotes the objects of the Regulations, and in so doing rejected Santos's proposed narrow construction of that phrase.[20] In rejecting Santos's proposed narrow construction, Kenny and Mortimer JJ noted that the proposed narrow

construction would not promote the principles of ecologically sustainable development set out in s 3A of the EPBC Act.

It is apparent from the reasons of Kenny and Mortimer JJ that, in finding that the phrase "functions, interests or activities" should be construed broadly, their Honours placed significant weight on the references to "people and communities", "the heritage value of places" and "social, economic and cultural features" in reg 4 and to "environmental, social and equitable considerations" and "inter-generational equity" in s 3A of the EPBC Act.

Indeed, in this regard, Kenny and Mortimer JJ stated, "whether and to what extent offshore petroleum…activity is to be permitted depends, amongst other things, on the potential effect of the activity on people and communities, on equitable concerns (including the principle of inter-generational equity) as well as on the natural world."[21]

Lee J also accepted that the phrase "functions, interests or activities" in reg 11A(1)(d) should be broadly construed.[22]

All Justices opined that, even though "functions, interests or activities" in reg 11A(1)(d) is a composite phrase, each concept has a distinct meaning and each must be given work to do.[23] The Justices made the following findings in respect of each of those concepts:

(i) Kenny and Mortimer JJ found that "functions" in reg 11A(1)(d) refers to a power or duty to do something.[24] Similarly, Lee J found that "functions" in reg 11A(1)(d) refers to an existing power or duty pertaining to an office or role;[25]

(ii) all Justices found that the reference to "activities" in reg 11A(1)(d) is not a reference to an "activity" (and thereby a "petroleum activity" or "greenhouse gas activity") as defined in reg 4;[26]

(iii) Lee J found that the reference to "activities" in reg 11A(1)(d) has its ordinary English meaning, being a thing that a person or group does;[27]

(iv) Kenny and Mortimer JJ found that the reference to "interests" in reg 11A(1)(d) should not be narrowly construed nor confined to legal interests.[28] Instead, Kenny and Mortimer JJ found that the reference to "interests" in reg 11A(1)(d) should conform to the accepted concept of "interest" in other areas of public administrative law.[29] In this regard, Kenny and Mortimer JJ found that the reference to "interests" in reg 11A(1)(d) includes "any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation";[30] and

(v) similarly, Lee J found that the reference to "interests" in reg 11A(1)(d) should not be narrowly construed nor confined to legally cognisable interests.[31] Lee J found that a person or organisation will have an "interest" within the meaning of reg 11A(1)(d) if that person or organisation has "an interest (in its usual sense) [that] is readily recognisable to the titleholder as being an existing interest over and above a member of the public at large".[32]

3.3 Did Mr Tipakalippa and the Other Munupi Clan Members Have "Interests"?

In their lead judgment, Kenny and Mortimer JJ considered the nature of the interests claimed by Mr Tipakalippa and the other Munupi clan members.

Kenny and Mortimer JJ found that Mr Tipakalippa and the other Munupi clan members had traditional connection to at least part of the sea, and the marine resources, within what the Drilling EP described as the "existing environment that may be affected" (the EMBA).[33] The EMBA was in effect the area of the environment that may have been contacted by hydrocarbons following their release (or spill) from the Operational Area.[34] In coming to this conclusion, Kenny and Mortimer JJ noted that the Drilling EP and its attachments contained material acknowledging:

(i) the traditional connection of Tiwi Islanders and other First Nations groups to the sea and marine resources within the EMBA; and

(ii) the potential adverse effect of the petroleum activities the subject of the Drilling EP on marine resources that were integral to Tiwi Islanders' traditional culture and custom.[35]

After determining that Mr Tipakalippa and the other Munupi clan members had traditional connection to the sea and marine resources within the EMBA, Kenny and Mortimer JJ considered whether those interests were "interests" within the meaning of reg 11A(1)(d).

Kenny and Mortimer JJ opined that whether the interests of Mr Tipakalippa and the other Munupi clan members were "interests" within the meaning of reg 11A(1)(d) was a "matter of fact and degree".[36] Their Honours went on to find that the interests of Mr Tipakalippa and the other Munupi clan members were "immediate and direct" and "well known to contemporary Australian law".[37]

Ultimately, Kenny and Mortimer JJ found that the interests of Mr Tipakalippa and the other Munupi clan members were "interests" within the meaning of reg 11A(1)(d).[38] Their Honours also further found that "interests" within the meaning of reg 11A(1)(d) include "cultural and spiritual interests of the kind described in the sea country material described in the Drilling EP and attachments". Accordingly, their Honours confirmed more broadly that the connection of traditional owners to sea country is an "interest" within the meaning of reg 11A(1)(d).

This finding is important given that Kenny and Mortimer JJ had, earlier in their reasons, acknowledged that Mr Tipakalippa and the other Munupi clan members did not have any rights in respect of the sea and marine resources within the EMBA by virtue of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or the *Native Title Act 1993* (Cth).

Lee J also found, for similar reasons, that the interests of Mr Tipakalippa and the other Munupi clan members were "interests" within the meaning of reg 11A(1)(d).[39]

3.4 Workability of the Broad Meaning of "Interests"

After finding that the interests of Mr Tipakalippa and the other Munupi clan members were "interests" within the meaning of reg 11A(1)(d), Kenny and Mortimer JJ went on to consider the arguments raised by Santos and NOPSEMA to the effect that adopting such a construction of "interests" would make reg 11A(1) "unworkable" and such unworkability supported a contrary construction being adopted.

Santos and NOPSEMA had argued that the construction of "interests" in reg 11A(1)(d) must "permit the ready ascertainment of persons who have those interests".[40] While Kenny and Mortimer JJ accepted that persons with "interests" must be "reasonably capable of ascertainment", their Honours concluded that such acceptance did not derogate from their preferred construction of "interests".[41] In this regard, Lee J opined that "interests" within the meaning of reg 11A(1)(d) must be readily ascertainable.[42]

Kenny and Mortimer JJ opined that the case law on s 251B of the *Native Title Act 1993* (Cth) demonstrated that there was nothing unworkable about a construction of "interests" in reg 11A(1)(d) which meant that First Nations peoples who have a traditional connection to the sea and marine resources that may be affected by Santos's activities under the Drilling EP have "interests" within the meaning of reg 11A(1)(d).[43]

While not directly addressing the "unworkability" arguments raised by Santos and NOPSEMA when the statement was made, Lee J noted that if the proper construction of reg 11A(1)(d) "causes what is perceived to be unacceptable expense and delay…the solution is not to distort its construction by adopting an unprincipled and restricted reading of what constitutes 'interests', but rather regulatory reform to provide greater specificity as to what is required…" [emphasis added].[44]

3.5 Practical Guidance in Respect of Consultation

Throughout their respective reasons, Kenny, Mortimer and Lee JJ made a number of statements that are useful to a petroleum titleholder in understanding its consultation obligations under reg 11A, including:

(i) the titleholder will have some decisional choice in determining how to fulfil its consultation obligations;[45]

(ii) the consultation undertaken by the titleholder must be genuine, and affected authorities, organisations and individuals must be given a reasonable period to identify the effect of the proposed activities on their functions, interests or activities and to respond to the titleholder with concerns;[46]

(iii) the purpose of the consultation is to ensure that the titleholder has ascertained, understood and addressed all the environmental impacts and risks that might arise from its proposed activities

and the titleholder should use the consultation as an opportunity to receive information that it might not otherwise have received from others affected by its proposed activities;[47]

(iv) the consultation required will vary with the particular circumstances – consultation that is superficial or token will not be sufficient and a titleholder should not assume that sending an email with an information package attached, and following up with one or more further emails, will be sufficient;[48] and

(v) where interests are held communally, in accordance with tradition, the method of consultation will need to reasonably reflect the characteristics of the affected interests (and, in this regard, properly notified and conducted meetings by the titleholder may be sufficient).[49]

4 Developments after the Tipakalippa Decision

Following the Tipakalippa Decision, NOPSEMA conducted a stakeholder briefing session in December 2022 that drew over 1,400 participants both in person and online. At that time, NOPSEMA also released an interim guideline on environment plan consultations and requested feedback on that guideline until March 2023.

In May 2023, NOPSEMA released its updated guideline on environment plan consultations.[50] That guideline addresses some of the stakeholder feedback that NOPSEMA received and incorporates the relevant findings of Kenny, Mortimer and Lee JJ in the Tipakalippa Decision.

Shortly after it published its updated guideline in May 2023, NOPSEMA released a report in respect of the stakeholder feedback that it had received.[51] That report sets out how NOPSEMA proposes to address the feedback that it received, including the feedback that was outside of the scope of the updated guideline.

In that report, NOPSEMA indicated that it would communicate to the Commonwealth Department of Industry, Science and Resources the feedback that NOPSEMA received in respect of the request for regulatory reform of reg 11A.

In late May 2023, the *Australian Financial Review* reported that a spokesman for the Minister for Resources, the Honourable Madeleine King MP, had told the paper that the Commonwealth Government would, later in 2023, be undertaking a review of the Regulations to address the backlog of environment plans awaiting decision by NOPSEMA caused by the Tipakalippa Decision.[52] The Commonwealth Government also indicated in the 2023-24 Federal Budget papers that this review would be undertaken.[53]

At the time of writing, there are some 42 environment plans for petroleum activities under assessment by NOPSEMA. That backlog of environment plans suggests that the Tipakalippa Decision may have resulted in NOPSEMA becoming more sensitive to the risk of being found to have not properly discharged its duties under the Regulations in respect of its acceptance of an environment plan, whilst at the same time making it more difficult for a petroleum titleholder to demonstrate that it has conducted the consultations required by reg 11A. That latter aspect can be seen in petroleum titleholders having resorted to advertising on radio and in newspapers as part of endeavouring to identify all "relevant persons" and satisfy their consultation obligations.

It is interesting to note that 4 of the 42 environment plans under assessment by NOPSEMA at the time of writing relate to petroleum exploration permits under the Act.[54] It is not clear how the National Offshore Petroleum Titles Administrator will deal with any applications for suspension or suspension and extension of any of the relevant petroleum exploration permits arising because of delays in NOPSEMA's acceptance of the applicable environment plan (including due to further consultation having to be undertaken for the purposes of the applicable environment plan as a result of the Tipakalippa Decision). This may be a particular issue where the activities to which the applicable environment plan relates are in the primary term of the relevant petroleum exploration permit.

It is understood that, in late June 2023, NOPSEMA convened a National Summit on Consultation on Offshore Petroleum Activities with First Nations Peoples at which First Nations groups and industry were represented with the summit's purpose to "discuss challenges related to consultation on environmental plans and agree workable solutions that deliver meaningful and appropriate consultation while managing impost and cost to all involved".

In August 2023, Senator Dorinda Cox introduced into the Parliament of Australia, as a private members' bill, the *Protecting the Spirit of Sea Country Bill 2023* (Cth), which proposes amendments to the Act and the Regulations to legislate the principles of the First Instance Decision and the Tipakalippa Decision. It does not appear that the Bill has the support of the Commonwealth Government.

At the time of writing, the Commonwealth Government has not publicly released any material in relation to the review of the Regulations mentioned above.

5 Potential Implications for the Offshore Electricity Infrastructure Regime

The *Offshore Electricity Infrastructure Act 2021* (Cth) (the OEI Act) and the *Offshore Electricity Infrastructure Regulations 2022* (Cth) (the OEI Regulations) have come into force to allow for the development of renewable energy projects in Commonwealth offshore waters.

Under the OEI Act, a project proponent is unable to be granted a commercial licence and develop an offshore renewable energy project unless the proponent has had a management plan approved by the Offshore Infrastructure Regulator.[55]

The OEI Act specifically allows the OEI Regulations to include regulations with respect to the consultation that is required to be undertaken before a management plan can be approved and a management plan having to address any consultation requirements and the outcomes of any consultation.[56]

At the time of writing, the Commonwealth Department of Climate Change, Energy, the Environment and Water is developing the regulations to be included in the OEI Regulations that will relate to management plan requirements.

It was, however, envisaged in the Explanatory Memorandum for the Bill that became the OEI Act that consultation requirements will need to be addressed in the development of a management plan to ensure that other users of the area in which the relevant activities are to be undertaken have been appropriately considered and that their concerns have been taken into account by a project proponent.[57]

It will be interesting to see whether the Commonwealth Government adopts a consultation regime for management plans under the OEI Regulations that is similar to the consultation regime for offshore petroleum activities established under regs 10A and 11A.

Given that the OEI Act and OEI Regulations govern activities in Commonwealth offshore waters (including the development of offshore renewable energy projects) much like the Regulations, it would not be a surprise if the Commonwealth Government adopted a consultation regime similar to that under regs 10A and 11A. If that is the case, then the Tipakalippa Decision may be relevant to consultations that are required to be undertaken under the OEI Regulations in order for a project proponent to obtain the Offshore Infrastructure Regulator's approval of a management plan.

6 Comparison Table

Regulations	2023 Regulations
Regulation 3	Section 4
Regulation 4	Section 5
Regulation 6	Section 17
Regulation 9(1)	Section 26(1)
Regulation 10	Section 33
Regulation 10A(g)	Section 34(g)
Regulation 11A	Section 25
Regulation 11A(1)	Section 25(1)

Regulations	2023 Regulations
Regulation 11A(1)(d)	Section 25(1)(d)
Regulation 11A(2)	Section 25(2)
Regulation 11A(3)	Section 25(3)
Regulation 11A(4)	Section 25(4)

1 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193; (2022) 406 ALR 358.

2 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). Given the preponderance of petroleum titles under the Act that have been applied for or granted, this article will focus on how the Tipakalippa Decision affects petroleum titleholders as opposed to greenhouse gas titleholders.

3 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121; (2022) 406 ALR 41.

4 Above n 3, First Instance Decision, [5].

5 Above n 3, First Instance Decision, [5].

6 *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*, reg 6(1).

7 Above n 6, Regulations, reg 4.

8 Above n 3, First Instance Decision, [55].

9 Above n 3, First Instance Decision, [55]–[60].

10 Above n 3, First Instance Decision, [60]–[61].

11 Above n 3, First Instance Decision, [8].

12 Above n 3, First Instance Decision, [7].

13 Above n 3, First Instance Decision, [7].

14 Above n 3, First Instance Decision, [290].

15 This article was written and finalised on 28 August 2023.

16 See above n 6, Regulations, reg 4, for the definitions of “petroleum titleholder” and “petroleum activity”.

17 Above n 6, Regulations, regs 10(1)(a) and (4)(a).

18 Above n 6, Regulations, regs 11A(2) and (3). See also the obligations of a petroleum titleholder in Regulations reg 11A(4).

19 Above n 1, Tipakalippa Decision, [44].

20 Above n 1, Tipakalippa Decision, [51].

21 Above n 1, Tipakalippa Decision, [52].

22 Above n 1, Tipakalippa Decision, [141].

23 Above n 1, Tipakalippa Decision, [45] (Kenny and Mortimer JJ), [142] (Lee J).

24 Above n 1, Tipakalippa Decision, [60] (Kenny and Mortimer JJ).

25 Above n 1, Tipakalippa Decision, [144] (Lee J).

26 Above n 1, Tipakalippa Decision, [58] (Kenny and Mortimer JJ), [146] (Lee J).

27 Above n 1, Tipakalippa Decision, [146] (Lee J).

28 Above n 1, Tipakalippa Decision, [62] (Kenny and Mortimer JJ).

29 Above n 1, Tipakalippa Decision, [65] (Kenny and Mortimer JJ).

30 Above n 1, Tipakalippa Decision, [63], [65] (Kenny and Mortimer JJ) citing *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321, 373 (Brennan J).

31 Above n 1, Tipakalippa Decision, [150]–[151] (Lee J).

32 Above n 1, Tipakalippa Decision, [154] (Lee J).

33 Above n 1, Tipakalippa Decision, [42] (Kenny and Mortimer JJ).

34 Above n 3, First Instance Decision, [94].

35 Above n 1, Tipakalippa Decision, [38]–[42], [67] (Kenny and Mortimer JJ).

36 Above n 1, Tipakalippa Decision, [67] (Kenny and Mortimer JJ).

37 Above n 1, Tipakalippa Decision, [68] (Kenny and Mortimer JJ).

38 Above n 1, Tipakalippa Decision, [80] (Kenny and Mortimer JJ).

39 Above n 1, Tipakalippa Decision, [157]–[158] (Lee J).

40 Above n 1, Tipakalippa Decision, [88] (Kenny and Mortimer JJ).

41 Above n 1, Tipakalippa Decision, [88] (Kenny and Mortimer JJ).

42 Above n 1, Tipakalippa Decision, [153] (Lee J).

43 Above n 1, Tipakalippa Decision, [109] (Kenny and Mortimer JJ).

44 Above n 1, Tipakalippa Decision, [164] (Lee J).

45 Above n 1, Tipakalippa Decision, [47]–[48] (Kenny and Mortimer JJ).

46 Above n 1, Tipakalippa Decision, [56] (Kenny and Mortimer JJ).

47 Above n 1, Tipakalippa Decision, [89] (Kenny and Mortimer JJ).

48 Above n 1, Tipakalippa Decision, [94], [104] (Kenny and Mortimer JJ), [153] (Lee J).

49 Above n 1, Tipakalippa Decision, [104] (Kenny and Mortimer JJ).

50 NOPSEMA, *Consultation in the Course of Preparing an Environment Plan* (Document N-04750-GL2086 A900179, 12 May 2023).

51 NOPSEMA, *Feedback on the NOPSEMA Consultation in the Course of Preparing an Environment Plan Guideline* (Document A934077, 15 May 2023).

52 Jacob Greber, “Offshore Gas Probe to Tackle Project Logjam Fears’, *Australian Financial Review* (31 May 2023).

53 Commonwealth Department of Industry, Science and Resources, *Portfolio Budget Statements 2023-24*, Budget Related Paper No. 1.11, 18.

54 Being the Sauropod 3D Marine Seismic Survey environment plan submitted by CGG Services (Australia) Pty Ltd, the Exploration Drilling WA-285-P & WA-343-P environment plan lodged by INPEX Browse E&P Pty Ltd, the Beehive-1 Exploration Drilling WA-488-P environment plan lodged by EOG Resources Australia Block WA-488 Pty Ltd, and the Possum 3D Marine Seismic Survey environment plan lodged by Searcher Seismic Pty Ltd.

55 *Offshore Electricity Infrastructure Act 2021* (Cth), ss 40(1) and 42(1)(f); see also s 59(1) for the need for a management plan to be approved in order to undertake activities pursuant to a transmission and infrastructure licence granted under the OEI Act.

56 Above n 55, OEI Act, ss 114(2)(c), 115(2)(e) and 115(2)(f).

57 Explanatory Memorandum, *Offshore Electricity Infrastructure Bill 2021* (Cth), [545].

CASE NOTE

FORREST AND FORREST PTY LTD AND MINISTER FOR ABORIGINAL AFFAIRS [2023] WASAT 28

John Southalan

Barrister (WA Bar Association), Mediator (NMAS), Adjunct Professor (UWA & Murdoch)

john@southalan.net This article is written in personal capacity and does not represent the views of any organisation with which the author is associated. Grateful thanks for comments and feedback on earlier drafts from Matt Hansen, Prof Richard Bartlett, Jeremy Brown, Melanie Noid and others who are not identified. Any errors remain the author's responsibility.

Western Australia's State Administrative Tribunal (SAT) has rejected a review, by Forrest & Forrest Pty Ltd, against the refusal of consent to impact an Aboriginal site in constructing weirs across the Ashburton River. A unanimous three-member panel published its decision in April 2023. SAT's decision and reasoning has direct significance and use for anyone involved in processes for a s 18 consent under the Aboriginal Heritage Act 1972 *and broader relevance for the law around protection of Aboriginal heritage in Western Australia. With the WA Government announcing the reversal of recent statutory changes and a return to the 1972 legislation, SAT's decision has increased relevance.*

1 Overview of WA's Heritage Law

The law protecting Aboriginal heritage in Western Australia is in transition. For the last half century the *Aboriginal Heritage Act 1972*[1] (the Act) has criminalised damage to Aboriginal heritage (s 17), while also enabling Ministerial consent for activities to occur regardless of the damage they cause (s 18).[2] In December 2021, the WA Parliament passed the *Aboriginal Cultural Heritage Act 2021* to provide more protection for Aboriginal heritage, with greater involvement and engagement of traditional custodians.[3] This included a long transition period and the existing s 18 consent process under the Act was to continue for many years.[4] On 8 August 2023, the WA Government announced the repeal of the 2021 legislation and a return to the Act (with some changes).[5] SAT's decision[6] has increasing relevance to actions involving Aboriginal heritage in Western Australia.

2 Facts and Summary of the SAT Decision

The pastoral station, Minderoo, in Australia's north-west near the coastal town of Onslow, is owned by Forrest & Forrest Pty Ltd (Forrest & Forrest).[7] This is in the traditional country of the Thalanyji people, whose native title rights were recognised in a Federal Court determination in 2008.[8] Minderoo and Thalanyji traditional country are crossed by the Ashburton, a major river known as Mindurru in local Aboriginal language. The river is about 700km long, with a catchment area around 20,000km^2, and flows seasonally after rains.[9]

Forrest & Forrest proposed to build ten weirs across the river to increase water use for its horticulture and beef production. The weirs would not prevent water flow, particularly during wetter periods when most water would flow uninterrupted, but would create larger and longer pools to replenish groundwater aquifers. In 2017, Forrest & Forrest applied for a s 18 consent under the Act, to approve that proposed use (regardless of potential breach of s 17 from impacting heritage) to enable building the weirs.[10] The company's application identified the river as an Aboriginal site that would be partially impacted if their proposal went ahead.

The Act requires that applications for a s 18 consent are first considered by the Aboriginal Cultural Material Committee (the ACMC, as SAT referred to it in their reasons), a specialist committee established under the Act and comprising persons experienced in Aboriginal cultural significance and archaeology.[11] The ACMC makes a recommendation to the Aboriginal Affairs Minister, who decides whether to issue a consent and any conditions.

In this case, the ACMC initially decided to recommend the Minister grant consent subject to conditions that the work must avoid any impact on the river's permanent pools.[12] After receipt of further information showing that impact could not be avoided, in 2018 the Committee recommended the Minister refuse consent.[13] In 2019, the Minister refused to issue a s 18 consent based on the importance and significance of the river to the Thalanyji.[14] Forrest & Forrest applied to SAT to review the Minister's decision,[15] which is a procedural right the landowner (but not the impacted Aboriginal group) has under the Act.[16] The Thalanyji people were granted intervener status.[17] SAT heard the case in 2021 and, in April 2023, effectively rejected the application for review and affirmed the Minister's decision.[18]

3 Aspects from SAT's Reasoning

SAT, when it receives a review application under the Act, is essentially exercising the same functions and discretions as those of the Minister under s 18, in deciding whether to grant consent.[19] SAT effectively stands in the shoes of the Minister, having to re-make the decision on the s 18 application, but can receive further evidence and material (which it did in this case).[20] So SAT's reasoning informs how any future Ministerial decisions ought be made regarding consents and the Act.

Future Ministerial decisions about s 18 consent applications under the Act should be expected. SAT explained that, when a party had applied for a s 18 consent, the Act requires that application *be decided by the Minister*. This is significant, because WA Government practice for many years has involved Departmental or ACMC decisions that there is no site and therefore not progressing the matter for Ministerial decision.[21] SAT considered that an inappropriate way of proceeding.[22] This leaves an interesting question regarding many previous applications, which have received no Ministerial decision, and any activities which have since occurred regarding the areas subject to those applications.

3.1 Role of the ACMC

SAT made some observations on the ACMC's role, emphasising its importance in the process.

- The ACMC must do three things when a s 18 application has been made: "(a) form a view as to whether there is any Aboriginal site on the land; (b) evaluate the importance and significance of any such site; and (c) make a recommendation to the Minister as to whether the Minister should consent to the use of the land for the purpose set out in the owner's notice, and (if applicable) as to the extent to which, and the conditions upon which, that consent should be given".[23]
- The ACMC's evaluation of a site's importance and significance has "two dimensions: the importance and significance of each Aboriginal site to people of Aboriginal descent, and the importance and significance of each Aboriginal site to the community more broadly, as part of the cultural heritage of the State".[24]
- The ACMC's consideration whether consent should be given is "on behalf of the community", involving assessment of "the importance of places and objects alleged to be associated with Aboriginal persons",[25] and it can include partial or conditional consent (e.g., areas/time periods).[26]

SAT considered the ACMC's function and expertise meant that its views on the cultural significance of a place should have considerable weight with the Minister (and SAT, where the Minister's decision is on review).

> [I]n the absence of any further information or evidence which cast doubt on the ACMC's opinion, the Minister would be expected to rely on the ACMC's opinion as to whether there is an Aboriginal site on any land, and the importance and significance of any such site, and to give it significant weight in the Minister's consideration as to whether consent should be given to proposed works. That is to be expected in light of the fact that it is not part of the Minister's functions under the AH Act to evaluate the importance and significance of places to ascertain whether they constitute Aboriginal sites.[27]

This is a different characterisation of ACMC's role than that expressed by the WA Supreme Court in 2019 in *Wintawari Guruma Corp v Aboriginal Affairs Minister*,[28] where Justice K Martin stated, "The role of the ACMC in recommending to the Minister under s 18(2) is plainly one of the incidental 'other purposes' [of the Act]".[29] That case involved the Government conceding that the ACMC had not evaluated the importance and significance of relevant sites before making its decision and that therefore the Minister's decision was made beyond the terms of the power prescribed by the Act.[30]

The Court also heard evidence, from the relevant Government official, that "the briefing note which was provided to the Minister included conditions said to have been recommended by the Committee that had not, in fact, been considered or recommended by the Committee".[31] The Court dismissed a challenge against the Minister's consent, reasoning that the content *or even the legality*, of the ACMC's recommendation is irrelevant to the validity of Minister's decision[32] because the Minister need only receive and consider the recommendation.

> [T]he Minister merely receives and considers the written ACMC recommendation before issuing any s 18(3) decision by way of consent or otherwise. Under s 18 the Minister is not constrained or fettered by a recommendation of the ACMC – other than by a mandatory need to consider it. Once that is done**, it is clear that the Minister is left at large to reach a decision upon the issue of a s 18(3) consent or otherwise as the Minister sees fit**.[33]

3.2 ACMC Determining Whether There Is a Site

In relation to the ACMC's consideration, SAT made the following observations.

- A broad area, rather than a specific location/archaeological site, can have cultural significance and protection under the Act. SAT considered the Thalanyji material showed the *entire* river was sacred and merited protection under the Act.[34] SAT did not explicitly decide the entire river *was* a site, considering that unnecessary for the current matter, but considered that a credible understanding of the ACMC's conclusion.[35]
- SAT explained that one of the reasons a place may qualify for protection under the Act is that it is a "sacred site". SAT noted previous jurisprudence that the Act's understanding of "sacred" encompasses places devoted to religious use but also includes places "subject to mythological story, song or belief".[36] SAT ruled this does not need to accord with western understanding or practice of "sacred" but is better understood "to contemplate spiritual and mythological purposes consistent with that culture".[37]
- SAT flagged that *cumulative* impacts cannot be ignored, indicating one relevant factor is "the potential for a longer term effect on Aboriginal culture of the incremental erosion of the foundations of ... cultural practices and spiritual beliefs".[38] This is not something apparent from previous jurisprudence.[39]
- There must be consideration of whether the proposed activity/use (for which s 18 consent is sought) can proceed in another way without causing the problematic impact. In this case, SAT determined that was not possible.[40]

SAT considered the natural flow of the river not being interrupted was significant for the Thalanyji and something which would constitute an impact prohibited by s 17 unless consent were granted. SAT's reasoning here is important to appreciate and so key paragraphs are extracted below.

> 606 [B]ecause the natural flow of the River, and the role of the water snake in determining that natural flow, is of such central importance in the Thalanyji people's spiritual beliefs about the River, we have found that to interfere with the natural flow of the River (as will be the inevitable effect of the [proposed weirs]) will interfere in a significant way with a central tenet of the Thalanyji people's spiritual beliefs.
>
> 607 We have found that, from the Thalanyji people's perspective, the implementation of the … project, which will affect the natural flow of the River, risks killing or harming the water snake, or causing the water snake to become angry, and that that would have a significant adverse impact on the Thalanyji people. This may occur in the form of fear or concern that the water snake may act in anger and cause harm to them, in the form of emotional harm that they will be held responsible to the water snake, in the form of spiritual harm flowing from action which interferes with one of the central tenets of their spiritual beliefs, and in the form of emotional harm in a sense of shame or failure in their personal responsibility, as custodians of the River, to prevent the … project from proceeding.
>
> 608 [I]mplementation of the … project will adversely impact on the Thalanyji people's appreciation of the aesthetics of the River. Given the significance of the River in the Thalanyji people's spiritual beliefs, the significance of that impact cannot be ignored.
>
> 609 [T]he consequences of the … project represent potential adverse impacts on the spiritual beliefs and the culture of the Thalanyji people.… [T]hose impacts warrant significant weight in assessing the potential impact of the … project on Thalanyji culture.

Where the ACMC decides an area *is* a site qualifying for protection under the Act, and its importance and potential impacts, SAT indicated the Minister should give that significant weight in deciding on consent.[41]

> [G]iven the expertise of the ACMC's members, its statutory role under the AH Act (as compared with the Minister's role) … we should give considerable weight to the ACMC's conclusions and its recommendation. They weigh strongly against the grant of consent to the use of the Land for the Purpose, namely the [weirs] project.[42]

SAT went on to muse, but indicated they were not deciding, in this case, "whether the Minister, and in turn the Tribunal [if the landowner applies for review of the Minister's decision – as was the case here], is bound by the ACMC's opinion as to whether there are sites".[43]

3.3 Minister's Decision

The Minister's decision on whether to grant consent having regard to "the general interest of the community"[44] can "take into account considerations additional to those taken into account by the ACMC, or may place different weight or emphasis on considerations taken into account by the ACMC…".[45] The Minister is not bound by the Committee's decision (and neither is SAT, when reviewing the Minister's decision).[46]

SAT acknowledged the Minister can grant consent, allowing interference with an Aboriginal site, if that is in the general interest of the community. As framed by SAT, "Aboriginal cultural considerations may be outweighed by other factors relevant to the general interest of the community".[47] The Act's requirement that the Minister have "regard to the general interest of the community"[48] is equivalent to the "public interest" according to SAT.[49] SAT usefully outlined factors relevant to a Minister's decision whether to grant consent.

> 147 In undertaking the evaluative and balancing exercise to determine whether consent should be given to the proposed use of the land, having regard to the general interest of the community, a variety of considerations may be of relevance. By way of example, they will include
>
> [a] the degree of significance and importance of the site to people of Aboriginal descent;
>
> [b] the significance and importance of the preservation of the Aboriginal site as part of the cultural heritage of the entire community;
>
> [c] whether the proposed use of the land will involve the destruction of, or permanent damage or alteration to, the Aboriginal site;
>
> [d] the nature of the benefits or advantages of the proposed use of the land for the community;
>
> [e] whether the entire community or merely a small section of it may benefit;
>
> [f] whether the benefit will be direct or merely indirect; and
>
> [g] whether the benefit to the community can be achieved through other means which would not require destroying, damaging or altering an Aboriginal site.
>
> 149 Other considerations may include:
>
> [h] whether the proposed use of the land could be achieved by other means, and
>
> [i] whether the damage to the Aboriginal site could be minimised by the imposition of conditions on the grant of consent.
>
> In that sense, the evaluative exercise cannot be viewed in isolation from the Minister's power to determine whether consent should be given to the use of the whole or a specified part of the land, or whether conditions should attach to the consent.

The Minister can "give the various factors relevant to the general interest of the community, such weight as the Minister thinks fit".[50]

There are, relevantly, two separate points where the Act involves community interest in the s 18 consent process. The ACMC's decision considers community interest "in the importance of places and objects",[51] in making a recommendation to the Minister. The Minister's decision considers community interest in "general" on whether to grant consent,[52] which frequently involves balancing protection as against development.

This balancing faced by SAT (and previously the Minister in this case) is nothing new. It has been evident in many s 18 cases over the decades. What is new, however, is the significance which SAT attributed to Aboriginal cultural interests. This was most clearly expressed in two paragraphs.

> 148 The general interest of the community in the preservation of an Aboriginal site of very significant historical, archaeological or ethnographical interest (for example, because it constituted unique evidence that Aboriginal people lived in a particular area thousands of years ago where they were previously unknown to have lived, or which site contained unique evidence that Aboriginal people used particular tools, or on which was located a unique example of ancient Aboriginal artwork) would strongly support the preservation of that site, rather than the grant of consent to permit the complete destruction or permanent damage of that site. If consent were to be warranted, a compelling interest of the community would need to be identified to support the use of the land in that way.
>
> 613 The preservation of Aboriginal culture, through the preservation of sites of importance and significance to Aboriginal people, is an important aspect of the preservation of the cultural heritage of the State.

These paragraphs appear to be influenced by the events concerning Juukan Gorge in 2020. There, the Minister granted a s 18 consent, in what SAT might now characterise as "the grant of consent to permit the complete destruction or permanent damage of … an Aboriginal site of very significant historical, archaeological or ethnographical interest (… because it constituted unique evidence that Aboriginal people lived in a particular area thousands of years ago where they were previously unknown to have lived, or which site contained unique evidence that [A]boriginal people used particular tools…)".[53] SAT's Decision here did not specify those events nor identify Juukan Gorge. But SAT's reasoning here gives greater emphasis to the protection of Indigenous heritage than had been apparent from previous decisions regarding the Act. This includes previous decisions by SAT [54] but, more significantly, decisions by the courts.[55]

This may simply reflect that decisions about a s 18 consent involve "having regard to the general interest of the community",[56] and community interest can change over time. It seems evident – and legally uncontroversial – that community interest has changed regarding the protection of Aboriginal heritage in WA from the following three points.

- Parliamentary statements from previous decades indicate an understanding of community interest then as involving less importance and Aboriginal agency in the protection of their heritage.[57]
- More recent Government and Parliamentary statements indicate that community interest sees greater importance and need for Aboriginal agency in the protection of their heritage.[58]
- Courts acknowledge that laws requiring a decision-maker to consider public interest power give a broad discretion (limited only by the statute's subject or purpose),[59] thus the Act's "community interest" reference gives the decision-maker a broad discretion.

A developer (applying for s 18 consent) is entitled to choose what/how they want to present in seeking s 18 consent from the Minister (or, on review, from SAT).[60] But, where there is an Aboriginal site, SAT emphasised the developer needs to satisfy the decision-maker of the broader benefits.

> [W]hen the Minister (and on a review, the Tribunal) comes to assess the general interest of the community in respect of a project, they need to have some degree of confidence that the claimed benefits to the community which are said to be offered by that project can and will be realised. The absence of a foundation for such confidence will undermine the strength of the general interest of the community considerations said to support consent for the project.[61]

SAT concluded that Forrest & Forrest had not provided evidence which sufficiently demonstrated "that the claimed benefits would in fact follow from the implementation of' [the project]".[62] SAT also explained that they took into account that the proposed alteration was permanent and the "permanent effect of the … project weighs strongly against the grant of consent".[63]

3.4 Relevant Impacts Are Not Only Physical

The assessment of impact is not just about physical impact (and its amelioration) but the spiritual impacts from proposed activities.[64] In this case, SAT found the environmental impacts would not be significant.[65] However, they considered s 18 consent should not be given because of the significant

impacts on the Thalanyji people[66] and the limited public benefit.[67] Most of the benefits were private to Forrest & Forrest and there was much less, or not well substantiated, public benefit.[68]

SAT rejected the argument by the company that the activity should receive consent because there was little tangible effect.

> 257 In assessing the impact of the MARS [the proposed weirs, termed a "Managed Aquifer Recharge Scheme"] on the Aboriginal sites and on the Thalanyji people and their culture, to focus exclusively on the extent of the physical impact of the MARS on the River's flow is to miss the point. The question is how, and to what extent, the MARS will have an impact on Thalanyji cultural and spiritual beliefs associated with the flow of the River.
>
> 267 …[I]n assessing the impact of a proposed use of land on an Aboriginal site and on Aboriginal culture, that impact must be evaluated through the prism of the actual beliefs of the Aboriginal people in question, and not by reference to secular analysis. With respect, in the context of the AH Act, it is nonsensical to suggest that the impact of the use of an Aboriginal site should be assessed only by reference to secular analysis. To illustrate the point by reference to Christian religious traditions, the physical desecration of a consecrated church, or other place of worship within a Christian religion, involves only physical damage to a building if assessed from a purely secular perspective. If assessed from the perspective of the members of the religion in question, however, that physical damage may represent an attack on a sacred place and thereby an attack on the central beliefs of their religion.

SAT found the proposal would alter river flow and that, because the river was a site, the proposal fell within the s 17 proscription of in any way altering or damaging a site.[69] In addition to weighing cultural impacts, SAT noted there would also be physical impacts on archaeological artefacts.[70] SAT summarised that "the implementation of the … project cannot be undertaken in any way which will avoid this alteration of the River as a site, or the destruction of the artefacts".[71]

3.5 Procedural Questions re SAT

Another significance of the Minister's decision, SAT reasoned, is that it provided an indication of community interest.[72] This seems somewhat circular. SAT acknowledged it was hearing the application "under s 18 afresh, by way of a hearing de novo",[73] effectively re-making the Minister's decision. And yet SAT referred to the Minister's decision as part of the material informing how it would decide the case.

SAT did not directly address this conundrum, other than to state, "[I]n the Review of the Minister's decision, the Tribunal … may consider any new material whether or not that material existed at the time the Minister's decision was made. That new material will include the Minister's decision itself".[74] "New material" is uncontroversial because SAT does not operate as if it were at the time of the original decision under review.[75] Given there is the scope for further material to inform SAT's decision, perhaps there is some rationale that a Minister's decision might be taken into account for its *content* rather than its *outcome*. That seems stretched in this instance, however, given:

- SAT's Decision specified "The evidence encompassed all of the material which was before the Minister, together with additional evidence" (suggesting there was no "evidence" within the Minister's decision);[76] and
- SAT's reasons indicated the Minister's decision had no additional content, or not that SAT was aware of. The full extent of what is known of the Minister's decision, from the SAT decision, is that the Minister refused to grant consent "based on the importance and special significance attributed by the Traditional Owners to the Ashburton (Mindurru) River".[77]

4 Relevance for the *Aboriginal Heritage Act 1972* and Beyond?

The most direct application of the SAT decision is to future decisions about s 18, particularly given SAT's collating and listing of relevant factors (see 3.3 above).

The relevance of the significance of SAT's decision will, however, depend on its longevity because there is the potential for appeal. Anyone involved in resources law or administrative procedure in Australia will be familiar with the name "Forrest and Forrest" from the 2017 High Court case *Forrest & Forrest P/L -v- Wilson*.[78] That concerned the same company and the same pastoral station but, in that case, disputes with other parties about land use. There, sand miners had obtained mining tenure

on Minderoo station after filing their relevant paperwork in the common way which had been used for many years in WA (being an application followed with a more detailed proposal). Forrest & Forrest objected, arguing the applications were invalid because the *Mining Act 1978* stated the proposal should "accompany" the application and therefore providing it later was an invalid application and could not be granted. The Mining Warden (Wilson) rejected that argument, which Forrest & Forrest appealed to a single Judge of the Supreme Court, who upheld the Warden's decision. Forrest & Forrest appealed that to the Court of Appeal, which unanimously upheld the Warden's decision. Forrest & Forrest appealed that to the High Court, which ruled (6-1) in favour of Forrest & Forrest.

Forrest & Forrest has already been refused by the ACMC here, then the Minister and now SAT. It remains to be seen whether that is where the matter rests, or whether this goes higher. And, if it does go higher, to where, and what relevance will SAT's reasoning have? The legal options for Forrest & Forrest are an appeal to the WA Court of Appeal (only on a question of law, and only if that Court gives leave[79]) and then, potentially, back to the High Court.

SAT's reasoning that the weirs proposal would not devastate the Aboriginal culture but would still have significant impact, justifying the Minister's decision, raises an interesting side issue.[80] The context for that reasoning was not obvious from SAT's reasons. Perhaps it responded to a submission seeking to minimise the significance of the impact. In that context, SAT's comment may make sense. But it could have some interesting implications in broader human rights contexts. There are international standards for the protection of Indigenous culture, including from the impacts of industrial developments. The international "jurisprudence" on these indicates that impacts which do not threaten cultural existence are less likely to be considered breaches of human rights standards around cultural protection.[81] Thus, SAT's observations may have broader implications outside the WA legal system.

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1 *Aboriginal Heritage Act 1972* (WA).

2 A summary of the Act's operation, and particularly the processing and operation of consents is provided in Southalan, J, *Sorry, Not Sorry: the Operation of WA's Aboriginal Heritage Act* (AUSPUBLAW, 2020).

3 Hon. Stephen Dawson, Aboriginal Affairs Minister, *Aboriginal Cultural Heritage Bill - Second Reading*, Legislative Council Hansard, 30 November 2021, 6006-6009, "Western Australia is establishing a new cultural heritage regime to achieve equity in the protection of Aboriginal cultural heritage by giving Aboriginal people custodianship over their heritage and putting them at the centre of decision-making".

4 Broadly, consents obtained under the Act (or applied for prior to mid 2023 and subsequently granted pursuant to that Act) will continue for at least ten years, with the potential to be extended by the Minister: explained in more detail in Bartlett, J, "Transitioning Section 18 Aboriginal Heritage Act 1972 Consents Under the Aboriginal Cultural Heritage Act 2021 of Western Australia" (2022) 41 *Transitioning Section 18 Aboriginal Heritage Act 1972 Consents Under the Aboriginal Cultural Heritage Act 2021 of Western Australia* 1.

5 WA Premier, Minister for Aboriginal Affairs, and Attorney General, *Laws Overturned: Aboriginal Cultural Heritage Legislation Replaced* (Media statement, 8 August 2023, Government of Western Australia).

6 *Forrest & Forrest and Aboriginal Affairs Minister* [2023] WASAT 28, President Pritchard J, Senior Member Dr S Willey, Member Ms C Barton.

7 Shire of Ashburton: *Local Government Heritage Inventory*, October 2019, 106. "In 1998 after 120 years on the property the [Forrests] … sold Minderoo Station after decreasing returns, drought and the never-ending challenges of station life. Minderoo was offered for auction along with 30,000 sheep and 1,200 cattle. Murion Pastoral Company outbid two other bidders, one including Don's son Andrew [Forrest], with the sum of $2.45 million. The company ran Minderoo for 11 years during which time the station [transitioned] from running sheep to fully running cattle. In 2009, Andrew Forrest bought back his family home at auction".

8 *Hayes (Thalanyji People) v WA* [2008] FCA 1487. The determination terms were agreed by all parties, including Minderoo, although at that time owned by Murion Pastoral Co (see n 6 above).

9 Above n 6, SAT Decision, [1], [20]-[21].

10 Above n 6, SAT Decision, [64].

11 Above n 1, the Act, s 28.

12 Above n 6, SAT Decision, [67].

13 Above n 6, SAT Decision, [71].

14 Above n 6, SAT Decision, [74]. The Minister stated this as "decline consent to the use of the land".

15 Above n 6, SAT Decision, [10].

16 *Traditional Owners (Nyiyaparli) and Indigenous Affairs Minister* [2009] WASAT 71; 62 SR (WA) 1183, [34].

17 Above n 6, SAT Decision, [11] (intervening through the Buurabalayji Thalanyji Aboriginal Corporation RNTBC).

18 Above n 6, SAT Decision, [635]-[636].

19 Above n 6, SAT Decision, [77]. SAT summarised their role thus: “Ultimately, the question for the Tribunal is whether the general interest of the community warrants consent being given to a proposed use of land which necessarily will involve the destruction, damage or alteration of an Aboriginal site, with a consequential potential adverse impact on Thalanyji culture.” [588].

20 Above n 6, SAT Decision, [153].

21 Above n 2, Southalan, “Many s 18 applications are determined as not having Aboriginal heritage sites and therefore consent for the purpose was not necessary. In 2013 to 2015, this was the case for 65% of s 18 applications considered” (internal quotes omitted – data was drawn from 2018 information from the WA Department for Planning, Lands & Heritage, see Extracts of material relevant to *Aboriginal Heritage Act 1972* (WA).

22 Above n 6, SAT Decision, [131], “[O]nce the s 18 process is engaged by an owner of land, the process must be completed by the making of a decision of the Minister pursuant to s 18(3) .... There is nothing in the language of s 18(2) that would suggest that the process terminates if the ACMC reaches a view that no 'site' will be affected by the owner's proposed use of the land.”

23 Above n 6, SAT Decision, [117].

24 Above n 6, SAT Decision, [121].

25 Above n 6, SAT Decision, [126].

26 Above n 6, SAT Decision, [127]-[128].

27 Above n 6, SAT Decision, [141].

28 *Wintawari Guruma Corp v Aboriginal Affairs Minister* [2019] WASC 33.

29 Above n 28, *Wintawari Guruma*, [328], K Martin J.

30 Above n 28, *Wintawari Guruma*, [227], see also [216]-[221].

31 Above n 28, *Wintawari Guruma*, [295 (40.4)] (internal quotes omitted).

32 Above n 28, *Wintawari Guruma*, [120], “[T]he jurisdictional pre-requisite for the Minister to ... provide a valid consent ... is simply the fact of a written recommendation from the ACMC, **not** a 'legally valid' ACMC recommendation”. K Martin J acknowledged an ACMC decision could be judicially reviewed and quashed ([27], [126]) provided that were done before the Minister had acted on the recommendation. But there is no requirement in the Act for the affected group to be told of the ACMC’s decision, and Justice Martin explicitly acknowledged there is no requirement the group be notified of the Minister’s decision [284].

33 Above n 28, *Wintawari Guruma*, [150], K Martin J (emphasis added). See, to similar effect, [[111] & [353].

34 Above n 6, SAT Decision, [603]-[604].

35 Above n 6, SAT Decision, [612].

36 Above n 6, SAT Decision, [84], referencing *Robinson v Fielding* [2015] WASC 108.

37 Above n 6, SAT Decision, [86].

38 Above n 6, SAT Decision, [302] “[T]o approach the matter by reference to a threshold of 'devastation' of Thalanyji culture would be to ignore the potential for a longer term effect on Aboriginal culture of the incremental erosion of the foundations of their cultural practices and spiritual beliefs. It is not necessary to make any such finding about that matter”.

39 A text search for “cumulative” in every court decision regarding the Act, indicated none considered cumulative impact on Indigenous culture (http://classic.austlii.edu.au/cgi-bin/sinosrch.cgi/au?method=boolean&rank=on&query=%22wa%20consol_act%20aha1972164%22). The National Native Title Tribunal has indicated cumulative impact on Indigenous interests *may* have relevance to considerations under the *Native Title Act 1993* (Cth): e.g., *Smith (Gnaala Karla Booja People) v Western Australia* [2001] FCA 19; 108 FCR 442, [27], French J (which has been approved and applied many times since); see also *St Ives Gold v Ngadju People* [2017] NNTTA 35, [57]-[64], Member McNamara and *Weld Range Metals v Wajarri Yamatji* [2011] NNTTA 172, [267], Sumner DP; *Yinhawangka Aboriginal Corp v Korab Resources* [2022] NNTTA 69 (16 November 2022), [175], Member Kelly.

40 Above n 6, SAT Decision, [610] “[W]e have found that it would not be possible to construct the [weirs project] in a way which minimised the impact on the River as a site of importance and special significance to the Thalanyji people or which would avoid damage to other sites of archaeological significance in or along the River.” See also [314].

41 Above n 6, SAT Decision, [141].

42 Above n 6, SAT Decision, [613].

43 Above n 6, SAT Decision, [141].

44 Above n 6, SAT Decision, [150], see also [142].

45 Above n 6, SAT Decision, [150].

46 Above n 6, SAT Decision, [613].

47 Above n 6, SAT Decision, [103].

48 Above n 1, the Act, s 18(3).

49 Above n 6, SAT Decision, [142].

50 Above n 6, SAT Decision, [151].

51 Above n 1, the Act, s 39(1)(a), e.g.; see above n 6, SAT Decision, [121].

52 Above n 1, the Act, s 18(3); see above n 6, SAT Decision, [142], [150].

53 Australian Parliament, Joint Standing Committee on Northern Australia, Final Report, *A Way Forward: Inquiry into the Destruction of Juukan Gorge* (October 2021): provides a comprehensive account of the events regarding Juukan Gorge.

54 A previous SAT statement decision on the Act was above n 16, *Traditional Owners (Nyiyaparli) v Indigenous Affairs Minister* [2009] WASAT 71. This concerned a s 18 consent obtained by the FMG mining group [6]-[7]. The Aboriginal group who considered their cultural heritage would be impacted by the consent objected. The group brought proceedings to SAT, seeking to review/appeal the Minister's consent: [1] & [9]. FMG and the State Government raised a preliminary issue that the Aboriginal group could not bring these proceedings because that was a right only for the company seeking the consent: [10]. The Tribunal agreed and dismissed the proceedings: [5] & [35]. As part of his reasons, President Chaney J made the following comments (emphasis added).

> [21] Provision for the Minister's consent arises in the context where a particular "owner" wishes to undertake work (on the land which they "own") which might interfere with places or objects of Aboriginal heritage significance. **The scheme of the Act is to vest in the Minister** the ultimate control of activities affecting such sites or objects. The interest which the Minister is required **to preserve is the general interest of the community.** The competing interest is that of the proponent of the particular activities which require consent. I am unable to see any basis upon which some other "owner" of the type described in s 18(1) and s 18(1a) might be extended a right of review in the context of those competing interests. Another owner, who is not the proponent of the proposed activity, has no interest in whether the works are permitted. Nor could such other owner sensibly propound the general interest of the community, protection of which the Act reposes in the Minister.

Chaney J also reasoned that the non-availability of appeal for an Aboriginal group was "very clear[ly] the Parliament's intention" on the examination of Hansard debates of the relevant provisions. Justice Chaney quoted the Minister for Cultural Affairs as saying (emphasis added):

> [27] The Act does not contain an avenue of appeal for Aborigines to a court, nor is there any need for such an appeal. The whole Bill is designed to protect the Aboriginal sites of consequence. **The Aborigines are protected by the Aboriginal Cultural Material Committee, the Museum trustees, and the government of the day**. The government is answerable to Parliament and to the people, it has an obligation to uphold and administer the Aboriginal Heritage Act. So there is no necessity for an appeal by Aborigines under any circumstances. It is not in the Act, and it is not in the Bill. There is no need for it.

55 Examples of previous court statements include the following (emphasis added):

"**[T]he Act should provide the scope for political direction in the national interest when it** be thought that the right to **preservation should give way to some competing interest**": *Noonkanbah Pastoral v Amax Iron* [1979] WASC 124, [14], Brinsden J;

"[T]he statutory provisions ... do not confer private rights or purport to directly advantage Aboriginal people or any class of people. ... [I]t is unlikely that Parliament intended that the ... Committee ... should have the de facto responsibility to weigh... the general interests of the community. That task — weighing the public interest — is plainly for the minister, and for good reason. It is a political function. ... **The possibility that the minister might, after a proper consideration of the [committee's] recommendation against the development, decide that the general interests of the community should prevail over cultural considerations, is inherent in the whole process**": State of WA v Bropho [1991] WASC 429; 5 WAR 75, 93-94, Anderson J (agreed by Malcolm CJ & Franklyn J, emphasis added) – approved in above n 28, *Wintawari Guruma*, [122], K Martin J.

"**[A] ministerial consent obtained by the … 'owners' under s 18(3) is likely to be a necessary component of an overall wider expansion in iron ore mining** operation plans. The Minister's s 18(3) consent for the owners is likely to be of a wider commercial significance - well beyond being a personal protection against a future prosecution for infringing s 17 of the AH Act. Obtaining of the s 18(3) consent of the Minister would likely be of project due diligence importance in the wider context as a required milestone necessary to be met in a project expansion process. Obtaining the s 18(3) consent is likely to carry affirmative implications for project expansion needed to satisfy persons such as bankers, financiers or the like. The advancing of a massive iron ore expansion project would typically require a satisfaction of a multitude of due diligence steps or enquiries all assembled to be fulfilled towards satisfying pre-requisites such as project funding, venture participation by others and the like.": above n 28, *Wintawari Guruma*, [114], K Martin J.

In above n 28, *Wintawari Guruma*, Justice Martin rejected the notion that a Minister's decision may be invalidated because of irregularities in how the ACMC earlier dealt with the matter. Such an outcome, His Honour considered was not correct when "seen within the framework of the AH Act as a whole as the antithesis of providing long term commercial certainty for a major expansion of a mining project once the Minister's consent had finally issued ... . An undermining of a s 18(3) consent ... would deliver obvious and unacceptable long-term and destabilising economic uncertainty - in the nature of a concern akin to a sovereign risk. Such **commercial uncertainty is discordant with the statutory objectives of the AH Act assessed as being enacted for the benefit of the whole West Australian community**": *Wintawari Guruma* [2019] WASC 33, [116]-[117].

"Pursuant to s 18(3), the Minister must consider the ACMC's recommendation and, having regard to the general interest of the community, either consent to the use of the land the subject of the notice, or part thereof, for the

purpose proposed, with or without conditions, or wholly decline to consent to the use of the land for that purpose, and advise the owner of that decision.”: *Abraham v Aboriginal Affairs Minister* [2016] WASC 269, [16], Pritchard J.

56 Above n 1, the Act, s 18(3).

57 Examples include:

In 1972, the Act’s second reading speech stated: “High among the reasons for protecting Aboriginal sites it is recognised that they are often important records of the history of early settlement of Australia by Aborigines, Asians, and Europeans”: Attorney-General, *Aboriginal Heritage Bill - Second Reading*, Legislative Assembly Hansard, 11 May 1972, 1550.

In 1981, when amending the Act, the responsible Minister explained to Parliament: “The Act does not contain an avenue of appeal for Aborigines to a court, nor is there any need for such an appeal. The whole Bill is designed to protect the Aboriginal sites of consequence. The Aborigines are protected by the Aboriginal Cultural Material Committee, the Museum Trustees, and the Government of the day. The Government is answerable to Parliament and to the people, and it has an obligation to uphold and administer the Aboriginal Heritage Act. So there is no necessity for an appeal by Aborigines under any circumstances. It is not in the Act, and it is not in the Bill. There is no need for it.”: Western Australian Parliament, *Aboriginal Heritage Amendment Bill - Second Reading,* debate, Legislative Assembly Hansard, 9 September 1980, 1190.

In 1992, when legislating to excise some land from the Act’s operation (to enable iron ore mining to proceed), the relevant second reading speech stated: “This Bill is designed to enshrine consent and prevent any unwarranted legal challenge by any party to the finality of the section 18 consent. ... This will be done by removing much of the land that was the subject of the application from the operation of the Aboriginal Heritage Act”: Minister for Aboriginal Affairs, *Aboriginal Heritage (Marandoo) Bill* 1992 – Second Reading (Legislative Assembly Hansard, 5 February 1992), 7915.

58 Examples include:

WA Government Submissions to the Joint Standing Committee on Northern Australia Inquiry into the Destruction of 56,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia, which stated:

> “The Act is now almost 50 years old. ... The Act does not reflect Aboriginal community aspirations regarding management of their heritage or support an efficient and culturally appropriate land use decision-making process…. One of the Act’s greatest weaknesses is that it does not expressly provide for consultation with Aboriginal people in the identification, management and protection of their heritage. ... The current Act’s Section 18 Notice and Consent process ... does not provide for any right of appeal by Aboriginal people in relation to decisions about their cultural heritage. There is also a lack of transparency required by the Act about decisions made. ... [T]he current legislation is well past its use by date”: Submission 24, 1-2, 8.
>
> “[T]he Act does little to prevent the destruction of valuable Aboriginal cultural heritage. ... [T]he Act is outdated and cannot protect Aboriginal cultural heritage in Western Australia as expected by both the Aboriginal and broader community.”: Minister for Aboriginal Affairs, additional questions on notice, Letter to Inquiry Secretary, supplementary submission 24.2, 15 September 2020, 1, 6.

Above n 3, Aboriginal Cultural Heritage Bill – Second Reading, Hansard, 6006. In 2021, the second reading speech introducing the new cultural heritage law to replace the Act, stated: “Western Australia is establishing a new cultural heritage regime to achieve equity in the protection of Aboriginal cultural heritage by giving Aboriginal people custodianship over their heritage and putting them at the centre of decision-making. ... [T]he Aboriginal Heritage Act 1972 ... is now outdated and does not meet the expectations of Aboriginal people and the broader community. ... [The bill’s] premise is that Aboriginal cultural heritage is a traditional and living culture that remains fundamental to the lives of Aboriginal people and that Aboriginal people should determine what constitutes their heritage and have an active role in its protection and management, including consultation, negotiation and agreement-making. Its underlying philosophy is avoiding and minimising harm whenever possible.”

59 See, e.g., *O'Sullivan v Farrer* [1989] HCA 61, 168 CLR 210, [13], Mason CJ, Brennan, Dawson and Gaudron JJ (internal quotes omitted): “[T]he expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory enactments may enable”. Approved and applied in WA in *Australian Leisure Group v Police Commissioner* [2020] WASCA 157; 56 WAR 102, [165], Buss P (agreed by Quinlan CJ & Vaughan JA at [3]).

60 Above n 6, SAT Decision, [590].

61 Above n 6, SAT Decision, [590].

62 Above n 6, SAT Decision, [589].

63 Above n 6, SAT Decision, [616].

64 Above n 6, SAT Decision, [257] & [267].

65 Above n 6, SAT Decision, [499] & [621].

66 Above n 6, SAT Decision, [603]-[607]

67 Above n 6, SAT Decision, [631].

68 Above n 6, SAT Decision, [590] & [623]-[630].

69 The prohibition in s 17 is that “A person who … damages, conceals or in any way alters any Aboriginal site … commits an offence unless … acting with the … consent of the Minister under section 18”. SAT’s finding (above n 6, SAT Decision) was [614].

70 Above n 6, SAT Decision, [605], including “damage the … Grinding Patches found in the River” [614].

71 Above n 6, SAT Decision, [615].

72 Above n 6, SAT Decision, [152], [632]. SAT expanded at [619]: “We take into account the Minister's decision, which was to refuse consent.… [W]e consider that it warrants some weight in our evaluation of the general interest of the community, because it constitutes the opinion, formed by the Minister, as an elected Member of Parliament and as the Minister with responsibility for the operation of the AH Act, that the general interest of the community did not warrant consent being given”.

73 Above n 6, SAT Decision, [77].

74 Above n 6, SAT Decision, [153(d)] (internal quotes omitted). The SAT Decision [153(b)], [619], also stated it is not bound by the Minister’s decision.

75 See e.g., *Health Resorts P/L v WA Planning Commission* [2007] WASAT 60, [24] approved in *LS v Mental Health Board* [2013] WASCA 128, [93], Murphy JA (Newnes JA agreeing), who explained SAT should “give attention to the state of affairs existing at the date of its decision, and was not confined to the circumstances existing at the date of the decision under review”.

76 Above n 6, SAT Decision, [13].

77 Above n 6, SAT Decision, [9], [74] indicating this was in a letter to Forrest & Forrest.

78 *Forrest & Forrest v Wilson* [2017] HCA 30; 262 CLR 510.

79 *State Administrative Tribunal Act 2004* (WA), s105.

80 Above n 6, SAT Decision, [302].

81 Examples include developments which:

threaten the way of life and culture of an Indigenous group: [33] of *Ominayak v CAN* (Human Rights Committee, UN doc CCPR/C/38/D/167/1984, 26 March 1990);

amount to a denial of the right to enjoy cultural rights in that region: [9.5] of *Länsman v FIN* (Human Rights Committee, UN doc CCPR/C/52/D/511/1992, 8 Nov 1994), [10.3] of *Länsman v FIN* (Human Rights Committee, UN doc CCPR/C/58/D/671/1995, 22 Nov 1996), and [10.2] of *Länsman v FIN* (Human Rights Committee, UN doc CCPR/C/83/D/1023/2001, 17 Mar 2005);

endanger the very survival of the community and its members: [7.6] of *Poma Poma v PER* (Human Rights Committee, UN doc CCPR/C/95/D/1457/2006, 24 April 2009);

substantially compromise or interfere with culturally significant activities: [7.6] of *Poma Poma v PER* (above), particularly where the group has not had opportunity to participate in the decision-making process in relation to these measures: [9.5] of *Mahuika v NZL* (Human Rights Committee, Communication No. 547/1993, 16 Nov 2000).

CASE NOTE

SHARMA v MINISTER FOR THE ENVIRONMENT

Libby Douglas, BA/LLB, MU

Knowledge Consultant, King & Wood Mallesons

More than a year on from the overturning of Sharma v Minister for the Environment *by the Full Federal Court, Justice Bromberg's original judgment continues to occupy the minds of the Australian legal community. Although the current position in Australia is that the Minister owes no duty of care in such cases, the Full Court of the Federal Court of Australia stressed that the expert evidence regarding the threat of climate change and global warming was largely uncontested, perhaps foreshadowing the cornerstone of cases to come. Globally, climate litigation is showing no signs of slowing down. As outlined below, despite numerous defeats in various jurisdictions, climate litigants have secured a small number of hard-won victories, fuelling the pipeline.*

1 The First Instance Decision: *Sharma v Minister for the Environment* [2021] FCA 560, 27 May 2021

In September 2020, Anjala Sharma and seven other children brought an action against the Federal Minister for Environment Sussan Ley and Vickery Coal, a wholly owned subsidiary of Whitehaven Coal. The Applicants claimed the Minister owed them and other Australian children a duty of care under the laws of negligence, and that she had breached that duty by approving the extraction of coal from a mine.

In February 2016, Whitehaven Coal applied to the Minister under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) to extend a coal mining project (Extension Project) in northern New South Wales. If approved, the Extension Project would increase total coal extraction from the mine site from 135 to 168 million tonnes, which when combusted would produce about 100 million tonnes of carbon dioxide (CO_2). The Minister had this decision before her at the time of these proceedings.

The Applicants claimed that a novel duty of care existed on the part of the Minister towards the children, arising out of the legal relationship between the two parties. The Applicants argued that the Minister was bound by this duty of care to exercise her power under the EPBC Act with reasonable care so as not to cause them harm, and therefore must deny the Extension Application for the reasonably foreseeable harm it would cause by the extraction of coal and emission of CO_2 into the Earth's atmosphere. The Applicants cited mental or physical injury, including ill-health or death, as well as economic and property loss as the kinds of harm relevant to the duty of care being claimed. The climatic hazards that would be exacerbated by continued CO_2 pollution, the Applicants argued, include frequent and more damaging bushfires, storm surges, coastal flooding, inland flooding, cyclones, and other extreme weather events.

The science behind these claims was presented in detail by a number of unchallenged expert witnesses, although the Minister, in her evidence, sought to downplay the effect of an Extension Project on predicted global temperature increases.

His Honour detailed the history of torts and negligence, and highlighted that the purpose of law is to evolve according to societal needs and issues. At [116] Bromberg J paraphrased Lord Macmillan in *Donoghue v Stevenson* [1932] AC 562: "The common law will respond to human errancy by imposing legal responsibility and, driven by the standards of the reasonable person, sensitive as they must be to the changing circumstances of human existence, the 'conception of legal responsibility may develop in adaptation to altering social conditions and standards'."

His Honour accepted the Applicant's claims regarding the foreseeable harm arising out of coal mining and CO_2 emissions, and found that the Applicants had established that the Minister owed a

duty of care. However, Bromberg J stopped short of granting the sought injunction, which would prevent the Minister from exercising her powers of approval under the EPBC Act, on the basis that there was no reasonable expectation that the Minister would approve the Extension Project (in other words, there was no reasonable expectation that she would breach the alleged duty). The application was approved in the interim between the First Instance Judgment and the hearing of the Minister's appeal.

2 The Appeal: *Minister for the Environment v Sharma* [2022] FCAFC 35, 15 March 2022

The decision of the Full Federal Court to overturn Bromberg J's judgment ran to over 200 pages. The case was overturned on three major points, being non-justiciability, causation of harm, and foreseeability of harm.

Chief Justice Allsop reasoned that the duty of care being claimed by the Applicants was centred around policy matters that are, by their nature, unsuitable for judicial determination. The Courts, he argued, are neither sufficiently equipped nor informed to make decisions concerning the policy response to climate change and the question of whether, and if so how, CO_2 emissions should affect the Minister's decision to approve or deny applications under the EPBC Act. The duty of care was therefore denied by Allsop CJ on the basis of non-justiciability.

Justice Beach held the view that the question regarding the duty of care could be addressed without consideration of policy issues. However, he posited that Blomberg J should not have made any declaration on the duty of care because such questions of breach, causation and damage could not yet be considered. Essentially, proceedings could only be brought after the breach of duty has occurred, not in anticipation of it.

All three judges agreed that the Minister had no duty to consider potential harm to Australian children resulting from CO_2 emissions when making decisions under the EPBC Act. Allsop CJ and Wheelahan J argued that the duty of care was incoherent with the EPBC Act as it would go beyond the intended scope of the legislation. However, Beach J did not find that the level of incoherence was significant enough to preclude the existence of a duty of care. Furthermore, the children were not considered a vulnerable class for the purposes of the claim, and the Court held that the relationship between the children and the Minister was not sufficiently close or direct enough to establish a duty of care.

The issue of causation presented a significant hurdle to the establishment of a duty of care. The Court reasoned that the harm resulting from CO_2 emissions is a global problem with countless contributors, and that the Minister could not be held responsible for a small contribution to the increased risk of harm.

The Minister was denied the opportunity to challenge the scientific evidence, as it had not been challenged in the First Instance. This was seen as indicative of a political environment in which countries and organisations do not wish to be seen as denying a link between CO_2 emissions and climate change. Although the Court considered that there may have been some areas of the expert evidence that could have been challenged, Bromberg J's acceptance and interpretation of the evidence was held to be legitimate, and could not be contested on appeal.

Finally, the FCAFC decided that the indeterminacy of harm in the context of rolling events potentially causing damage, where there is no meaningful limit on how many children would suffer and how many times, precluded the existence of a duty.

Based on the issues of non-justiciability, causation, and foreseeability of harm, the novel duty of care was found not to exist. This has been seen by some as a major setback for climate litigation applicants globally, as these issues had either been considered favourably by judges in foreign cases, or not at all. In particular, the discussion around non-justiciability established a strong argument that the Courts are inappropriately placed to decide matters around climate change policy.

3 Climate Litigation around the World

3.1 New Zealand: *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552, 21 Oct 2021

This case was an appeal and cross-appeal of a decision handed down by Wylie J in the New Zealand High Court in March 2020. The Plaintiff was Michael Smith, a Māori elder who brought three actions in the High Court: public nuisance, negligence, and breach of novel duty of care. The Defendants were seven New Zealand companies. In the first instance, Wylie J struck out two out of the three causes of action, but was unwilling to dismiss the novel duty of care claim. The Plaintiff appealed against the decision to dismiss the first two causes of action, and the Defendants cross-appealed the decision not to strike out the third cause. The Court of Appeal unanimously dismissed the Plaintiff's appeal and upheld the Defendant's cross-appeal. The Court reasoned that tort claims were not an appropriate vehicle for addressing climate change, and at [26] described climate change as "a striking example of a polycentric issue that is not amenable to judicial resolution".

3.2 Netherlands: *Urgenda Foundation v State of the Netherlands* ECLI:NL:HR:2019:2007

In the ground-breaking Urgenda case of 2019, the issue at hand was whether the Dutch State was obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990, and whether the courts could order the State to do so. The answer to both questions was yes, setting brand new precedent and sparking a wave of climate litigation throughout Europe.

3.3 UK: *Friends of the Earth v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841

The Plaintiffs in this case argued that the UK Government's Net Zero Strategy was not exhaustive enough, and inadequate to achieve the necessary emissions reductions. The UK High Court held that the Government's plan was unlawful, and allowed the Government eight months to update its climate plan.

3.4 US: *Juliana, et al. v United States of America, et al.* 6:15-cv-01517-TC

The Juliana case was filed in 2015 by 21 young people in the District Court of Oregon. The plaintiffs alleged that the US Government knowingly violated their due process rights of life, liberty, and property, as well as its sovereign duty to protect public grounds, by allowing for the release of CO_2 emissions. The case was dismissed in January 2020 by a Ninth Circuit panel, and in February 2021 the Ninth Circuit denied the appeal. The case is currently awaiting the District Court's decision regarding the plaintiff's application to amend their claim. In a surprising and creative turn, the plaintiffs intend to use the recent Supreme Court decision to overturn *Roe v. Wade* to demonstrate the common law protection of the right to life, which they argue must be extended to protecting the lives of young Americans from the harms of climate change.

3.5 *Canada:* *La Rose v Her Majesty the Queen* (2019) T-1750-19

Canada has several climate litigation cases underway, all of them led by young people. In this case, brought in 2019 and currently in the process of an appeal hearing at the Federal Court, the plaintiffs alleged that Canadian youth are already being harmed by climate change, and that the Federal Government is violating their rights to life, liberty and security of the person under section 7 of Canadian Charter of Rights and Freedoms by allowing the release of CO_2 into the Earth's atmosphere.

3.6 *Colombia:* *Future Generations v Ministry of Environment and Others* STC4360-2018

In 2018, 25 young people won a lawsuit against the several Colombian government and corporate bodies. The plaintiffs claimed that climate change threatened their fundamental rights to a healthy environment, life, health, food, and water, and that the Government violated their rights and those of future generations by not doing enough to combat deforestation of the Amazon rainforest. The Colombian Supreme Court found in favour of the plaintiffs, and recognised the Colombian Amazon

as an area having its own rights. The Supreme Court also ordered the Government to formulate and carry out clear plans to significantly reduce emissions and deforestation.

4 What's Next for Australia and Beyond?

The Federal Court case of *Pabai & Kabai v Commonwealth* VID 622/2021 is set for trial to begin in June 2023. The case was brought by a group of Torres Strait Islanders from the Gudamalulgal Nation seeking relief on the behalf of all Torres Strait Islanders people for the harm caused by CO_2 emissions. The Applicants contend that the Commonwealth has engaged in an ongoing breach of its duty of care by allowing for the release of greenhouse gases into the Earth's atmosphere, causing degradation of the land and marine environment, loss of the *Ailan Kastom* (traditional way of life), damage to their native title rights, and physical and psychological harm.

Corporate responsibility has come to the forefront in a new derivative action brought by ClientEarth against 11 Shell directors in the High Court of England and Wales in February 2023. The Applicant alleges that the Shell directors have mismanaged material and foreseeable climate risks, and have breached their duties under the *Companies Act 2006 (UK)* to exercise reasonable care, skill and diligence, and to act in good faith in a way that promotes the success of the company for the benefit of its members. At the time of writing, the Applicant is waiting on permission from the Courts to proceed with the claim.

In conclusion, it has become clear that young people in Australia and around the world are growing increasingly frustrated with institutional responses to climate change. Our most junior citizens, not yet able to vote, are bringing their concerns to the courts in search of better, faster solutions for what they perceive to be an urgent problem that the government has not earnestly addressed. The *Sharma* decision, as we have seen, hinged on three points. The first two, duty of care and reasonable foreseeability of harm, are becoming increasingly difficult to deny in the face of climate science, environmental devastation, and the sentiment of young people globally. The third point, and the final hurdle upon which the *Sharma* case stumbled, is non-justiciability.

Lauren Wright, one of the youth plaintiffs in the Canadian *La Rose* case, told a courtside reporter, "To hear the lack of urgency, to hear 'well just come take it to your Federal Government' as if we haven't tried that, as if they are not the perpetrator that we are seeing in the legal domain … we are pursuing the legal branch and the legal basis because we have tried everything else".[1] It is evident that climate litigants are, by their nature, unwilling to acquiesce to the status quo. Based on what we have seen thus far, if systemic overhaul is required in order for effective action to be taken, it is reasonable to expect that these young litigants will not baulk in the face of such a challenge.

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[1] Rachel Morgan, "15 youth push Charter case against Ottawa as global environmental movement expands legal action", *The Pointer*.