COMMENT ON CHANGING ENVIRONMENTAL CONTROLS OVER THE MINING INDUSTRY IN AUSTRALIA

By R. J. Fowler*

It was ten years ago that the author undertook the daunting task of reviewing environmental controls as they applied to the minerals industry[1] for an AMPLA Conference. The topic has continued to make its way onto the agenda of subsequent AMPLA Conferences since then and Brian Hayes Q.C. has made a valiant effort to canvass the field afresh in his paper. He has drawn attention to the role which the Commonwealth government performs in relation to environmental management through a number of enactments. He has sought also to review the appropriate State measures, quite rightly emphasising the environment protection function which mining legislation itself may perform alongside the host of separate and additional requirements in environmental legislation.

Inevitably, any such review must be fairly cursory unless one is willing to present a thesis on the topic. In his concluding remarks, Hayes notes the enormous complexity of existing controls, particularly since it has been necessary to superimpose environmental controls over established mining legislation. He concludes by suggesting that in the future the mining industry will be subject to greater levels of control, particularly through the environmental impact assessment process.

These are familiar observations. They have led in turn in recent years to an increasing level of criticism by the mining industry of the effects of environmental controls — in particular, with respect to the specific issue of restrictions upon access to land.[2] The apprehension that the existing complexities may be added to by even further controls is, a very real one. Whether it is justified is quite another matter.

The writer does not consider that the past ten years has seen a significant change in the level or type of environmental controls applicable to mining activity. The writer can think of only two situations in which some new regulatory constraints have been, or in the future might be, applied to mining. The first of these is the World Heritage Properties Conservation Act 1983 (Cth.), which provides for the identification and protection of sites of world heritage significance according to criteria laid down in the Convention for the Protection of the World Cultural and Natural Heritage. The Convention obliges Governments to take all appropriate steps to secure the protection of listed areas.

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1 R.J. Fowler 'Environmental Law — A Review of Legislative Controls Applicable to the Mineral Industry' (1978) 1 *AMPLJ* 533.

2 The most recent example being Australian Mining Industry Council's publication, 'Shrinking Australia: The Problem of Access to Land' (April 1988, Canberra), which claims that 'more than 23 per cent of the land surface of Australia is either severely restricted or closed to new exploration or mining activity'. National parks are stated to account for 5.6% of restrictions.

It is clear from the World Heritage Act[3] that mining activities (including at the exploration stage) may be regulated by the Commonwealth on world heritage sites. In the case of Stage II of Kakadu National Park, the Government chose to ban all mining activity, both existing and future at the time of submitting its nomination for world heritage listing. However, it actually implemented this decision through amendments to the National Parks and Wildlife Conservation Act 1975 (Cth.) rather than by the exercise of the powers granted by the World Heritage Act.

In the case of the projected Daintree world heritage area, it is the writer's understanding that the Government proposes to implement a management plan which may countenance some mining activity within the relevant area. This proposal will be, without question, one of the more contentious aspects of the proposed management plan in political terms, but it illustrates nevertheless that world heritage listing does not necessarily preclude mining activity as a matter of law. Rather, it raises the requirement of having to obtain Commonwealth consent for such activity, a consent which it can be assumed will be difficult to secure in most instances.

A related issue which arose in relation to the Kakadu situation was the right of those holding existing mining interests to compensation because they could no longer exercise those interests. Article 6 of the World Heritage Convention recognises that the duty to protect world heritage which is imposed by the Convention is 'without prejudice to property rights provided by national legislation'. But, as Mason J. noted in the *Franklin Dam* case,[4] this provision has no domestic operation *per se* and merely 'provides some safeguard for such existing and future rights in property forming part of the world heritage as a national State may choose to protect, acknowledge or create'. In the *Peko-Wallsend* case,[5] Beaumont J. at first instance observed quite rightly that 'there is no obligation on the Commonwealth enforceable under domestic law to provide protection for property rights'.[6] Furthermore, it is clear from the *Franklin Dam* case that the exercise of powers under the World Heritage Act does not involve any taking of property on unjust terms contrary to section 51 (xxxi) of the Constitution (despite a strong dissenting view by Deane J.). As a result, the compensation provisions contained in section 17 of the World Heritage Act, which apply where the operation of the Act or Regulations thereunder has resulted in an acquisition of property from a person, have no application where activities are regulated by the Commonwealth under the Act. Nothing short of a formal acquisition of title to the relevant land seems likely to attract the operation of section 17 of the Act.

In the case of Kakadu, the amendments to the National Parks and Wildlife Conservation Act 1975 (Cth.) enacted in May 1987 dealt specifically with the problem of existing interests and rights to compensation. The amendments removed the protection afforded to existing mining

3 Ss.9, 10 & 11.
4 *Commonwealth of Australia v. State of Tasmania* (1983) 46 ALR 625, 698.
5 (1987) 70 ALR 523 (Beaumont, J.); reversed on appeal (1987) 75 ALR 218 (Fed. Ct. of Aust. FC).
6 *Ibid.* 546.

interests by section 8B of the Act (it should be emphasised that section 8B remains applicable to all other parks subject to the Act) and then provided that the 'Commonwealth is not liable to pay compensation to any person by reason of the enactment of this Act'.[7]

At first sight, this may appear a drastic, even unconstitutional, measure. But it must be appreciated that the amending legislation did not formally terminate or provide for the acquisition of existing rights. Rather, it simply lifted the protection previously afforded by section 8B to existing interests and raised a prohibition upon their continued exercise. The rights remain but they cannot be exercised. The legislation did not therefore involve any taking on unjust terms, contrary to section 51(xxxi) of the Constitution. This view is consistent with the High Court's stance on the matter of acquisition in the *Franklin Dam* case.

The second situation where some new form of environmental control may confront the mining industry is in relation to wilderness protection. Whilst the concept of wilderness has been understood for many years in Australia, its legal recognition has been very limited until recently. The first comprehensive wilderness legislation in Australia was enacted in New South Wales in 1987.[8] It provides for the protection of wilderness areas outside the national parks system by interim protection orders where voluntary arrangements cannot be reached. This legislation has provided a precedent for supporters of wilderness legislation elsewhere in Australia and there are proposals being advanced for such legislation to be introduced in South Australia and at the Commonwealth level.

Having identified what might be regarded by the mining industry as the 'bad news', the writer must return to the earlier observation that there have been few other significant changes in the nature or extent of environmental controls as they apply to the mining industry over the past ten years. What has happened, however, is that the effect of the numerous measures introduced some years ago has begun now to be felt more noticeably by the mining industry. It is, the writer believes, the emerging realisation of the impacts of environmental controls that has prompted the industry to protest, in particular, about the loss of access to land for exploration or mining activity. This protest is evident in various forms, but in particular through political lobbying to remove constraints upon mining activity in national parks.

Some governments are responding to this pressure by changing the existing rules. In particular, the South Australian government has adopted a policy of allowing access in certain circumstances to any new parks. This policy has been enshrined in recent amendments to the National Parks and Wildlife Act 1972 (S.A.) (including section 43 of the Act, which is recited in the paper in its unamended form).[9] The same amendments have also provided for a new category of reserve, the 'regional reserve', in which existing mining and pastoral interests will be allowed to continue under the supervision of the National Parks and Wildlife Service. It is conceivable that, in the future, governments in this

7 National Parks and Wildlife Conservation Act Amendment Act 1987 (Cth.) s.7.

8 Wilderness Act 1987 (NSW); also Miscellaneous Acts (Wilderness, Amendment Act 1987 (NSW)).

State will elect to establish this type of reserve rather than proclaim new national parks where tighter rules would apply. It should be noted that in Western Australia also the existing rules on mining access to parks have been reviewed recently, through the Bailey Report, and that changes to those rules are proposed as a result.

It cannot be said, therefore, that the traffic is all one way for the mining industry in relation to environmental controls. The writer thinks it is interesting also to observe a tendency toward the use of the courts to attack the operation of environmental controls, in particular by invoking the principles of natural justice. The *Peko-Wallsend* case was one instance of this particular trend and, whilst it was ultimately unsuccessful in relation to the matter of world heritage nominations by the Commonwealth, there are other, recent cases in which natural justice principles have been invoked with success, *e.g.* in relation to the exercise of various powers by land-use planning authorities.[10] In a slightly ironic twist on this theme, the Western Australian Full Court recently applied natural justice principles in *Merman Pty. Ltd. v. Parker, Minister for Minerals and Energy*[11] to prevent the respondent Minister from exercising his powers to grant or refuse an interest under the Mining Act 1978 (W.A.) until the applicant had been afforded a reasonable opportunity to complete and present an environmental report concerning its proposed activity. Clearly, the applicant felt that its environmental report would provide all the requisite answers to any environmental concerns which its proposal raised!

It seems possible, therefore, that whilst there may be changes to environmental controls which will increase the level of regulation over the industry, there also may be changes which will accommodate the interests and needs of the industry — either through the political process or as a result of judicial determinations. The tensions between the mining industry and environmental concerns merely reflect the underlying differences in philosophy and objectives concerning these issues. For the most part, however, it seems to be unlikely that there will be major or radical changes to the existing rules. In particular, environmental controls are here to stay, even if in varying forms of intensity from State to State and at the Commonwealth level.

9 National Parks and Wildlife Act Amendment Act 1987 (SA)

10 *E.g., Rv. Perron: Ex Parte Central Land Council* (1985) 31 NTR 38; *City of Brighton v. Selpam Pty. Ltd.* [1987] VR 54; and contra *Idonz Pty. Ltd. v. National Capital Development Commission* (1986) 67 ALR 46. For a discussion of these cases, see R.J. Fowler 'Environmental Law', in R. Baxt, R. & G. Kewley (eds.), *The Annual Survey of Australian Law* (1988) 362–364

11 [1987] WAR 159.