THE FUTURE ROLE FOR STATE AGREEMENTS IN WESTERN AUSTRALIA

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This paper analyses State Agreements from two perspectives to identify the circumstances where they will most likely add value to future mining projects. The reasons why the State and a developer may choose to enter into a State Agreement are considered in an economic and policy analysis. A legal analysis is performed to identify the effectiveness of the State Agreement mechanism in achieving the intention of the parties. This analysis also identifies whether State Agreements are better directed at the regulation or facilitation of mining projects.

1. INTRODUCTION

State Agreements, contracts between the State and a company seeking to develop a project, have traditionally been the vehicle used to conduct major resource projects in Western Australia. They are comprehensive documents, designed to establish 'an integrated regime for approval, management and monitoring of all stages of the project' under ministerial supervision.[1] Each State Agreement is negotiated on an ad hoc basis and is then ratified under an Act of Parliament. The purpose of ratification is to enable the project to proceed outside most State laws, under the terms of the agreement.

In 2002 approximately 70 per cent of the total value of production in the Western Australian resources sector occurred under State Agreement projects, a figure that was relatively stable in the decade before that.[2] This extensive use is somewhat anomalous.[3] Tasmania and the Northern Territory are the only other State or Territory governments to recently enter into State Agreements for resource projects.[4] Overseas, use of analogous mining agreements is generally limited to developing nations.[5] Though some Canadian Provinces have used State Agreements,[6] Western

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1. M Crommelin, "State Agreements: Australian Trends and Experience" [1996] AMPLA Yearbook 328, 330.
2. Independent Review Committee ("Keating Review") *Review of Project Development Approvals System*, Crown in the right of the State of Western Australia, 2002, 33.
3. R Mikesell, *Foreign Investment in Mining Projects: case studies of recent experiences,* Oelgeschlager, Gunn & Hain, 1983, 6; United Nations Conference on Trade and Development ("UNCTAD") *Management of Commodity Resources in the Context of Sustainable Development: Governance Issues for the Mineral Sector,* UNCTAD/ITCD/COM/3 1997, 9.
4. The most recent resource agreements by these governments are the Copper Mines of Tasmania Pty Ltd (Agreement) Act 1999 (Tas) and the Tanami Exploration Agreement Ratification Act 2004 (NT). Queensland legislated to facilitate certain aspects of a native title agreement in the Century Zinc Project Act 1997 (Qld).
5. See AR Tussing & GK Erickson, *Mining and Public Policy in Alaska – Mineral Policy, the Public Lands and Economic Development*, Institute of Social and Economic Research 1969, 55; J Otto & J Cordes, *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy*, Rocky Mountain Mineral Law Foundation 2002, ch 4 p 2.
6. AM Fitzgerald, *Mining Agreements – Negotiated Frameworks in the Australian Minerals Sector,* LexisNexis Butterworths 2001, 257; Mikesell, op cit, n 3, 6; J Richards & L Pratt, *Praire Capitalism: power and influence in the New West*, McClelland and Stewart 1979, 8-9.

Australia is exceptional in scale and specificity of use.[7] To investigate whether this anomaly is justified into the future, and in what circumstances, this paper seeks to identify the circumstances under which State Agreements may add value. The approach is more general than specific, detailed consideration of individual State Agreements or the *Mining Act* 1978 (WA) ("*Mining Act*") is beyond the scope of this paper.

Part 2 examines the policy and economics behind the use of State Agreements. Economic factors are the fundamental influence upon the design of a mining regime, affecting the developer's decision to commit to a project and, together with political considerations, the State's mineral policy.[8] The factors that influence the choice of both the State and a developer to negotiate a State Agreement are examined. Economic analysis is used to indicate where the use of State Agreements may be counterproductive or beneficial. The Part also considers how these factors have changed over time, an interesting question given the internationalisation of the mining industry and its matured state in Western Australia. Although many significant projects are being conducted (and will proceed in the future) under existing State Agreements, new State Agreements are significantly rarer than in the 1960s and 1970s when over forty were ratified.[9]

The legal structure of a mining regime is the servant of the State's mineral policy. [10] As well as maximising economic rent, mineral policy is directed at encouraging investment and exercising control over development. Mining laws can therefore be said to perform facilitative and regulatory functions. Part 3 examines whether State Agreements, by ratification, efficiently serve either function. The analysis allows a conclusion to be made on the most effective role for State Agreements within the mining law framework.

In light of the unresolved future of State Agreements, Part 4 concludes with recommendations for the limited future use of this mechanism. These recommendations are timely given a recent investigation into the project development approvals system in Western Australia ("Keating Review") recommended a significantly reduced role for State Agreements.[11] The government has made no decision on this part of the Keating Review.[12]

2. POLICY AND ECONOMICS BEHIND STATE AGREEMENTS

Mining rules and regulations are designed to serve the mineral policy,[13] which in the Australian States is a creature of constitutional,[14] economic, political, technological and geological factors.[15]

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7. D Forde, *Mechanism for Mineral Resource Development in Western Australia,* Thesis at Murdoch University 1993, 4 & 41-42; Mikesell ibid; UNCTAD op cit, n 3, 9; P McNamara, "The Enforceability of Mineral Development Agreements to which the Crown in the Right of a State is a Party", (1982) 5 UNSWLJ 263, 265.
8. See Otto & Cordes, op cit, n 5, vi.
9. See R Hillman, *The Legal and Economic Efficiency of State Agreements,* Dissertation at The University of Western Australia 2005, 90-93; Keating Review, op cit, n 2, 205.
10. Otto & Cordes, op cit, n 5, vi.
11. See Keating Review, op cit, n 2, 101-102.
12. Department of Industry and Resources, ("DOIR") *Schedule of Government Positions and Progress Report on Keating Recommendations,* (2006) <http://www.doir.wa.gov.au/documents/investment/Governments_position_on_recommendations_and_status_v2.pdf>.
13. Otto & Cordes, op cit, n 5, ch 4 p 2.
14. M Crommelin, "Resources Law and Public Policy" (1983) 15 UWAL Rev 1, 4.
15. See JM Otto, *Mineral policy, legislation and regulation*, UNCTAD: Mining, Environment and Development, (1999) <http://www.natural-resources.org/minerals/generalforum/docs/word/otto.doc>, 8.

There are three central objectives of State mineral policy, which are not always complementary.[16] They are to:

- encourage development of the State's natural resources to generate economic benefits;
- control development, to make sure it is carried out consistently with government policies; and
- maximise the economic rent collected by the government for the use of the State's resources.[17]

Many of Western Australia's current policies towards mineral development are represented in its Industry Policy Statement.[18]

The government will seek a State Agreement where it perceives that the general mining legislation is 'incapable of implementing government policy for a specific project'.[19] The developer will enter into negotiations where it believes a State Agreement is a commercially viable document that will create an efficient framework for the project, based upon a number of factors.[20] The negotiation of the State Agreement is thus a complex and lengthy process designed to satisfy the economic and policy objectives of the parties. Factors that should be considered by the parties before entering into a State Agreement include:

- The assurance and certainty required by the developer
- Issues associated with the negotiation and evaluation of State Agreements
- The negotiated trade-off between the State and developer
- The desired working relationship between the parties
- Co-ordination and facilitation under a State Agreement
- The suitability of the general legislation.

2.1 Assurance and certainty

A State Agreement is a highly visible signal of the State's support for and commitment to a project.[21] This commitment effectively reduces sovereign risk, the risk of adverse decisions and actions by the State,[22] and makes the project more attractive to key stakeholders. The effectiveness of the commitment is increased by the public nature of the document and the implications for future investment (and bond ratings) if the State unilaterally modifies the agreement. Western Australian political parties have a bipartisan policy that they will not unilaterally modify State

16. See LA Warnick, "State Agreements" (1988) 62 ALJ 878; Crommelin, op cit, n 14, 9.
17. Warnick, ibid, 878; C Barnett, "State Agreements" [1996] AMPLA Yearbook 314, 318; Department of Resources Development ("DRD"), *In Agreement - How major developers obtain project security through State Agreement Acts*, 1997, 10; R Griffiths, M Tagliaferri & A Komninos, *State Agreements,* Crown Solicitor's Office 2001, 3; DOIR, *State Agreements*, (2005) <http://www.doir.wa.gov.au/documents/investment/state_agreements_text_v2.pdf>, 1.
18. DOIR, *Building Future Prosperity – Creating Jobs and Wealth through Industry Development,* 2004.
19. MW Hunt, "Government Policy and Legislation Regarding Mineral and Petroleum Resources" (1988) 62 ALJ 841, 860.
20. See DP Grinlinton, *Legal Aspects of Large Scale Mineral Developments: A Case Study of Western Australia*, University of Dundee Centre for Petroleum and Mineral Law Studies 1988, 33-35.
21. Grinlinton, ibid, 45.
22. See P Turner, "Sovereign Risk" [1993] AMPLA Yearbook 135 at 137 for a more comprehensive definition of sovereign risk, which includes inconsistent actions between the Commonwealth and a State government.

Agreements[23] and, although State Agreements have been directly affected by subsequent legislation, in almost all cases these modifications were negotiated or made in accordance with the agreement.[24] The Western Australian government, as in South Australia,[25] has also negotiated the phasing out[26] or elimination[27] of concessions within early State Agreements.

The assurance offered by a State Agreement is valuable, but does not provide comprehensive protection against sovereign risk. Although governments are conscious of the effect their actions have on outside perceptions, Seddon notes that "if a government does enter into this zone it is not going to be deterred."[28] He cites the legislative repeal of the rights of Pechiney Holdings under a Queensland State Agreement in 2004 as an example of the legal vulnerability of State Agreements.

Historically, the assurance offered by State Agreements has played an important role in the development of the State. Mensaros[29] noted the importance of the mechanism in attracting Reynolds Aluminium (now Alcoa) to invest in the State.[30] The company was concerned about investment security (its substantial Jamaican project had just been expropriated) and only committed under a State Agreement. The critical role played by the mechanism has probably declined in line with the development of Western Australia and the growth of its reputation internationally. Indeed, there is evidence to suggest jurisdictions tend to rely on their existing legal frameworks more as their legal and mineral sectors mature.[31]

2.1.1 Certainty of project ground rules

State Agreements are said to provide a "blueprint" of the future intentions and undertakings of the parties.[32] They present a formalisation of responsibilities that sets the ground rules for the project.[33] The Keating Review found that this role was of great value to industry, providing regulatory certainty and solidifying government promises into obligations.[34] Security of tenure is

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23. *Hansard* (LA) 26 Aug 2004 (Question No 522) 5754; *Hansard* (LC) 15 Oct 2003, 11980-11981; *Hansard* (LA) 16 May 2002, 10566-10567. See also Warnick, op cit, n 16, 891.
24. For example, exemptions to the *Environmental Protection Act* 1986 (WA) ("EPA") for pre-1972 State Agreements were removed by amendment to the EPA: see section 123 of the *Environmental Protection Amendment Act* 2003 (WA). For most pre-1972 State Agreements the removal was successfully negotiated before the amending legislation was introduced. Amcor Limited, party to the *Paper Mill Agreement Act* 1960 (WA), did not agree to a removal of the exemption: see *Hansard* (LA) 16 Sep 2003 (Question No 1692) 11315.
25. RJ Daugherty, "Comment on State Agreements" (1977) 1 AMPLJ 48, 50.
26. The Western Australian government has negotiated with BHP Billiton and Rio Tinto to phase out concessions on pelletised iron ore under early State Agreements: see R Pedler, "WA to gain extra $80m from BHP" *The West Australian,* 22 Aug 2005, 4.
27. In 1997 the Western Australian government negotiated with Cockburn Cement the elimination of royalty concessions on shell sand under the *Cement Works (Cockburn Cement Limited) Agreement Act* 1971 (WA): see the Fourth Schedule to that Act; *Hansard* (LA) 20 Aug 1997, 5113-5116.
28. N Seddon, "State Instrumentalities and Sovereign Risk" [2005] AMPLA Yearbook 29, 37.
29. Former Resources Minister of Western Australia.
30. *Hansard* (LA) 2 May 1991, 1230.
31. There is a trend for jurisdictions to rely on the existing legal framework as their legal and mineral sectors mature: see J Otto, "Global changes in mining laws, agreements and tax systems" (1998) 24 *Resources Policy* 79, 82; Otto & Cordes, op cit, n 5, ch 4 p 4.
32. Grinlinton op cit, n 20, 45.
33. MW Hunt, *Mining Law in Western Australia* (3rd edn.), The Federation Press 2001, 15.
34. Keating Review, op cit, n 2, 101.

valued as the paramount investment consideration by mining companies.[35] Alcoa, for example, was first convinced to invest in Western Australia when the State covenanted that it would not impair, disturb or prejudicially affect the company's rights under a State Agreement.[36]

State Agreements enable the State to offer security of tenure required by companies, where it might not be feasible to do so under the general legislation. There is a desire in some sectors of the community, which is reflected in the *Mining Act* (particularly the 'public interest' discretion in section 111A), for the State to retain discretion when considering tenement applications.[37] Barnett[38] notes that State Agreements provide certainty by removing this discretion.[39] In actuality the grant of title under a State Agreement depends on ministerial approval of the developer's proposals,[40] though in the event of a failure to grant a tenement the developer is often able to resort to arbitration rather than the courts.[41]

The ability of State Agreements to override existing laws is valuable where there are barriers to investment, such as the 'farmer's veto' in the *Mining Act*.[42] This veto is considered to have restricted exploration and mining activity within Western Australia, but attempts to remove it have proven unsuccessful.[43] Clause 7(9) of the Worsley State Agreement confers jurisdiction upon the mining warden to dispense with a landowner's consent where it is unreasonably withheld.[44] Notably however, and in light of the judgment of Parker J in *Re Michael; Ex parte WMC Resources Ltd*[45] discussed in Part III below, under the current model of ratification in Western Australia this conferral of jurisdiction is questionable.

It should be noted that the ability to override existing laws can be achieved by different means. Part 8A of the *Mining Act* 1971 (SA) provides for an agreement between the Minister and a developer, ratified by the Governor, concerning projects of major significance. Exemptions or modifications to that Act can be made under a Part 8A agreement. This mechanism allows

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35. J Otto, "National mineral policy as a regulatory tool" (1997) 23 *Resources Policy* 1, 4; J Otto, "A global survey of mineral company investment preferences and criteria for assessing mineral investment conditions" in United Nations, *Mineral Investment Conditions in Selected Countries of the Asia-Pacific Region,* United Nations ST/ESCAP 1197, 1992 at 330-342.
36. *Alumina Refinery Agreement Act* 1961 (WA) sch 1 cl 19. See R Williams, "Resource and title security through State Agreements – is it still working?" in ABARE *Outlook '97 – Minerals and Energy: Vol 3*, ABARE 1997, 65.
37. Keating Review, op cit, n 2, 101. Consider also the wide 'public interest' discretion invested in the responsible Minister under section 111A of the *Mining Act* 1978 (WA) to refuse or terminate applications for mining tenements.
38. Former Minister for Resources Development.
39. Barnett, op cit, n 17, 321.
40. See Crommelin op cit, n 17, 333. *Nickel (Agnew) Agreement Act* 1974 (WA) sch 1 cl 15(1); *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) sch 1 cl 10(1).
41. See Crommelin ibid, 333. *Nickel (Agnew) Agreement Act* 1974 (WA) sch 1 cl 7(4); *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) sch 1 cl 7 (4).
42. The veto allows private landowners using their property for agricultural purposes to withhold consent to development: see ss 8, 29(2) *Mining Act 1978* (WA). It is of particular importance in the South-West of the State which is heavily farmed.
43. See L Ranford, W Carr A Smurthwaite & M Freeman, "Resource Access in Western Australia'" in ABARE *Outlook '97 - Minerals and Energy: Vol*, ABARE 1997, 56, 61.
44. *Alumina Refinery (Worsley) Agreement Act Amendment Act* 1978 (WA) amended cl 7(9) of the *Worsley State Agreement.*
45. (2003) 27 WAR 574.

inconvenient provisions of the mining legislation to be overridden, but all other State laws would continue to apply to the project.

2.1.2 Assistance with Financing

Knowledge of the stability of a project carried on under a State Agreement allows the developer to make an accurate and relatively early assessment of a project's viability.[46] It has also been suggested that identification of the State with a project assists a developer in obtaining finance[47] and securing sales contracts.[48] State Agreements convey positive information to potential financiers and customers about the capacity of the developer to carry out the project, since the government will not enter into negotiations unless satisfied the developer has the ability to successfully develop and manage the project. State Agreements are therefore considered to be interdependent with finance,[49] particularly project finance.

Project financing is where finance (primarily debt) is repaid out of the cash flows of a project and is secured by project assets.[50] Recourse is essentially limited to these two sources, so the financier has a higher than usual stake in the project and plays an active role in risk management.[51] Before finance is issued, the parties must identify and quantify project risks and then allocate them amongst themselves. The stability offered by a State Agreement is important reassurance for the financier as well as the developer.[52]

The rationalisation of the mining industry into large multinational corporations means that there is now a significant capacity within the sector to finance projects internally. Project finance is time consuming to obtain and is more expensive and less flexible than the use of corporate funds.[53] Whilst junior mining companies resort to project finance because it is the primary debt financing tool at their disposal, larger companies are not so limited. Davies notes that large multinationals will use project finance in more limited circumstances. [54] Two major Western Australian nickel

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46. Industry Commission, *Mining and Minerals Processing in Australia*, AGPS 1991, 136.
47. Hunt, op cit, n 33, 15; Fitzgerald, op cit, n 6, 272; Grinlinton, op cit, n 20, 34-35.
48. National Competition Council ("NCC"), *Western Australia Chamber of Commerce and Industry Submission: Goldfields Gas Pipeline (WA),* (2003) <http://www.ncc.gov.au/pdf/regaggpsu-016a.pdf>, 22; KD MacDonald, "The Negotiation and Enforcement of Agreements with State Governments Relating to the Development of Mineral Ventures" (1977) 1 AMPLJ 29, 31; Griffiths, Tagliaferri & Komninos, op cit, n 17, 4.
49. See J Otto & D MacDougall, "Project financing and the mineral development agreement" (1994) 103 Trans Instn Min Metall (Sect A) A117; Daugherty, op cit, n 25, 48.
50. For a more comprehensive definition see P Doyle, T Holland & J Naughton, "Project and Infrastructure Financing" in Mallesons Stephen Jaques *Australian Finance Law* (5th edn), Law Book Company Information Services 2003, 312.
51. See Otto & MacDougall, op cit, n 49, A117.
52. M Davies, "Project Finance: Issues for Project Sponsors" [2003] AMPLA Yearbook 142, 152; UNCTAD, op cit, n 3 14; TH Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition,* International Institute for Economics 1998, 144-145.
53. Davies, ibid, 151.
54. Davies ibid, 152. The circumstances he lists are: multi-billion US dollar mega projects, projects in politically volatile areas, joint ventures with heterogeneous partners, investments in non-core businesses, entry into new industries, markets or technologies, tax based transactions and budgetary constraints.

projects that are not operating under State Agreements, the Murrin Murrin project[55] and the Mount Keith project,[56] did not use traditional project financing.

2.2 The Negotiation and Evaluation of State Agreements

The pursuit of a fair deal from knowledgeable and experienced mining companies places significant demands upon the skill and resources of the bureaucracy, [57] leading to protracted and costly negotiations.[58] The Department of Industry and Resources ("DOIR") has stated that considerable resources are required to negotiate a State Agreement.[59] Despite these costs, State Agreements have been employed for projects that require little infrastructure provision or could have proceeded under existing laws. [60] There are no clearly identified public criteria to guide the DOIR or Cabinet on the use of State Agreements,[61] yet the benefits the State obtains from negotiations 'are often not nearly as determinable as they are from the [developer's] point of view'.[62] The State must weigh up a considerable number of intangible factors in considering whether to proceed with a State Agreement.

The absence of transparent criteria means that State Agreements can become an unwieldy means to achieve mineral policy. Active promotion of their use by the State may be inefficient, given the company is in a better position to determine the economics of the project and its governing framework. Yet State Agreements have been pushed by the bureaucracy, despite opposition by the developer. For example, after Western Mining Corporation ("WMC") acquired the Mount Keith project it decided not to proceed with a State Agreement which would have imposed obligations requiring local content, further processing and the construction of a new town.[63] This decision met some resistance from the predecessor to DOIR,[64] even though WMC:

- had further processing facilities at Kalgoorlie and Kwinana;[65]
- would fund the development internally;
- had nearby facilities, including accommodation, and would utilise air transport;
- wanted to organise its transportation arrangements without State involvement;
- found expenditure conditions under the *Mining Act* acceptable; and
- considered its existing licences sufficient for development.[66]

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55. The contributions of the Murrin Murrin joint venturers were financed by the US capital markets rather than a bank: see R Ladbury, "Resource Project Financing: Capital Markets Project Financing" [1998] AMPLA Yearbook 190.
56. The Mount Keith project was funded internally: see PSR Jackson, "The implementation of the Mt Keith Project", Annual AMPLA (WA Branch) State Conference, 15 Oct 1993, 19.
57. AR Tussing & GK Erickson, *Mining and Public Policy in Alaska – Mineral Policy, the Public Lands and Economic Development,* Institute of Social and Economic Research 1969, 55.
58. Otto & Cordes, op cit, n 5, ch 4 p 4; Otto, op cit, n 31, 82.
59. DOIR, **"**Mineral law and Policy issues in Western Australia" (2002) 111 Trans Instn Min Metall (Sect B) B189, B193; DRD, op cit, n 17, 13.
60. Auditor General for Western Australia ("Auditor General"), *Performance Examination – Developing the State: The Management of State Agreement Acts,* 2004, 21.
61. Auditor General, ibid, 21-22.
62. Daugherty, op cit, n 25, 49.
63. See Jackson, op cit, n 56, 7, 17-18 & 22-23.
64. Jackson, ibid, 20.
65. See Jackson ibid, 8.
66. See Jackson ibid, 8, 19-20.

Interestingly, pressure was also unsuccessfully applied to Woodside to enter into a State Agreement for its Pluto gas project. In particular, the State wanted a clause reserving a proportion of gas for domestic supply (as in the North West Shelf and Gorgon gas projects).[67] The State has subsequently published a policy on securing domestic gas supplies to guide negotiations with project developers, the practicality of this action is yet to be demonstrated with considerable resistance being expressed by the oil and gas explorers.[68]

2.2.1 Evaluation of Cost-Benefits of State Agreements

Governments face significant difficulties evaluating major developments where they must consider a large number of intangible factors. The Industry Commission[69] ("Commission") reported a tendency for government use of multiplier analysis to overstate the benefits flowing from projects. The analysis often failed to take into account the opportunity cost of a project.[70] A decision may also be influenced by the incentives of the government agency recommending the adoption of a State Agreement. The DOIR, which assumes this role in Western Australia, has significant responsibility for the facilitation, negotiation, regulation and management of State Agreement projects. When making a recommendation, the DOIR is implicitly evaluating the performance of the agreements it manages. It is in a position of conflict.

Ultimately the greatest obstacle to the accurate evaluation of a State Agreement is the insulation of agreement provisions from demand and competitive pressures. The cost to the State in pursuing mineral policy by way of negotiations is represented by the concessions offered to the developer[71] and the economic rent foregone.[72] These costs must be weighed off against intangible policy benefits that are often difficult to measure.[73] The fundamental flaw with State Agreements, in imposing obligations as part of ad hoc negotiations, is that there is no clear standard by which to identify the cost of the obligations or their success.[74]

2.3 The negotiated trade-off

Tussing and Erickson note that the negotiated trade-off is counterproductive in sophisticated economies.[75] The developer will want to maximise its returns and the State will want to achieve its policies, with a central goal of maximising economic rent.[76] Where markets for a project's inputs and outputs are efficient, there is no advantage to either party in being tied to mutual obligations

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67. See, *Barrow Island Act* 2003 (WA) sch 1 cl 17; *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) sch 1 cl 43; *North West Gas Development (Woodside) Agreement Act* 1979 (WA), cl 44A of the Agreement (inserted by sch 3). See also J Phaceas, "State has no agreement for $5b Pluto project", *The West Australian*, 8 Sep 2006 <http://www.thewest.com.au/default.aspx?MenuID=32&ContentID=6014>.
68. The policy is available at http://www.doir.wa.gov.au. The policy was applied to negotiations with Woodside over the Pluto project, see J Phaceas, "Woodside sidesteps gas-for-WA demand ", *The West Australian,* 19 Oct 2006 <http://www.thewest.com.au/default.aspx?MenuID=77&ContentID=10291>
69. Now Productivity Commission.
70. Industry Commission, *State, Territory and Local Government Assistance to Industry,* AGPS 1996, 89. See also Forde, op cit, n 7, 49-50.
71. Jackson, op cit, n 56, 20.
72. Crommelin, op cit, n 14, 9.
73. Tussing & Erickson, op cit, n 57, 55.
74. Tussing & Erickson, ibid, 56.; Auditor General, op cit, n 60, 17-19.
75. Tussing & Erickson, ibid.
76. Crommelin, op cit, n 14, 9.

that restrict their capacity to pursue these objectives.[77] The issue is exacerbated over time, given the difficulty in adapting a contract to changing conditions without bilateral agreement.[78]

2.3.1 Infrastructure

In economies where competitive markets for certain inputs may not exist, a negotiated contract is often an appropriate method of ensuring development.[79] The market to supply the infrastructure required for the large-scale exploitation and transportation of minerals is specialised and limited because of the financing involved and the expertise required. The size and remoteness of Western Australia underlines the importance of infrastructure within the State. Large distances impose significant costs upon mining operations, including the transportation of capital equipment, the attraction of skilled labour, the supply of energy and the establishment of communications.[80] The assistance provided by State Agreements can help mining companies overcome deficiencies in the market, including the high barrier to investment presented by large start-up costs.

Developers in Western Australia are generally responsible for the capital costs of infrastructure,[81] with the State providing support in the form of concessions, land,[82] the provision of services[83] and the conferral of administrative powers.[84] For a number of reasons, including the increased financing capacity of the States,[85] proliferation of fly-in fly-out arrangements[86] and the ability to use existing networks and facilities, the establishment of infrastructure under a State Agreement will generally not be as demanding as 40 years ago. Agreements have nevertheless retained a role because, among other things, they can facilitate land access for large projects.

The provision for infrastructure in State Agreements, while valuable, does not necessarily provide for the future efficient use of that infrastructure. The railway networks established in the Pilbara under State Agreements are controlled by Rio Tinto and BHP Billiton ("BHPB"). Even though the networks have unused capacity, provisions within State Agreements have so far been ineffective in providing access to rival miners.[87] Concentrated control of the networks dampens competition and the development of new mines. If access cannot be obtained, duplication at a very high cost (billon dollar cost[88]) may be the only alternative.

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77. Tussing & Erickson, op cit, n 57, 55.
78. See DRD, op cit, n 17, 11. The DRD considered inflexibility as a problem for the development of minerals under large mineral-specific State Agreement mining leases, other than the mineral the developer is entitled to mine.
79. Tussing & Erickson, op cit, n 57, 55.
80. Industry Commission, op cit, n 46, 136.
81. F Perkins, "Financing and charging for infrastructure" in P Drysdale & H Shibata (eds), *Federalism and Resource Development – The Australian Case*, George Allen & Unwin 1985, 161.
82. DRD, op cit, n 17, 16.
83. For example teachers, medical staff, police and local government employees: see Crommelin, op cit, n 1, 342.
84. Hunt, op cit, n 33, 14.
85. Note, for example, the reduction in the role of the Loan Council: see Fitzgerald, op cit, n 6, 290-291.
86. Fly-in fly-out arrangements are where workers commute from Perth and regional centres to mine sites: see Barnett, op cit, n 17, 316; Jackson, op cit, n 56, 19.
87. J Poprzeczny, "Iron ore comers look to break big players' rail duopoly", *WA Business News*, 11 Aug 2005, 12-13.
88. Poprzeczny, ibid, indicates that a railway network costs about $1.5 billion to build.

Duplication is effectively encouraged by some provisions in State Agreements, because the agreement is targeted at a single project and not the needs of the economy. It has been suggested that too many new towns were created in the Pilbara, at the expense of existing towns.[89] The towns were constructed independently of market demand, being established due to obligations imposed by the State to promote regional development.

2.3.2 Concessions

Historically, State Agreements were used to provide privileges to mining companies that would not otherwise be available under the general mining law.[90] Government policy now limits direct financial assistance and incentives to 'exceptional circumstances'.[91] Rating exemptions are no longer provided to developers,[92] whilst greater consultation with local governments occurs regarding new State Agreements.[93] Other exemptions, such as for stamp duty, have been progressively reduced.[94]

As a basic proposition, government assistance to industry through ad hoc concessions is inefficient. The recipient of a benefit does not adequately measure its true cost to society when making an investment decision. Consequently, a concession may lead to a misallocation of resources where a decision is made to go ahead with a subsidised project at the expense of one that is more efficient and socially beneficial.[95] In a State Agreement, however, the cost of the concessions to the developer is represented by the obligations undertaken in exchange. This cost will only approximate the true cost of the concessions where both parties have a similar understanding of all aspects of the project.[96] In practice, this is not the case. The developer should have superior knowledge, a consequence of its expertise and intentions to invest a significant amount of capital.[97] Supporting this theory is the evidence that Western Australia has increasingly removed or narrowed concessions, which has occurred as it has gained experience in negotiating and administering State Agreements.[98]

Concessions may be economically efficient where they assist developers to overcome the costs imposed by government intervention. For example, stamp duty causes a significant and immediate cost to a project. State Agreements provide relief that assists a project as it being established and financed, though the degree of benefit depends on whether the necessary transactions can be structured within the exemption period.[99] Given government policy on concessions, if this

89. *Hansard* (LA) 2 May 1991, 1232-1234.
90. MacDonald, op cit, n 48, 30.
91. DOIR, op cit, n 18, 14.
92. For example, the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Ac*t 2004 (WA) did not contain any provisions limiting the capacity of local government to collect rates: see *Hansard* (LA) 26 Nov 2004, 8667.
93. DOIR, Department of Local Government and Regional Development & Western Australian Local Government Association *Protocol for future State Agreements and resources projects of significance to the State*, 2004.
94. See Fitzgerald, op cit, n 6, 169-170.
95. Perkins, op cit, n 81, 160; Industry Commission, op cit, n 70, 4.
96. These include geologic, engineering, financial and marketing aspects: see Tussing & Erickson, op cit, n 57, 55.
97. Fitzgerald, op cit, n 6, 31. The developer also is not required to weigh up as many intangible factors as the State when considering whether to proceed with a State Agreement: see Daugherty, op cit, n 25, 49.
98. Fitzgerald, ibid, 169; L Warnick, "The Roxby Downs Indenture" [1983] AMPLA Yearbook 32, 65.
99. Stamp duty exemptions generally have a sunset clause ending their operation after a particular date. Recent iron ore agreements have applied exemption periods of 2-3 years: eg *Iron Ore Processing*

assistance is considered necessary to promote development there is no reason why it should be conferred solely on an ad hoc basis.

2.3.3 Obligations

State Agreements have always been used to achieve policy objectives, though in recent times the control exercised over projects has been greater through more comprehensive approvals and by the imposition of stricter obligations. Common obligations imposed upon developers are for:

- further processing of the mineral resource;
- the maximisation of local content (labour, services and materials) used by the project; and
- third party access to infrastructure.

Obligations imposed upon a developer are not necessarily beneficial for the State. By increasing the burden upon the developer, the State places increased financial pressure upon the project and limits the funds available for expansion or other ventures.[100] This may prove counter-productive, particularly where the project itself comes under threat. For most obligations in a State Agreement, there are no means to assess whether the benefits obtained outweigh the costs of imposing the obligation. It is only possible to judge whether an obligation achieves the desired result.

2.3.4 Further Processing

Further processing obligations generally require the developer to investigate processing and to build facilities where commercially viable.[101] They seek to add to living standards, because processing is more labour intensive than mining and adds proportionally more value to the resource.[102] Taken to the extreme, though, they can reduce living standards by artificially requiring activity be undertaken in areas that are serviced more cheaply through imports.[103] Table 2.1 indicates that the obligations have had mixed success, depending upon the mineral and its location.[104]

Anecdotal evidence indicates that further processing obligations have encouraged the establishment of facilities,[105] but this is not an end in itself. The State has expended considerable effort encouraging the development of these facilities, particularly for iron ore,[106] but has not been

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(Mineralogy Pty Ltd) Agreement Act 2002 (WA) sch 1 cl 41 (3 years); *Iron and Steel (Mid West) Agreement Act* 1997 (WA) sch 1 cl 41 (3 years); *Iron Ore (Yandicoogina) Agreement Act* 1996 (WA) sch 1 cl 42 (2 years); *Iron Ore (FMG Chichester Pty Ltd) Agreement Bill* 2005 (WA) sch 1 cl 38 (2 years).

100. The Chamber of Minerals and Energy asserts that achieving further investment should be the primary goal of the government in promoting the mineral industry: Chamber of Minerals and Energy Western Australia Inc, *Adding Value to WA's Resources Sector: Executive Overview,* 2004, 8.
101. Auditor General, op cit, n 60, 17; DRD, op cit, n 17, 12.
102. Industry Commission, op cit, n 46, 135-136.
103. Ibid, 136.
104. See Fitzgerald, op cit, n 6, 200.
105. C Brown, "BHP's New Direct Reduced Iron project", 10th Chemical Industry and Professions Seminar, 21 Feb 1996, summary available at <http://www.chemlink.com.au/cipbhp.htm>.
106. See *Iron Ore (Hamersley Range) Agreement Ac*t 1963 (WA) sch 1 cl 12; *Iron Ore (Mount Newman) Agreement Act* 1964 (WA) sch 1 cl 11.

Table 2.1: Success of Processing Obligations[107]

Mineral	Processing Objectives	Benefit Achieved
Bauxite	Alumina Refinery	Yes
	Smelter	No
Copper	Further Processing	Yes
Diamonds	Sorting Facilities	Yes
	Further processing	No
Iron Ore	Further processing	Yes
	Steel production	No
Mineral Sands	Further processing	Yes
Natural Gas	Petrochemical Industry	No
Nickel	Refinery/Smelter	Yes
Timber Products	Pulp Mill	No

successful in removing the impediments to their survival. The failure of the Boodarie DRI plant[108] (and earlier ventures[109]) demonstrates that, unless this is done, the enforcement of these obligations will only cause economic waste. The role of the government is crucial, because miners undertaking obligations do not necessarily have expertise as processors.[110]

In 1991 the Commission reported a number of artificial impediments that detracted from Australia's natural advantages in minerals processing.[111] These included:

- high transportation costs;
- high energy costs;
- taxes, charges and regulations;
- high assistance to other industries; and
- restrictive work practices.

By removing these impediments, the government facilitates an environment that supports further processing. For example, BHPB's Boodarie plant was considered feasible only after the deregulation of the electricity and gas industries.[112] Though the Commonwealth has responsibility for some areas,[113] the State has an important role to play. Industrial problems (which plagued the

107. Source: Auditor General, op cit, n 60, 18. Information was also obtained from Fitzgerald, ibid, 200.
108. See J Phaceas, "BHP set to pull Boodarie pin", *The West Australian,* 6 Aug 2005, 62.
109. See J Phaceas, "High stakes for HIsmelt", *The West Australian,* 27 Apr 2002, 53.
110. See *Hansard* (LA) 2 May 1991, 1240.
111. Industry Commission, op cit, n 46, 135-151.
112. Brown, op cit, n 106.
113. The Commonwealth has been involved in waterfront and industrial reform and the progressive removal of tariffs. It also provides assistance to overcome the underinvestment in research and development. Rio Tinto obtained $125m of Commonwealth assistance for the process used at the HIsmelt plant: see L

Rio Tinto HIsmelt plant[114]), a lack of infrastructure and inefficient rail networks remain significant barriers to the development of the industry.

2.3.5 Local Content

It is impossible to judge to what extent Western Australia's world-class engineering industry has been delivered by local content obligations in favour of natural comparative advantage.[115] The Auditor General has reported poor monitoring of local content obligations.[116] In addition the obligations have a restricted operation, applying in circumstances where performance is 'reasonably and economically practicable' or, more recently, 'not impracticable'.[117]

This restricted operation means companies are not unduly restricted from employing more efficient services and labour where they can provide a suitable justification. For example, Woodside reduced the local content it employed on the North West Shelf Gas project from approximately 65 per cent on its train four expansion to 45 per cent on the fifth expansion,[118] despite local content obligations under a State Agreement.[119] The reduction was justified by the skills shortage, though there are suggestions that the decision was also influenced by the State's industrial relations risk.[120]

Daintith suggests that to maximise local content, legal obligations should be combined with an entrepreneurial government attitude.[121] He points to practice in the United Kingdom where co-operative institutions aim to improve competitiveness by influencing the behaviour of operators, contractors, suppliers, unions and the government.[122] Legal obligations will only be effective if local services, labour and materials are reasonably efficient. The State should look to increase

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Tickner, "Kwinana Pig-iron Plant May Lead To Steel Mill", *The West Australian,* 25 Apr 2002, 4; J Phaceas, "Rio eyes $30b windfall", *The West Australian,* 25 Apr 2002, 27.

114. See J Phaceas, "Rio on eve of pig-iron pour despite industrial setbacks", *The West Australian,* 27 Apr 2005, 49; J Phaceas, "Rio braces for more delays as HIsmelt plant hits straps", *The West Australian,* 11 Jun 2005, 77.

115. Forde, op cit, n 7, at 51, cites a DRD report which demonstrates that after the introduction of local content clauses in the 1960s construction expenditure within Western Australia increased by 25-40% to the late 1980s. This statistic, however, does not prove that local content clauses caused this increase in local content.

116. Auditor General, op cit, n 60, 19. Six agreements with local content obligations were reviewed by the Auditor General. Under three of the six agreements the company ceased submitting local content reports without censure from the DOIR. No local content reports were ever requested under another State Agreement.

117. Auditor General, ibid.

118. See M Beyer, "Fire is out of Australian LNG jobs", *WA Business New,* 16 Jun 2005, 5; M Beyer, "Voelte defends local content on train 5", *WA Business News,* 21 Jul 2005 <accessed via www.factiva.com>.

119. *North West Gas Development (Woodside) Agreement Act* 1979 (WA) sch 1 cl 12.

120. See M Beyer 'Fire is out of Australian LNG jobs' *WA Business News* 16 Jun 2005 5; M Beyer 'Concern mounts on Woodside project' *WA Business News* 3 Mar 2005 <accessed via www.factiva.com>.

121. T Daintith, "Promoting local content in oil and gas ventures: some international experience", *Oil and Gas Projects Summit*, 27 Feb 2005, slides at <http://www.doir.wa.gov.au/documents/businessand industry/oil-gas-terence-daintith-presentation.ppt>.

122. Western Australia has a co-operative institution. The Industry Capability Network (WA) has the aim of improving the competitiveness of developers whilst also supporting local industry participation: see DOIR *Building Local Industry Policy*, 2004, 7.

labour market supply[123] and address industrial problems to complement Western Australia's natural advantages, such as its skilled workforce and abundant supply of natural resources.

2.3.6 Third Party Access

The National Competition Council ("NCC") has stated that a regime facilitating effective access negotiations must address information and market asymmetries, which are in the advantage of the owner, and provide for credible enforcement mechanisms.[124] The NCC also underlined the importance of independent regulatory guidance and open and transparent processes to engender market confidence in the regime.[125] The access provisions in the Goldfields Gas Pipeline Agreement[126] did not meet these requirements, conferring limited legal rights on the Minister and none upon third parties.[127]

The NCC's analysis may explain the failure of other State Agreements to facilitate negotiated third party access to infrastructure. Hope Downs failed to reach agreement with BHPB on access to BHPB's Pilbara railway network,[128] despite successfully seeking a declaration that it had rights to negotiate access under a State Agreement.[129] The State Agreement provided for the referral of disputes to an independent expert, but there was no adjustment to BHPB's superior bargaining position created by its market power and informational advantages.[130]

The NCC suggested that an effective regime must be created under legislation, it stated:

> Regulatory processes should be derived from legislative underpinnings, rather than applied on… *ad hoc* bases, and they should be clearly defined and made publicly available, to allay concerns of bias or perceptions of agreements made 'behind closed doors'.[131]

Contemporary State Agreements follow this reasoning, no doubt influenced by the *Re Michael* decision (which is discussed below). Fortescue Metals Group ("FMG") has acknowledged in its

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123. The Argus Report has made numerous recommendations to address the shortage. These include, in the short-term, to introduce 'up-skilling programs, workforce re-entry training, labour migration and strategies to reduce skills attrition': Argus Research, *Western Australian Development Projects: Employment Demand and Predicted Skill Requirements 2003 – 2007,* 2004, 3.
124. NCC *Application for revocation of coverage of the Goldfields Gas Pipeline under the National Gas Access Regime: Final Recommendation*, 2003, <http://www.ncc.gov.au/pdf/regaggpre-002.pdf>, 138-140.
125. Ibid.
126. Ratified by the *Goldfields Gas Pipeline Agreement Act* 1994 (WA).
127. NCC, op cit, n 124, 134-142.
128. See Poprzeczny, op cit, n 35, 13.
129. The access rights were contained in a Rail Transport Agreement, between the Mount Newman joint venture participants and the State of Western Australia, which was executed on 27 January 1987. It provided content to the access provisions in cl 9(2)(a) of the Mount Newman State Agreement, ratified by the *Iron Ore (Mount Newman) Agreement Act* 1964 (WA): see *Hancock Prospecting Pty Ltd v BHP Minerals Ltd* [2003] WASCA 259, Templeman J paras 5-25, Hasluck J paras 46-59; S Eley & P Fitzpatrick, "Interpreting State Agreements: Third Party Access to Existing Railway", (2004) 23 ARELJ 39.
130. Clause 3 of the Rail Transport Agreement: see *Hancock* ibid, Templeman J para 25, Hasluck J paras 51, 57.
131. NCC, op cit, n 124, 138.

State Agreements that access laws may be applied to a railway line it will construct.[132] Interestingly though, after the Treasurer's failure to declare the Mount Newman railway line following an application by FMG under section 44F of the *Trade Practices Act* 1974 (Cth) ('TPA'), access to this line may be achieved under an agreement negotiated by the State with the owner, BHPB (particularly if FMG is unsuccessful in its appeal, which was finalised in October 2006, against the Treasurer's decision).[133]

2.4 Relationship between the State and the developer

The Keating Review revealed popular unease with the negotiation process, stemming from the lack of public involvement or scrutiny.[134] This secrecy and the close and continuing association required between the government and the developer can create perceptions of favouritism, which is detrimental to the parties' reputations[135] and to public confidence in the agreement. [136] There has been significant community disquiet concerning the FMG State Agreements following the expedited negotiation and ratification of the Railway and Port Agreement,[137] together with the significantly positive impact on the FMG share price.

Perceptions of preferential treatment are heightened by a lack of transparency. In February 2000 the Minister for Mines granted the Argyle Diamond joint venture ("Argyle") a mining lease over tenements at Ellendale, days before an application by Kimberley Diamond Company for an exploration licence over the same area was to be heard in the Warden's Court. The Minister for Resources Development had earlier purported to retrospectively reinstate Argyle's rights at Ellendale, which arose under a State Agreement, [138] and gave Argyle an extension of time to submit a development proposal.[139] A legal challenge was eventually settled, but the Ministers both failed to provide written reasons for their decisions, despite court orders requiring them to do so.[140]

Accusations of favourable treatment were made in similar circumstances in April 2006 after the Resources Minister had used his broad 'public interest' power under s 111A of the *Mining Act* to refuse an application by Cazaly Resources for an exploration licence over land at Shovelanna. The Rhodes Ridges Joint Venture had previously held the land under a State Agreement but had neglected to renew the licence before it expired. The joint venturers sought this decision from the Minister so that their application for mining leases could be heard, as Cazaly would otherwise have had priority rights to the land under s 105A of the *Mining Act* (which is subject to the public

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132. See *Iron Ore (FMG Chichester Pty Ltd) Agreement Bill* 2005 (WA) sch 1 cl 14(5)(c); *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act* 2004 (WA) sch 1 cl 16(3).
133. ABC News Online, "Fortescue's railway appeal 'premature", 2006, <http://www.abc.net.au/news/news items/200606/s1661953.htm>.
134. Keating Review, op cit, n 2, 228-237.
135. Industry Commission , op cit, n 70, 46-47.
136. The Clutha company withdrew from its project under the *Clutha Development Pty Ltd Agreement Act* 1970 (NSW) following, among other things, a strong public reaction to the project which was negotiated in secret and ratified without informed debate: see Fitzgerald, op cit, n 6, 317.
137. Ratified by the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act* 2004 (WA).
138. The agreement ratified by the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA).
139. N Prior, "Miner Wins Hearing On Argyle Decision", *The West Australian,* 4 Apr 2000, 47.
140. M Weir, "Diamond duo resolve dispute over Ellendale", *The West Australian,* 7 Sep 2001, 34; S Kemp, "KDC Ups Ante Over Prospects", *The West Australian,* 25 May 2000, 43.

interest power in s 111A). Only after significant public pressure were reasons released by the Minister for his decision.[141]

Like Kimberley Diamond Company before it, Cazaly has taken legal action to defend its rights. The company has successfully obtained the right to judicial review of the Minister's decision in the Court of Appeal.[142] Ironically, Cazaly has itself used s 111A to object to the joint venturer's application in the warden's court.[143] Cazaly's applications put before the courts a significant issue as to whether it is in the public interest for favourable treatment to be accorded to developers who have held iron ore tenements under State Agreements over those who would seek to rely purely on the *Mining Act*.[144] In this regard, it will be interesting to see what relevance is accorded to evidence expected to be led by Cazaly about the joint venturer's efforts and intentions to develop the resource.[145]

Controversy is not limited to ministerial decision making, but also arises concerning the role of Parliament and perceptions that it can be a "rubber stamp" for the executive's will. Argyle's tenements under its State Agreement were validated in the ratifying Act, which terminated overpegging claims.[146] The circumstances surrounding the passage of this Act were controversial, given that Parliament only had one week to consider the agreement and could only vote to approve or reject it.[147] Concerns about Parliamentary scrutiny are built upon past experiences. Under the Cockburn Cement State Agreement[148] the Crown promised to make every endeavour to find alternative supplies of shell sand when existing arrangements became impracticable.[149] This promise, which obliged the State to favour Cockburn Cement when considering tenement

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141. DOIR, "Minister explains reasons behind Shovelanna decision", 27 April 2006, available from <http://www.mediastatements.wa.gov.au/media/media.nsf>; for critical comment on this decision see M Stevens, "Bowler bats for Rio but refuses to reveal why", *The Australian,* 25 Apr 2006 <http://www.theaustralian.news.com.au/story/0,20867,18918884-5001641,00.html>; M Stevens, "Reasons to doubt Bowler rationale", *The Australian,* 29 Apr 2006 <http://www.theaustralian.news.com.au/story/0,20867,18962684-5001641,00.html>.

142. Cazaly Resources Limited, *ASX Release: Supreme Court orders that Minister's decision to terminate Shovelanna application should be reviewed,* ASX Limited, 14 Aug 2006, available from <http://www.asx.com.au/>.

143. J Phaceas, "Rio accuses Cazaly of ambush in lease row", The *West Australian,* 9 Sep 2006 <http://www.thewest.com.au/default.aspx?MenuID=32&ContentID=6168>

144. Consider the Minister's justification of his decision on the basis of the State's iron ore policy. See DOIR, op cit, n 139.

145. Regarding this expected evidence, see: J Phaceas, "Cazaly opens second front in Rio wrangle", The West Australi*an,* 28 Aug 2006 <http://www.thewest.com.au/default.aspx?MenuID=32&ContentID=4710> and Cazaly Resources Limited, *ASX Release:Cazaly seeks to oppose grant of Rio JV mining lease applications on public interest grounds ,* ASX Limited, 28 Aug 2006, available from <http://www.asx.com.au/>.

146. See *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (WA) pt III; *Hansard* (LA) 15 Oct 1981 (Question No 628) 4543-4544; *Hansard* (LA) 18 Nov 1981 5812-5813;. *Hansard* (LA) 25 Nov 1981 6188-6189, 6199-6201, 6211-6219, 6224; Warnick, op cit, n 18, 897; T Thomas, "Argyle, the gleam in Ewen Tyler's eye", *Business Review Weekly,* 7 Jun 1991*,* 55.

147. *Hansard* (LA) 26 Aug 1981 (Question No 416) 3293; *Hansard* (LA) 27 Oct 1981 (Question No 688) 4930-4931; *Hansard* (LA) 29 Oct 1981 (Question No 710) 5077; *Hansard* (LA) 25 Nov 1981, 6188, 6192.

148. Ratified by the *Cement Works (Cockburn Cement) Agreement Act* 1971 (WA). This agreement replaced a 1961 agreement for the same project.

149. *Cement Works (Cockburn Cement) Agreement Act* 1971 (WA) sch 1 cl 6(6).

applications,[150] was not even mentioned in Parliamentary debate when the agreement was first ratified.[151]

2.4.1 Enforcement

Transparency is an issue for the monitoring of obligations under State Agreements as well. Where the State establishes a regulatory scheme under a State Agreement it is pursuing conflicting objectives. On the one hand it is seeking to facilitate development and on the other it is seeking to control aspects of that development. This conflict can lead to 'regulatory capture', where the agency responsible for the enforcement of regulation serves the interests of the developer.[152] Until the late 1990s developers under Queensland State Agreements widely failed to comply with their environmental obligations, largely because of poor enforcement.[153]

2.4.2 Government control

Agreements generally impose additional obligations to the general law[154] and may restrict the developers' mining rights to a single mineral.[155] In addition the developer is often required to keep the State informed about all aspects of the project, especially through the process of submitting proposals to the State. [156] Information about significant dealings with a third party or the Commonwealth can also be extracted through consultation clauses in the agreement.[157]

The continuing relationship required under a State Agreement gives significant power to the State, for example expansion approvals were used as leverage to negotiate the phasing out of royalty concessions with BHP Billiton and Rio Tinto.[158] The government has also required the sharing of confidential ore body information under the Mitchell Plateau State Agreement,[159] where the developers sought to defer development by arguing that it was uneconomic.[160]

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150. See T Treadgold, "Quicklime project turns to quicksand", *Business Review Weekly,* 28 Feb 1994, 35.
151. *Hansard* (LA) 20 Aug 1997, 5114-5116.
152. See M Briody & T Prenzler, "The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?" (1998) 15 EPLJ 54, 55.
153. D Hutton, "Mining and the Environment in Queensland: Where the Law beings and Enforcement Fails – Regulatory Capture and Implementation Failure", (1999) 6 AJNRL&P 149, 168-169.
154. For example the *Barrow Island Act* 2003 (WA): see ibid.
155. For example, *Iron Ore (Marillana Creek) Agreement Act* 1991 (WA) sch 1 cl 12.
156. See Griffiths, Tagliaferri & Komninos, op cit, n 17, 7.
157. See, for example*, Barrow Island Act* 2003 (WA) sch 1 cl 31; *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) sch 1 cl 43; *North West Gas Development (Woodside) Agreement Act* 1979 (WA) sch 1 cl 39.
158. *Hansard* (LA) 2 Jun 2005 (Question No 263) 2712-2713. See also Pedler, op cit, n 26; M Drummond, "No Threat In Rio Deal, Says Gallop", *The West Australian,* 12 Jul 2005, 4; M Drummond, "Royalties Deal Worth Up To $150m A Year", *The West Australian,* 11 Jul 2005, 4; M Drummond, "Teachers Or Mining Giants, It's All Much The Same To Carpenter", *The West Australian,* 8 Jun 2005, 8; J Phaceas, "Iron Giants Battle State Over Rise In Royalties", *The West Australian,* 31 May 2005, 4.
159. As ratified by the *Alumina Refinery (Mitchell Plateau) Agreement Act* 1971 (WA).
160. Comalco, Alcoa and AngloGold shared geo-technical information concerning the Mitchell Plateau bauxite deposits with other companies after submitting that it was not practical to develop an Alumina Refinery on the deposits: see J Phaceas, "Rio Test for State Agreements", *The West Australian,* 10 Sep 2004, 45.

By entering into a State Agreement the developer cedes significant control over the continuity of the development. The developer generally has no ability to determine the agreement and, with the exception of a force majeure or a termination agreement,[161] is locked into the contractual obligations.[162] An approved proposal may even require that the developer ensure the continuous operation of the project.[163] WMC was unable to exit the Poseidon State Agreement[164] until it was assigned in 2005,[165] despite the mine and processing operation closing in 1994 and the company conducting an award winning rehabilitation program.[166] There is a view within industry that the advantages State Agreements offer at the early stages of a project are outweighed by the long-term disadvantages and administrative costs that they display in practice.[167]

Excessive governmental control is detrimental to investment,[168] but a reduction in the autonomy of the developer may be necessary to safeguard the interests of the State. In 2004 Xstrata ceased its vanadium mine and processing operation at Windimurra and stripped the mine of significant movable equipment and infrastructure. This decision delivered the company windfall profits through an increase in the world price of vanadium, of which it was effectively the monopoly supplier.[169] Xstrata's action considerably devalued the contribution of $40m in infrastructure to assist the project.[170] It also effectively prevented another miner from developing the resource. The decision-makers were criticised for not locking in any contractual safeguards.[171] A State Agreement would not be necessary solely to safeguard the State's interests (this could be achieved by obligations in a simple contract) but may be justified in combination with other circumstances.

2.5 Co-ordination and facilitating mechanism

A State Agreement is promoted as a facilitating document. The ability to negotiate the project framework has led to the view that State Agreements provide unlimited flexibility.[172] In practice, this flexibility is constrained to the degree that 'precedent' agreements are strictly applied by either the developer or the State in negotiations. Facilitation of the project is more likely to occur at the proposals stage, where the State considers the actual development under a State Agreement.[173]

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161. See for example the BHPB termination agreement proposed to be ratified by the *BHP Billiton (Termination of Agreements) Agreement Bill* 2005 (WA). As explained in Part III the provisions of State Agreements generally take effect with contractual (rather than statutory) force. Ratification of a termination agreement will only be necessary where statutory power is required to be exercised (for example the continuation of leases granted under a State Agreement as in clause 3(2) of the BHPB termination agreement).
162. For example, *Iron Ore (Marillana Creek) Agreement Act* 1991 (WA) sch 1 cls 32, 34. *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) sch 1 cls 33, 35.
163. For example, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) sch 1 cl 7(6).
164. The agreement ratified by the *Poseidon Nickel Agreement Act* 1971 (WA).
165. N Prior, "Niagara Pays WMC $8m For Mt Windarra", *The West Australian,* 1 Feb 2005, 34.
166. K McDonald, "The Poseidon Adventure", *The West Australian,* 24 Aug 1998, 11; J McIlwraith, "Just In The Nickel Of Time". *The West Australian.* 15 Dec 1997, 24. See also Keating Review, op cit, n 2, 102.
167. Keating Review, op cit, n 2, 101.
168. Otto & Cordes, op cit, n 5, ch 4 p 17.
169. *Hansard* (LA) 11 Nov 2004 8037-8042. Xstrata also closed another vanadium mine in South Africa: see p 8042.
170. The State contributed $33m, including contributions from Western Power. The Shire of Murchison and Australian Gas Light Company also contributed $7m to infrastructure: see *Hansard* (LA) 11 Nov 2004 8039.
171. J Phaceas, "State Knocks Back Windimurra Rescue", *The West Australian,*12 May 2004, 48.
172. Grinlinton, op cit, n 20, 37.
173. The proposals mechanism was introduced in the 1960s. See, for example, the *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA) sch 1 cl 4.

During the proposals stage the developer is required to submit detailed project development proposals to the responsible Minister. These proposals, which are developed in consultation with relevant government agencies,[174] inform the State of the developer's plans.[175] Proposals must satisfy the Minister the company has authorised the project, finance is available and that the project is feasible.[176]

A proposal cannot be considered by a Minister unless primary approvals are obtained.[177] Upon submission, the Minister has two months to make a decision, which is made in consultation with government agencies and corporations.[178] The Minister may not reject a proposal, but may:

- approve the proposal without qualification;
- defer consideration until the developer addresses further issues; or
- require the developer to make alterations to the proposal.

Once approval is given, the proposal becomes binding on both parties and the project enters the development phase.[179]

This proposals mechanism, by channelling contact through the Minister, provides the developer with a single point of contact with the State.[180] Co-ordination reduces duplication and once a proposal is approved, the State must grant all consequential approvals. For these reasons, State Agreements have traditionally been viewed as a 'powerful facilitating tool'.[181] The Industry Commission recommended the increased implementation of State Agreements in 1991, in order to minimise confusion and delays caused by lack of co-ordination between government departments and the chaotic interaction of legislation.[182]

This view is not universally accepted within the mining industry. State Agreements impose additional constraints on a project (to those that proceed under the general law) and require a large amount of bureaucratic involvement. In addition, the emergence of native title and the environment as primary compliance issues means that a State Agreement cannot be a one-stop shop for the developer. Indeed, it is not necessarily clear how a new State Agreement project will interact with existing law.[183] The Commission also failed to acknowledge that the cost and delay in negotiating a State Agreement can be significant[184] and may not be justified for small or

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174. DOIR, *State Agreement and Development Proposals Process* (2005) <http://www.doir.wa.gov.au/documents/investment/stateagreementskeatingfchart.pdf>.
175. This includes information on the development schedule operational plans, plant and equipment, workforce, accommodation, project specific infrastructure, social infrastructure, impact on public infrastructure and services, land requirements and environmental management of the proposed project: see DOIR, op cit, n 17, 2; DRD, op cit, n 17, 8; Hunt, op cit, n 33, 17.
176. DOIR ibid; DRD, ibid, 11.
177. For example, native title agreements, environmental approvals and heritage clearances: see DOIR ibid.
178. DOIR, op cit, n 174.
179. DOIR, op cit, n 17, 3.
180. Hunt, op cit, n 33, 14-15.
181. Keating Review, op cit, n 2, 205.
182. Industry Commission, op cit, n 46, 326.
183. Grinlinton, op cit, n 20, p 38 n 181.
184. *The Central Queensland Coal Associates Agreement Act* 1968 (Qld) ratified an State Agreement after five years of negotiations between the State and the developers: see Fitzgerald, op cit, n 6, 316. The

uncomplicated projects.[185]

The Commission advocated other methods of improving the facilitation of projects, recommending States adopt an integrated approvals system ("IAS") and time frames for approvals.[186] The Keating Review included these suggestions, among others, as recommendations in its final report. The recommendation for an IAS,[187] which is influenced by the model Queensland adopted in 1981, [188] has significant consequences for the use of State Agreements. The system applies to projects that the relevant Minister declares to be state significant after an application by the developer.[189] The approvals process for a state significant project, including all *Environmental Protection Act* 1986 (WA) ("*EPA*") approvals, is co-ordinated by a single government department. Relevant agencies would determine their approvals, but the developer could choose to deal solely with the co-ordinating department.[190] Information requirements of relevant agencies, including Commonwealth agencies, would be rationalised at a project planning meeting[191] and the IAS allows for the parallel processing of native title and aboriginal heritage approvals.[192]

An IAS does not preclude the use of State Agreements, though as the Queensland experience demonstrates, future State Agreements would be rare. [193] The Keating Review recommends that the proposals mechanism in State Agreements be abandoned, implicitly in favour of the IAS.[194] No decision on either recommendation has been made by the government,[195] although there have been efforts to improve co-ordination of approvals.[196] As a facilitating mechanism, the IAS does appear to have a significant advantage. This system creates a dedicated body that would be able to assist in the facilitation of primary approvals as well as secondary approvals. The IAS would not, however, be able to over-ride inconvenient legislation[197] or provide a legal framework for the

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agreement ratified by the *Roxby Downs (Indenture Ratification) Act 1982* (SA) was negotiated between mid-1981 and March 1982 and ratified in June 1982: see Warnick, op cit, n 98.

185. A State Agreement was not considered appropriate for the Vanadium mine at Windimurra because, according to Precious Metals Australia's Roderick Smith, it was considered a lengthy and expensive process: see Economics and Industry Standing Committee (LA) *Inquiry Into Vanadium Resources At Windimurra*, 2004, 49.

186. Industry Commission, op cit, n 46, 326-327. The IAS is described in the report as 'one-stop shopping'.

187. Keating Review, op cit, n 2, 8.

188. The IAS was adopted when Part 5 was inserted into the *State Development and Public Works Organisation Act* 1971 (Qld) by the *State Development and Public Works Organisation Act Amendment Act* 1981 (Qld).

189. Keating Review, op cit, n 2, 124.

190. Ibid, 122. The Keating Review also suggests that highly controversial projects proceed by way of public inquiry (assisted by the co-ordinating department) and uncomplicated projects proceed by way of a condensed system: ibid, 149-159.

191. Keading Review ibid, 131-136.

192. Ibid, 141.

193. Queensland adopted the *Mount Isa Mines Limited Agreement Act* 1985 (Qld) after Part 5 was inserted into the *State Development and Public Works Organisation Act* 1971 (Qld) in 1981. Queensland has, however, otherwise maintained its policy not to enact mineral resource State Agreements: see JM Florence, "Development of Major Mineral Projects in Queensland", (1982) 4 AMPLJ 229, 229-231.

194. Keating Review, op cit, n 2, 7.

195. DOIR, *Schedule of Government Position and Progress Report on Keating Recommendations* (2005) <http://www.doir.wa.gov.au/documents/investment/Governments_position_on_recommendations_and_status_v2.pdf>.

196. See DOIR, *Investment – Review of Project Development Approval Process (Keating Review)* (accessed 2006) <http://www.doir.wa.gov.au/investment/BBA99CC0746C4109A3F9CB39FCB25ED5.asp>.

197. Note, for example, clause 5 of the FMG Chichester State Agreement, which (if ratified) would allow FMG Chichester to apply for clearances under section 18 of the *Aboriginal Heritage Act* 1972 before it

development.[198]

2.6 Suitability of the general legislation

When the majority of State Agreements were ratified in the 1960s and 1970s,[199] the general legislation was the *Mining Act* 1904 (WA) ("Old Act"). This Act was developed at a time when gold was the only mineral of economic significance in Western Australia. Gold mines are, by nature, small and the search for gold is often carried out by individual prospectors with unsophisticated equipment. The tenements that developed under the Old Act were insufficient to cater for base metal exploration[200] or the infrastructure requirements of large bauxite and iron-ore projects.[201] Security of tenure was restricted by weak rights of occupancy,[202] onerous tenement conditions[203] and weak conversion rights from exploration to production tenements.[204]

State Agreements have been used to avoid the problems under the Old Act, though the passage and amendment of the *Mining Act* 1978 has reduced the importance of granting improved certainty and security on an ad hoc basis.[205] The *Mining Act* has abolished some onerous tenement conditions[206] and given the holder of an exploration tenement improved occupancy and conversion rights.[207] Development of the *Mining Act*, such as recent amendments to allow for retention titles, [208] improves flexibility for all projects and further reduces the necessity to seek a contractual solution with the State. There is an increasing reliance on the general legislation, demonstrated by the large Mount Keith and Murrin Murrin nickel projects.[209]

2.7 Comment

The use of State Agreements in developing countries demonstrates that their value lies in providing a stable project framework and overcoming market deficiencies. In Western Australia State Agreements are used by the State to facilitate development, provide for infrastructure and achieve policy objectives. This last role can cause the most economic waste. State Agreements are

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held a mining tenement (ie before the minister's approval of proposals under the agreement) as relevantly required by that Act: see *Iron Ore (FMG Chichester Pty Ltd) Agreement Bill* 2005 (WA) sch 1 cl 38.

198. See Industry Commission, op cit, n 46, 314; Florence, op cit, n 193, 245.
199. See Hillman, op cit, n 9, 90-93.
200. Government of Western Australia, *Report of the Committee of Inquiry Appointed to Inquire into …the Mining Act 1904*, Government Printer 1971, 10. See also Hunt, op cit, n 33, 4-5; Barnett, op cit, n 17, 316.
201. BM Rogers, "Mining law in Western Australia" in RT Prider (ed) *Mining in Western Australia*, University of Western Australia Press 1979, 285, 290.
202. Occupancy rights were particularly weak for temporary reserves, which were used for large-scale exploration. See *Nicholas v Western Australia* [1972] WAR 168, Jackson CJ 170-172; E Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979,* University of Western Australia Press 1980, 292.
203. Jackson, op cit, n 56, 19.
204. See MacDonald, op cit, n 48, 30.
205. The substantive sections of the New Act, as amended by the *Acts Amendment (Mining) Act* 1981 (WA), came into force on 1 January 1982.
206. Jackson, op cit, n 56, 19.
207. Hunt, op cit, n 19, 858.
208. Under the *Mining Amendment Act* 2004 (WA).
209. Keating Review, op cit, n 2, 205. See also Hillman, op cit, n 9, 90-93.

sheltered from the discipline of the market and the objectives they seek to implement are not necessarily achieved by contractual obligations alone. This, together with the large costs involved in negotiating a State Agreement indicates their use will often be inefficient. The mechanism is, nevertheless, an option to be considered by the State and developer. Although the general legislation is in many cases acceptable for mining projects, a State Agreement may be considered necessary for a large and complex project.

3. LEGAL EFFICIENCY

A State Agreement has both facilitative and regulatory functions, which vary depending upon the project and the intentions of the parties. This Part considers whether the legal status given to State Agreements by Parliamentary ratification is effective to achieve either function. Given that the two appear to conflict, it identifies which function a State Agreement is best adapted to achieve.

3.1 Purpose of Ratification by Parliament

Legislative endorsement of State Agreements has been called into question by the Keating Review, which recommended that contracts between the developer and the State should generally not be ratified.[210] The recommendation is controversial, because ratification is considered essential to the legal effectiveness of a State Agreement.

Statutory ratification is not necessary to allow the Crown to enter commercial contracts, so long as the contract is executed 'in the ordinary course of administering a recognised part of the government of the State'[211] by a person in authority. Legally then, the Crown can enter into and be sued under contracts with project developers,[212] though the developer bears some risk that the contract is outside the ordinary course of government administration and is therefore invalid.[213] Ratification eliminates this risk and ensures the executive has authority to enter the contract on behalf of all relevant agencies.[214] Warnick identifies two other distinct assurances that it provides to the developer:

1. That the terms of the agreement are supported by statutory authority, so that the State's obligations can be lawfully carried out.
2. That the State has a legally binding obligation to carry out its undertakings in the agreement.[215]

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210. Keating Review, op cit, n 2, 102. The interim report recommended that mining contracts should not be ratified by Parliament.
211. *New South Wales v Bardolph* (1934) 52 CLR 455, Dixon J 508, Evatt J 474. See also *Xenophon v South Australia* (2000] 78 SASR 251, Bleby J 259.
212. The Crown is able to be sued under these contracts because of section 5 of the *Crown Suits Act* 1947 (WA). This Act also establishes a standing appropriation for judgment debts: see s 10.
213. See L Warnick, "State Agreements – The Legal Effect of Statutory Endorsement", (1982) 4 AMPLJ 1; Turner, op cit, n 22, 140-141. There are doubts as to whether any risk actually exists: see McNamara, op cit, n 7, 265.
214. It also removes any doubt as to whether the contract is a political arrangement that is not legally enforceable: see *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353, Windeyer J 368; E Campbell, "Legislative Approval of Government Contracts", (1972) 46 ALJ 217, 221.
215. Warnick, op cit, n 213, 1-2; Warnick, op cit, n 16, 882. See also Griffiths, Tagliaferri & Komninos, op cit, n 17, 4.

3.2 Form of Ratification

The effectiveness of State Agreements in achieving the legal assurances required by the developer depends in part upon the model of ratification used. Warnick provides comprehensive analyses of the common models used by Parliamentary draftsmen throughout Australia.[216] These include statutory stipulations that the agreement is:

- to be read 'as if enacted' in the ratifying Act;
- approved and the Crown is authorised and directed to do everything necessary to give it full effect;
- approved and its implementation is authorised; and
- approved ("bare approval").

Of all the States, Western Australia has shown the most variety in methods of ratification.[217] To some extent the legal effect has been standardised across all State Agreements by the *Government Agreements Act* 1979 (WA) ("*GAA*"),[218] though the variations in the models used in Western Australia to ratify agreements continue to have legal implications.[219]

Recent State Agreements in Western Australia have been ratified and their implementation authorised. The ratifying Act has then provided that, without limiting the *GAA*, the Agreement operates and takes effect despite any other Act or law.[220] This statutory direction is aimed at enabling the State Agreement to operate outside existing laws. The ratifying Act will often go further by expressly providing that certain laws do not apply[221] and may empower the State to resume Crown land where required.[222]

3.3 Authority to Perform

To facilitate a project, State Agreements may contain agreement on matters that require statutory authority, including:

- the use of powers to resume land and manage Crown land for the benefit of the developer;
- modified tenements, tenement conditions and rights to tenements;
- exemptions from stamp duty;

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216. Warnick, op cit, n 213; Warnick, op cit, n 16, 878.
217. Warnick, op cit, n 16, 883.
218. See *GAA* ss 2, 3. The effect of s 3 is explained below at pp 317 and 319.
219. Some forms of ratification used in Western Australia in the past give provisions the force of law (see, op cit, n 323), which is not done by the *GAA*: see, below at 317. There is also a question whether the *GAA* validates an exception to legislation, where that legislation has been passed after the enactment of the *GAA*: see Warnick, op cit, n 16, 900.
220. See, for example, *Barrow Island Act* 2003 (WA) s 5; *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) s 4.
221. For example, in the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act* 2004 (WA) s 6 expressly declared that s 96 of the *Public Works Act* 1902 would not apply to the railway constructed pursuant to the agreement. See *Hansard* (LC) 26 Nov 2004, 8581-8582.
222. See, for example, *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) s 5, sch 1 cl 27; *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act* 2004 (WA) s 5 sch 1 cl 23. See also Warnick, op cit, n 16, 888.

- zoning exemptions;
- the conferral of municipal powers upon the developer for the administration of company towns or facilities;[223] and
- the grant of water licences.[224]

The Crown is unable to come to a legally effectual agreement on these matters without authority. Only the legislature has the power to make laws;[225] the Crown cannot override or modify legislation. This incompetence extends to the suspension and dispensation of laws without Parliamentary consent, which is expressly prohibited by the *Bill of Rights* 1689.[226] Statutory authority is also required for dealings with Crown lands and resources. [227] This power, formerly a Crown prerogative, has been vested in the legislature[228] and utilised by Parliament.[229]

A Minister may have a discretionary power under an enactment, such as the discretion to grant a mining lease,[230] but is unable to enter into a contract that would fetter the future exercise of this discretion.[231] The Privy Council found to this effect in *Cudgen Rutile (No 2) Pty Ltd v Chalk*[232] where a contract, under which the Crown in right of Queensland purported to grant the right to a mining lease, was unenforceable. The principle is developed from the executive necessity doctrine.[233] In *Ansett Transport Industries Pty Ltd v The Commonwealth*[234] a majority of the High Court supported the proposition that the executive necessity doctrine has no application to government contracts that have been approved by the Parliament.[235]

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223. See, for example, *Western Mining Corporation Limited (Throssell Range) Agreement Act* 1985 (WA) sch 1 cls 15(14), 18(1).
224. The modifications listed would apply to the *Mining Act* 1978 (WA), *Land Administration Act* 1997 (WA), *Stamp Act* 1921 (WA), *Local Government Act* 1995 (WA) and *Rights in Water and Irrigation Act* 1914 (WA) among others. For a list of modifications commonly made under State Agreements, see McNamara, op cit, n 7, 264; Crommelin, op cit, n 1, 333-343; MW Hunt, op cit, n 33, 14-15.
225. *Constitution Act* 1889 (52 Vic No 23) s 2.
226. 1 Wm & Mar c 2. See Campbell, op cit, n 214, 219.
227. See, for example, *Nicholas v Western Australia* [1972] WAR 168, Jackson CJ 172, Burt J 174. See also *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520.
228. Crommelin, op cit, n 14, 2.
229. For example, the *Land Administration Act* 1997 (WA) and the *Mining Act* 1978 (WA).
230. *Mining Act* 1978 (WA) s 71.
231. McNamara, op cit, n 7, 266-268; Warnick, op cit, n 213, 20-28; Warnick, op cit, n 16, 892-893; MacDonald, op cit, n 48, 31; Fitzgerald, op cit, n 6, 59; Turner, op cit, n 22, 141-142, 145-150. See also *Ansett Transport Industries Pty Ltd v Commonwealth* (1977) 139 CLR 54, Barwick CJ 61, Mason J 74-75, Aickin J 113; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, Mason J 17-18.
232. Op cit, n 227.
233. The doctrine, as propounded by Rowlatt J in *Rederiaktiebolaget Amphitrite v The King* [1921] 2 KB 500 at 503, provides that the Crown may not fetter its future executive action in matters of the public interest. Though not given such broad application in Australia, the doctrine has influenced judgments in the High Court and the Supreme Court of Western Australia concerning contracts respecting the future exercise of statutory powers by Ministers and public authorities: see *South Australia v Commonwealth* (1962) 108 CLR 130, Dixon CJ 141; *Ansett*, op cit, n 231, Mason J 74-77, contra Aickin J 113; *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146, Ipp J 157.
234. Op cit, n 231.
235. Ibid, Barwick CJ 61, Gibbs J 62, Mason J 77, Aickin J 113-114. See also Warnick, op cit, n 213, 27; Warnick, op cit, n 16, 893.

The High Court, however, made it clear in *Sankey v Whitlam*[236] that the approval of an agreement simply validates that agreement.[237] Without more, it does not change the legal nature of an agreement's provisions, which have contractual rather than statutory force.[238] On this basis, Warnick and Turner both contend that bare approval cannot give force to provisions that purport to repeal existing laws so far as they apply to a project.[239]

State Agreements that received bare approval were therefore subject to a risk that provisions seeking to operate outside State law were invalid. This risk was addressed shortly after the Supreme Court decision in *Margetts v Campbell-Foulkes*, [240] where the legal status of a State Agreement was at issue,[241] by the enactment of the *GAA*.[242] Section 3 of that Act provides that provisions in a State Agreement operate and take effect from their inception notwithstanding any other Act or law and are effective where they purport to modify pre-existing State law for the purposes of the agreement. This formulation does not impose statutory duties upon the parties, but is directed at the validity and effectiveness of the provisions in a State Agreement.[243]

The 'take effect notwithstanding' formula cannot give binding force to an otherwise unenforceable commitment in a State Agreement, since it does not change the effect of the provision.[244] If a provision is invalid, it remains invalid. Even where a provision is valid, the formula does not indicate to what extent the modified law is to be affected.[245] The *GAA* does not allow a State Agreement to be read in isolation. Any change in the general legal framework may affect the developer's rights under a State Agreement, even if the Parliament has no intention of unilaterally amending that State Agreement.[246]

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236. (1978) 142 CLR 1.
237. *Sankey* ibid, Gibbs ACJ 31, Stephen J 77, Mason J 89-90, Aickin J 105-106.
238. Ibid. See also *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, Dixon J 410. Statutory approval also cannot make an otherwise unenforceable agreement valid and enforceable: see *Placer Development,* op cit, n 214, where the ratified agreement was unenforceable for uncertainty. See also Turner, op cit, n 22, 156.
239. Warnick, op cit, n 213, 45; Warnick, op cit, n 16, 889-890; Turner, ibid, 155-156.
240. (unreported), WA Sup Ct, Full Court, 29 Nov 1979, Appeal Nos 186-208 of 1979.
241. *Margetts* concerned appeals from convictions under the now repealed s 67(4) of the *Police Act* 1892, which relevantly provided for an offence of obstructing an activity that a person is empowered to perform by virtue of a licence issued under a law of the State. The appellants were environmentalists who had obstructed the establishment of an alumina refinery under the State Agreement ratified by the *Aluminum Refinery (Wagerup) Agreement and Acts Amendment Act* 1978 (WA). An issue before the Court was whether the agreement approved by this Act was a law of the State, although the appeal was upheld on another ground.
242. See PW Johnston & RS French, "Environmental Law in a Commonwealth-States Context", (1980) 2 AMPLJ 77, 86-87; Warnick, op cit, n 213, 46-47; Warnick, op cit, n 16, 898; Griffiths, Tagliaferri & Komninos, op cit, n 17, 6.
243. *Re Michael*, op cit, n 45, Parker J 581; Warnick, op cit, n 16, 894, 899, 903-904; Warnick, op cit, n 213, 48. Contra: Johnston & French ibid, 87; *Mount Margaret Nickel Pty Ltd v WMC Resources Ltd* [2001] WAMW 6, Calder MW para 57.
244. *Re Michael*, ibid, Parker J 586.
245. Daugherty, op cit, n 25, 51.
246. See P Brazil, "Book Review: *Mining Agreements – Negotiated Frameworks in the Australian Minerals Sector* by Anne M Fitzgerald", (2002) 21 AMPLJ 202, 203.

In *Re Michael*, Parker J commented that 'it would not be competent for parties by agreement to purport to confer jurisdiction on a statutory official'.[247] The obiter remark concerned the Goldfields Gas Pipeline Agreement[248] which utilised the current Western Australian model of ratification. Justice Parker's comment calls into question the ability of the parties to reach agreement on the exercise of legislative power, even upon ratification. Where a State Agreement is not given the force of law, this view would preclude the delegation of statutory powers to any entity, unless done in the ratifying Act.

3.4 The *Re Michael* Decision

Re Michael required the Full Court of the Supreme Court of Western Australia to consider provisions in the Goldfields Gas Pipeline Agreement. This State Agreement purported to regulate the access arrangements that would apply to the pipeline. In particular, clause 21(3) purported to prevent future laws or regulations from applying where they had a "material adverse effect on the legitimate business interests" of the developer.

Parker J (with whom Templeman and Miller JJ agreed) viewed clause 21(3) as no more than an expression of comfort or moral commitment between the parties to the contract. The provision did not have contractual force because it is beyond the power of the Crown to bind the Parliament in respect of the exercise of its legislative powers. As noted above, ratification under the 'take effect notwithstanding' formula could not change this state of affairs.[249]

In the context of the case this meant that the WA Independent Gas Pipelines Regulator would be acting beyond jurisdiction, conferred under the *Gas Pipelines Access (Western Australia) Law*,[250] in purporting to take into account the provision. Irrespective of its legal effect, the provision did not confer any jurisdiction upon the Regulator.[251] The legacy of *Re Michael* can be seen in the FMG State Agreements, where there are express acknowledgements by FMG that railway access laws may be applied to a line to be constructed by the company.

3.5 Failure of State Agreements to Prevent Inconsistent Action

Legally binding obligations maximise security and certainty, not only by ensuring performance, but also timely performance. State Agreements are, nevertheless, incapable of offering absolute legal certainty to developers, since the degree to which the State is bound depends on the form of ratification and the constitutional framework in which the agreement is made. The developer must bear risk of delay and interference by the Crown, the legislature, the Commonwealth or a third party.

3.5.1 Crown

Ratification ensures the Crown is bound to its obligations under the agreement. The words used by Parliament to ratify a State Agreement, however, may not be sufficient to ensure that statutory

247. *Re Michael*, op cit, n 45, Parker J 589.
248. Op cit, n 126.
249. Above, p 42..
250. Section 9 of the *Gas Pipelines Access (Western Australia) Act* 1998 (WA) applied the *Gas Pipelines Access Law* in Western Australia, including the *National Third Party Access Code for Natural Gas Pipeline Systems* 1997.
251. *Re Michael*, op cit, n 45, Parker J 589.

discretionary powers vested in the Crown are to be exercised consistently with the developer's rights.[252] Mason J said in *Ansett* that this question is determined by asking whether the ratifying Act expressly or impliedly amends the pre-existing law providing for the exercise of the discretion.[253] Specific enforcement of an obligation may be available if the ratifying Act imposes a duty upon the Crown to exercise the discretion in conformity with the obligation. If no duty is imposed by the Act then action inconsistent with the obligation would only sound in damages.[254]

Where the developers' rights have been given statutory support, either under the 'as if enacted' formula or by a statutory direction to perform, the legislature has restricted the inconsistent use of statutory powers by the Crown.[255] Both forms of ratifying language place a statutory duty upon the Crown, leaving no discretion to act otherwise than in accordance with the State Agreement.[256] This enables the specific enforcement of these obligations against the Crown, as opposed to a mere remedy in damages.[257] The 'as if enacted' model gives the agreement the force of law,[258] meaning its provisions impose statutory obligations upon both parties, third parties may have standing to sue and the principles of statutory interpretation apply.[259] The statutory direction to perform places a statutory obligation upon the party or parties to whom it is directed,[260] which is usually the Crown alone.

The legislative stipulation that agreement provisions are to take effect notwithstanding any other Act or law does not create statutory obligations upon either party.[261] Arguably, this leaves discretion in the Crown to derogate from the developer's rights under the agreement. If this is the case, the developer would only be able to recover damages for such action.[262] Warnick believes that there is a strong contrary argument that this formulation operates as a restriction on pre-existing discretionary powers.[263] He cites this argument with reservations, given the generality of the formula and the capacity of the courts to read it down.[264] These reservations are well made

252. Warnick, op cit, n 16, 891.
253. *Ansett*, op cit, n 231, Mason J 77.
254. Ibid.
255. Warnick, op cit, n 16, 892.
256. See, op cit, n 253.
257. Ibid; Warnick, op cit, n 16, 902-903.
258. See *Wik Peoples v Queensland* (1996) 187 CLR 1, Brennan CJ 99, Kirby J 258.
259. Campbell, op cit, n 214, 218; Warnick, op cit, n 213, 3-6; Warnick, op cit, n 16, 883-886; Griffiths, Tagliaferri & Komninos, op cit, n 17, 6; Turner, op cit, n 22, 158. Normal principles of contractual interpretation apply to contracts not given the force of law: see *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* [2003] WASCA 259, Hasluck J paras 65-67; *Mineralogy Pty Ltd v The State of Western Australia* [2004] WASC 275, Pullin J para 36; *Mineralogy Pty Ltd v The State of Western Australia* [2005] WASCA 69, McLure JA para 13.
260. *Sankey*, op cit, n 236, Mason J 89, Aickin J 105-106; *Caledonian Railway Co* v *Greenock and Wemyss Bay Railway Co* (1874) LR 2 Sc & Div 347, Lord Cairns LC 349. Daugherty, op cit, n 25, 50; Turner, op cit, n 22, 157; Warnick, op cit, n 213, 19; Warnick, op cit, n 16, 886.
261. See, op cit, n 243 and accompanying text.
262. See, op cit, n 253.
263. Warnick, op cit, n 16, 892, 894-895.
264. Ibid, 895.

given that the decision in *Re Michael* does not suggest an expansive view of the 'take effect notwithstanding' formula.[265]

Ultimately, the degree of protection of the developer's rights under a State Agreement will depend on the intention of the parties as expressed in that document.[266] The agreement may impose a contractual duty upon the Crown to do all acts necessary for the performance of a contractual obligation or it may leave the Crown 'at liberty to decide whether the acts shall be done, even if the consequence of [that] decision is to disentitle the [developer] to a benefit'.[267] Where an obligation is fundamental to the State Agreement, and has the requisite statutory support mentioned above, the Crown would not be able to exercise a statutory power inconsistently with that obligation. The Crown, however, would be entitled to exercise a statutory power to the detriment of the developer if it did not affect the fundamental nature of the State Agreement or compromise the Crown's own contractual (or statutory) obligations.[268]

3.5.2 Legislature

The Western Australian Parliament is a creature of statute, originally deriving legislative power from the United Kingdom Parliament.[269] The current source of this power, the State's Constitution Act,[270] is now regarded as being derived from Australian sources. [271] The power is a plenary power[272] and the legislature has the inherent constitutional capacity to amend or repeal its own legislation.[273] As a consequence, ratification of a State Agreement does not guarantee a project is

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265. In *Re Michael*, op cit, n 45, Parker J at 581 held that this formula does not change the contractual nature of the agreement terms, which are binding 'on the parties to the State Agreement by the force of the common law, [with] no binding legal force on those who are not parties'.

266. See, by analogy, *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, Mason J 607-608. Note the possibility of an estoppel: see Turner, op cit, n 22, 150-154.

267. *Secured Income* ibid.

268. There appears to be little scope for a general duty of good faith upon the Crown not to disentitle the developer to a benefit under a State Agreement, particularly given the comprehensive nature of a State Agreement and the common inclusion of arbitration provisions. See P Baron, R Carroll & A Freilich, "Implied Terms: Central Exchange Ltd v Anaconda Nickel Ltd", (2003) 31 UWAL Rev 293; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] 186 ALR 289; *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33; *Central Exchange Ltd v Anaconda Nickel Ltd* (2001) 24 WAR 282.

269. The Western Australian legislature was first established under *Imperial Act* 10 Geo IV c 22 in 1829. This Act authorised the Crown to appoint three or more persons to the Executive Council to make laws for Western Australia. Representative Government was partly introduced under the *Australian Constitution Act* 1850 (13 & 14 Vic c 59). A bicameral legislature with general legislative power was established under the *Western Australia Constitution Act* 1890 (53 & 54 Vic c 26), which enabled the *Constitution Act* 1889 (52 Vic No 23).

270. *Constitution Act* 1889 (52 Vic No 23) s 2. See also *Australia Act 1986* (Cth) s 2.

271. See *Commonwealth Constitution* ss 106, 107. In *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, Gleeson CJ, Gummow, Hayne and Heydon JJ held at 570-571 that constitutional norms are to be traced to Australian sources.

272. *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, Mason CJ, Wilson, Brennan, Deane Dawson, Toohey & Gaudron JJ 9; *R v McCawley* [1920] AC 691, Lord Birkenhead 712.

273. *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, Starke J 422; *The South-Eastern Drainage Board (South Australia) v The Savings Bank of South Australia* (1939) 62 CLR 603, Latham CJ 617; *Magrath v Commonwealth* (1949) 69 CLR 156, Rich J 169-170, Williams J 183; *Vauxhill Estates Ltd v Liverpool Corporation* [1932] 1 KB 733, Avory J 743; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590, Maugham LJ 597; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, Brennan CJ & McHugh J 357; *West Lakes Ltd v South Australia* (1980) 25 SASR 389, Zelling J 413.

free from the unilateral interference by the State, or even that compensation could be obtained in such circumstances.[274]

The actions of the Queensland Parliament in legislating to terminate leases held by Pechiney illustrate the vulnerability of State Agreements to unilateral action. The State originally brought an action in the Queensland Supreme Court to terminate mining leases held by Pechiney under the *Aurukun Associates Agreement Act* 1975 (Qld).[275] Controversial legislation was subsequently enacted that retrospectively terminated the leases before the Supreme Court could determine the dispute.[276] The only compensation provided for in the repealing Act was for Pechiney's costs (to be assessed) and for a sum representing mining lease rental and interest during the period the State Agreement was retrospectively deemed to have no force and effect. As decided in *Durham Holdings Pty Ltd v New South Wales*,[277] the States are under no constitutional restraint that requires compensation to be paid for the acquisition of property.[278]

The capacity of a State Parliament to exercise legislative power can, however, be constrained by valid restrictive procedures, known as manner and form provisions. Where effective, these provisions prevent the amendment or repeal of existing legislation unless the restrictive procedures are complied with. Manner and form provisions are binding on State Parliaments by virtue of section 6 of the *Australia Act* 1986 (Cth) ("*Australia Act*"),[279] which requires laws respecting the constitution, powers or procedure of a State Parliament to be made in such manner and form as required by a law of the Parliament. It has been suggested that a common law principle enunciated in *Bribery Commissioner v Ranasinghe*[280] allows for manner and form provisions to apply to legislation without constitutional character. This interpretation is reliant on an obiter comment by Gibbs J in *Victoria v Commonwealth*[281] and has not received significant judicial support.[282]

No developer has successfully challenged amending legislation by arguing that a provision in legislation ratifying a State Agreement prescribed a manner and form which had not been complied with. In *Commonwealth Aluminium Corporation Ltd v Attorney General (Qld)*,[283] the Queensland Supreme Court (Hoare J dissenting) rejected a challenge to the *Mining Royalties Act* 1974 (Qld) ("*Royalties Act*"). Comalco argued without success that the *Royalties Act* did not

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274. See McNamara, op cit, n 22, 270.
275. No 8822 of 2003.
276. The *Aurukun Associates Agreement Repeal Act* 2004 (Qld). See also *Hansard* (Qld) 11 May 2004, 809-842.
277. (2001) 205 CLR 399.
278. Compare the restraints upon such action by the Commonwealth and Territories. See generally N Seddon, *Government Contracts: Federal, State and Local,* The Federation Press 2004, [5.17].
279. Before enactment of the *Australia Act* 1986 (Cth and UK) manner and form provisions were binding on the Western Australian Parliament by virtue of s 5 of the *Colonial Laws Validity Act* 1865 (28 & 29 Vic c 63). This legislation was repealed by s 3 of the *Australia Act* 1986 (Cth and UK). Note that reservations exist as to the validity of s 6 of the Australia Acts (Cth and UK): see PW Johnston, "Method or madness: constitutional perturbations and Marquet's case", (2004) 7 CLPR 25, 33-34; *Marquet*, op cit, n 271, Kirby J 613-614.
280. [1964] 2 All ER 785, Lord Pearce 791-792.
281. (1975) 134 CLR 81, Gibbs J at 163.
282. See, in particular, *Marquet*, op cit, n 271, Gleeson CJ, Gummow, Hayne and Heydon JJ 574, Kirby J 616-617; *West Lakes*, op cit, n 273, Zelling J 413, Matheson J 422. See also Crommelin, op cit, n 1, 332.
283. [1976] Qd R 231.

comply with a manner and form validly prescribed in legislation ratifying a State Agreement.[284] In a later case, *West Lakes Ltd v South Australia,*[285] West Lakes sought to restrain Ministers of State from furthering the passage of a Bill that would amend the *West Lakes Development Act* 1965 (SA). The South Australian Supreme Court was not prepared to interfere with Parliamentary processes.[286] In any event, the restrictive provision, directed at the Crown, was of no effect.

These cases show that any provision seeking to secure the developer's rights under a State Agreement from unilateral variation is unlikely to be successful. Firstly, the provision must be in the ratifying Act.[287] Secondly, the provision must prescribe a valid manner and form which is also protected by a valid restrictive procedure (otherwise the manner and form provision could simply be repealed by the normal means).[288] A provision that requires the agreement of the developer to any amendment is invalid as an abdication of legislative power. By requiring the consent of an extra-parliamentary entity, it prohibits rather than conditions the exercise of legislative power.[289] Lastly, under section 6 of the *Australia Act* the amending law must be characterised as a law with respect to 'the Constitution, powers and procedure of the Parliament'.[290] There is a possibility of a wider application of the principle in *Ranasinghe*, though this is unlikely.[291] In any event, the capacity of the legislature to bind itself under a State Agreement will probably not be tested. Contemporary ratifying legislation makes no attempt to prescribe manner and form requirements and developers no longer seek such clauses.[292]

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284. The *Commonwealth Aluminium Corporation Pty Ltd Agreement Act* 1957 (Qld). Section 4 of this Act relevantly provided that the rights of the company under the State Agreement were not to be derogated from, except by agreement between the responsible Minister and Comalco.
285. (1980) 25 SASR 389.
286. (1980) 25 SASR 389, King CJ 390, 399, Zelling J 407, 414, Matheson J 422.
287. The manner and form must be contained in a 'law made by [the] Parliament': see the *Australia Act* 1986 (Cth and UK) s 6. An argument could be made that a State Agreement given the force of law is a law made by the Parliament. Under the contemporary Western Australian model of ratification, however, the manner and form provision must be in the ratifying Act: see also *Re Michael*, op cit, n 45, Parker J 581, 586.
288. *West Lakes*, op cit, n 273, Zelling J 414; *Comalco*, op cit, n 283, Hoare J 250. See also Warnick, op cit, n 213, 14; Turner, op cit, n 22, 161; McNamara, op cit, n 7, 282-283.
289. *Comalco* ibid, Wanstall SPJ 231, 237-239; *West Lakes*, ibid, King CJ 397. See also Crommelin, op cit, n 1, 331; Warnick, op cit, n 213, 14-15; E Campbell, "Comment on State Government Agreements", (1977) 1 AMPLJ 53, 57-58; D Gately, "Sovereign Risk: Commentary", [1993] AMPLA Yearbook 173, 177; Turner, op cit, n 22, 162.
290. In *Comalco* ibid, Hoare J, held at 248-250 that because the *Royalties Act* conflicted with the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act* 1957 (Qld) it was prima facie a law respecting the Constitution, powers and procedure of Parliament. Contra: Dunn J at 261-263. Academic commentary suggests that so long as a manner and form provision touches the process of law-making it is a law with respect to the powers or procedure of Parliament: see McNamara, op cit, n 7, 283-284; P McNamara, "The Entrenchment of Development Agreements to Which the Crown in the Right of the State is a Party", (1982) 1 AMPLA Bulletin 23, 27; Campbell, ibid, 58; Turner, op cit, n 22, 163. Contra: Crommelin, op cit, n 1, 332.
291. See, op cit, n 282.
292. See Crommelin, op cit, n 1, 331; McNamara, op cit, n 7, 284-285; Warnick, op cit, n 213, 14-15; Warnick, op cit, n 16, 890-891; Warnick, op cit, n 98, 40; MacDonald, op cit, n 48, 46.

3.5.3 Commonwealth

Under the *Constitution* the Commonwealth has the exclusive power to make laws in areas such as external affairs[293] and defence.[294] Where the Commonwealth enacts a law in an area of shared legislative competence with the States, its laws prevail to the extent of any inconsistency with a State law.[295] Commonwealth powers are not without constraint, since they are subject to the *Constitution*,[296] but their application has broadened considerably since Federation.

In *Murphyores Inc Pty Ltd v Commonwealth*,[297] it was held that a Commonwealth Minister could legitimately take into account an environmental report[298] in determining whether to grant export approval for minerals. This wide ministerial discretion, derived from the trade and commerce power,[299] is still used to regulate the mining of uranium.[300] It offers the Commonwealth significant control over mining ventures because export is necessary to access significant markets for the extracted resource.[301] The *Tasmanian Dams case*[302] illustrates the width of other legislative powers with respect to external affairs and corporations. The *Constitution* contains some restraint on these powers, for example, section 51(xxxi) would invalidate legislation enacted by the Commonwealth where compensation was not paid (or was not on just terms) for the acquisition of mining titles or other property granted under State law.[303]

Although the current federal government favours an approach of limited intervention,[304] the Commonwealth's powers provide significant scope for regulation concerning the environmental aspects of mining projects. The Commonwealth has also had a significant impact on projects through its legislative protection of native title rights. After the decision in *Mabo v Queensland*

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293. *Commonwealth Constitution* s 51(xxix). See also *Australia Act* 1986 (UK and Cth) s 2(2); JRS Forbes & AG Lang, *Australian Mining and Petroleum Laws* (2nd edn), Butterworths 1987) 38-29.
294. *Commonwealth Constitution* s 51(vi); Forbes & Lang ibid, 35-36.
295. *Commonwealth Constitution* s 109. See, by example, *Ex parte McLean* (1930) 43 CLR 472; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Western Australia v Commonwealth* (1995) 183 CLR 373. State Agreements recognise the primacy of valid Commonwealth laws: see *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA) sch 1 cl 37(1).
296. See *Commonwealth Constitution* ss 51, 52.
297. (1976) 136 CLR 1.
298. Made under the now repealed *Environmental Protection (Impact of Proposals) Act* 1974 (Cth).
299. *Commonwealth Constitution* s 51(i).
300. *Customs (Prohibited Exports) Regulations* 1958 (Cth) reg 9, sch 7. The defence power is also important for the regulation of uranium mining: see Hunt, op cit, n 33, 9.
301. Fitzgerald, op cit, n 6, 98. An embargo on the export of iron ore, imposed under the trade and commerce power, delayed the development of the Pilbara until after it was lifted in December 1960: see AF Trendall, 'Iron' in RT Prider (ed), *Mining in Western Australia*, University of Western Australia Press 1979, 76.
302. *Commonwealth v Tasmania* (1983) 158 CLR 1.
303. See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513. In this case s 51(xxxi) of the *Commonwealth Constitution* required valid Commonwealth legislation to compensate Newcrest on just terms for the expropriation of mining leases, granted to that company under the *Mining Act* 1980 (NT). Cp: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 concerning an expropriated tenement granted under Commonwealth legislation over the continental shelf.
304. Prime Minister J Howard and Minister for Resources and Energy W Parer, *Minerals and Petroleum Resources Policy Statement*, February 1998; Fitzgerald, op cit, n 6, 86-91. Assessment and approval powers under the EPBCA are only triggered where the projects have a 'significant impact' on matters of 'national environmental significance'.

(No 2),[305] both the Commonwealth and Western Australia sought to address the uncertain legal position. The Commonwealth passed the *Native Title Act* 1993 (Cth) ("*NTA*") to provide a framework for the resolution of native title claims,[306] whilst Western Australia attempted to extinguish native title and replace it with rights of 'traditional usage'.[307] In *Western Australia v Commonwealth*,[308] the extinguishment provision was held to be inconsistent with section 10 of the *Racial Discrimination Act* 1975 (Cth) and invalid under section 109 of the *Constitution*.[309] The effect of this decision is that the *NTA* governs claims for native title within the State.[310]

Ray asserts that most projects impeded by sovereign risk in Australia are affected by a conflict between State and Commonwealth laws.[311] This element of sovereign risk cannot be dealt with under a State Agreement,[312] which is, according to Williams, no longer sufficient to guarantee a developer the right to mine.[313] The use of Commonwealth legislative power may derogate from rights specifically provided for under a State Agreement. Consider Part IIIA of the *TPA* which provides for a 'legal regime to facilitate competitive access to the services of facilities of national significance'.[314] Without protection within the *TPA*,[315] this legislation would appear to threaten exclusive or priority rights to infrastructure under State Agreements.[316] In addition, if rights under a State Agreement are derogated from by the Commonwealth, redress would be limited to constitutional challenge under section 51(xxxi) or on wider grounds.

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305. (1992) 175 CLR 1. In this case a High Court majority rejected the view that Australia had been *terra nullius*, land belonging to no-one, at the time of the British acquisition of sovereignty. Upon settlement the Crown acquired radical title, ultimate title in all land that had been settled. However, as the land was not desert and uninhabited the absolute beneficial title to all land was not conferred upon the Crown by the acquisition of sovereignty. The land rights of the native inhabitants remained as a burden upon radical title, unless they were lawfully extinguished.
306. The objects of the *Native Title Act* 1993 (Cth), listed in s 3, are to recognise native title, provide a framework for the resolution of claims, regulate future acts affecting native title and provide for the validation of past acts that invalidly purported to extinguish native title.
307. Under s 7 of the *Land (Titles and Traditional Usage) Act* 1993 (WA).
308. (1995) 183 CLR 373.
309. Section 10 protected native title rights by providing native title holders the same security enjoyed by persons deriving title from the Crown.
310. Under ss 207A and 270B of the *Native Title Act* 1993 (Cth), however, a State can appoint a body to perform the functions of the Native Title Tribunal and the Native Title Registrar in that State.
311. AJ Ray, "Sovereign Risk: Commentary", [1993] AMPLA Yearbook 167.
312. See Turner, op cit, n 22, 136.
313. Williams, op cit, n 36, 70-73.
314. See N O'Bryan, "An Excess of Access? The Uses and Abuses of Part IIA of the Trade Practices Act in the Resources Sector", [2004] AMPLA Yearbook 181. See also R Miller, "An Excess of Access? Unanswered Questions for the Resources Industry – Part I", [2004] AMPLA Yearbook 200; M Carkeet, "An Excess of Access? Unanswered Questions for the Resources Industry – Part 2", [2004] AMPLA Yearbook 213.
315. Note that section 44W(1)(c) of the *Trade Practices Act* 1974 (Cth), read with s 44W(5), provides that when making a determination in a dispute over access, the Australian Competition and Consumer Commission must not deprive any person of a right under a contract that was in force at the beginning of 30 March 1995. An interesting question is whether rights under a State Agreement given the force of law could be considered rights under a contract for the purposes of this provision.
316. See Carkeet, op cit, n 314, 223-224.

3.5.4 Third parties

State Agreements generally provide significant security from interference by third parties. For example:

- after *Margetts*[317] the *GAA*, under section 4, introduced offences designed to prevent disruption of State Agreement projects;
- in *RGC Mineral Sands Ltd v Lewis*[318] a provision in a State Agreement was interpreted so as not to provide landowners a veto power over development on their land; and
- in *Allen v Gulf Oil Refining Ltd*[319] the House of Lords held that parliamentary authorisation of the construction and use of an undertaking provides the developer with immunity from a third party claim in nuisance.[320]

Regardless of these protections, State Agreements cannot provide a comprehensive regulatory framework for a project because they cannot effectively regulate the activities of third parties. In *Re Michael*, Parker J found the State Agreement was merely a contract between a developer and the Crown, which could not have binding legal force on third parties.[321] Binding legal force can be achieved if the State Agreement is given the force of law under the 'as if enacted' model.[322] This form of ratification is no longer used in Western Australia, [323] either for an agreement or an individual provision.

Third parties may be able to enforce a State Agreement against a developer, depending upon the intentions of the parties. Though the privity doctrine would appear to preclude third party enforcement rights under a contract not given the force of law, this doctrine has been modified by statute[324] and arguably at common law.[325] In *Hancock Prospecting Pty Ltd v BHP Minerals Ltd*,[326] the Mount Newman joint venturers acknowledged that a State Agreement[327] created access rights for third parties that were enforceable at law, [328] even though it was not given the force of law. Third party rights may also be conferred under State, Commonwealth or international law. There is

317. Op cit, n 240.
318. (unreported), Perth Warden's Court, 16 Dec 1994, Plaint No IH/945.
319. [1981] 2 WLR 188.
320. Ibid, 191. See also Warnick, op cit, n 16, 898.
321. See *Re Michael*, op cit, n 45, 581.
322. Turner, op cit, n 22, 158.
323. Griffiths, Tagliaferri & Komninos, op cit, n 17, 6. See also Warnick, op cit, n 16, 886. The formulation was used in several State Agreements from the 1960s: for example the *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) ss 3-6.
324. See *Property Law Act* 1969 (WA) s 11.
325. See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107. Mason CJ and Wilson J said at 123-124 that where there is an expressed indication to benefit a third party and an indication of an intention that the third party is entitled to sue, that thid party should be able to sue on the contract. There was no clear majority in *Trident* and it does not support a general exception to the privity rule for third party benefit contracts: *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363, Gummow J 368. See also *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277.
326. [2003] WASCA 259 and [2002] WASC 224 at first instance.
327. The access rights were contained in a Rail Transport Agreement which provided content to access provisions in cl 9(2)(a) of the Mount Newman State Agreement, ratified by the *Iron Ore (Mount Newman) Agreement Act* 1964 (WA). See, op cit, n 129.
328. [2002] WASC 224, McKechnie J para 28.

therefore considerable scope for interference with a State Agreement project, given that it is not secure from modifications under State law and protections at Commonwealth[329] and international[330] level may be limited.

3.6 Limitations of Ratification

State Agreements often seek to stipulate the rules for a development comprehensively. Since political and economic restraints discourage the State from unilaterally changing these rules, this practice is designed to provide certainty and ensure the long term stability of the project. Although, theoretically, there is flexibility when the rules are negotiated,[331] the situation reverses after they have been set and the agreement ratified.[332] At this point, changes to the State Agreement can only be made with the approval of both houses of Parliament. Not only is this a time consuming process, [333] but it is of particular concern for the developer when unforeseen circumstances occur. Though an agreement may be designed to lock in rights, it also locks in liabilities.

Inflexibility after ratification is demonstrated by *Mineralogy Pty Ltd v Western Australia*.[334] Mineralogy and a co-developer sought a declaration that the Minister was obliged to consider a proposal to vary a project, approved by the Minister under a State Agreement,[335] to allow for the export of iron ore concentrate. Three types of project were defined in the agreement, each providing for further processing of the iron ore. The approved project had two purposes, the production of pellets and the supply of limited quantities of iron ore concentrate within Western Australia. On the construction of the agreement accepted by the Supreme Court, no variation to the purpose of a project could be considered by the Minister, only a variation to activities that served that purpose.[336] The declaration was refused. The Minister apparently had no opposition to the proposal to export the concentrate, but correctly took the view that this could only be achieved by variation under clause 32 of the agreement. [337] This clause requires a variation to be tabled in Parliament, with either House able to disallow it.

Mineralogy desired the export of concentrate to complete a sales contract and overcome financial difficulties, including co-developer and subsidiary Austeel being placed into administration.[338] It obviously deemed litigation a superior option to variation, knowing that it would be difficult to achieve Parliamentary approval to a relaxation in its further processing obligations. The requirement to obtain approval is a significant barrier to change on sensitive political issues, even where the change has the support of both parties. Variations that are in the public interest, such as the requirement to comply with the *EPA*, would be accepted by Parliament, but those that would confer a benefit or ease a hardship upon a developer may be resisted.

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329. For example, s 44W(1)(c). See, op cit, n 315 and accompanying text.
330. See Fitzgerald, op cit, n 6, 326-335.
331. Grinlinton, op cit, n 20, 37.
332. See Keating Review, op cit, n 2, 101; Fitzgerald, op cit, n 6, 335-339.
333. See J Nonggorr "The legal effect and consequences of conferring legislative status on contracts", (1993) 17 UQLJ 169, 184.
334. [2005] WASCA 69 and [2004] WASC 275 at first instance.
335. Ratified by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act* 2002 (WA).
336. See [2005] WASCA 69, McClure JA paras 54, 67, and [2004] WASC 275, Pullin J paras 46-49.
337. [2004] WASC 275, Pullin J paras 21-23, 50.
338. M Drummond, "State Government steel partner calls in administrators", *The West Australian*, 16 Nov 2004, 8.

3.7 Comment on Legal Efficiency

Legislative ratification of mining agreements is generally effective to provide the Crown with authority to perform the agreement but is unable to create a comprehensive and secure regulatory regime. Regulation under contract:

- conflicts with facilitative objectives;
- does not have the legitimacy of legislative processes, which are open to the public;
- is only able to control the behaviour of the parties, unless given the force of law;
- is bilateral but remains subject to the constitutional framework, including unilateral action by the State or the Commonwealth; and
- is inflexible, even though State Agreement projects last for decades.

State Agreements are designed to facilitate development. They can serve a regulatory function, since they control behaviour,[339] however regulation should only be achieved between the parties as a by-product of facilitation. Regulation is more effective in a co-ordinated fashion under statute where it has greater credibility and the force of law.

4. CONCLUSIONS

The following recommendations are derived from the preceding economic, policy and legal analyses and are directed at identifying the circumstances where State Agreements may add value.

4.1 Entering a State Agreement

The decision to seek a State Agreement should generally be left to a developer, who does not have a stake in the continued use of State Agreements and has the best knowledge of the project's requirements. State Agreements should not be sought by the State solely for policy reasons, since they can be an unwieldy and expensive means of achieving policy objectives. The Xstrata case, however, demonstrates that the government may consider negotiating a State Agreement to lock a developer into certain obligations, although a simple contract may also be effective to achieve the desired result.

Evidence from Part II demonstrates that State Agreements may also be useful where:

- it is not feasible to provide the land access, certainty of tenure or access to resources (such as water) required by the developer through the general legislation;
- as a result of factors such as the size, complexity, remoteness, subject matter, financing, duration and uniqueness of a proposed project, the general legislation cannot provide an appropriate framework for development;
- the State has infrastructure, energy or resource requirements that can be efficiently dealt with as part of the development of a resource project;

339. See T Daintith, "Mining Agreements as Regulatory Schemes'", in G Jaenicke et al (eds), *International Mining Investment*, Kluwer 1988, 143.

- the developer requires State assistance to establish infrastructure and the benefits to the State of providing that assistance outweigh the associated costs;
- the State has a policy objective which, in combination with broader government initiatives, is appropriately achieved through negotiation.

The government is developing criteria upon which new State Agreements will be based,[340] as recommended by the Auditor-General.[341] Ultimately the criteria that are developed should form part of a government policy, in order to lend transparency to the Cabinet decision to enter a State Agreement. A public policy can be used to guide the proper planning of development, which is difficult to achieve on an ad hoc basis. It would also allow for scrutiny of the negotiating process, whilst the negotiations themselves would remain confidential.[342]

4.2 Facilitation

An integrated approvals system has significant advantages over the proposals mechanism in State Agreements and should be considered in Western Australia. The IAS does not require a lengthy negotiation and ratification process before it can be utilised, applying instead where the project is accorded 'stage significant' status.[343] This system is more inclusive than the proposals mechanism and is a more transparent co-ordinating tool, allowing for the rationalisation of information with all relevant agencies through a project planning meeting.

4.3 Security of Tenure

State Agreements retain a role for politically sensitive projects, including uranium mining, where the developer needs reassurance against subsequent changes in government policy. They are also useful where modifications are required to the general legislation, although alternatives to a traditional State Agreement are available. A similar mechanism to Part 8A of the *Mining Act* 1971 (SA) merits consideration in Western Australia. Although limited to the mining legislation, it would provide for improved tenure without requiring the entire project framework to be negotiated or the ratification of the agreement by Parliament.[344]

4.4 Regulation

The primary objective of State Agreements should be to facilitate development, there are numerous problems with regulation of the activities of a developer under a bilateral mechanism. Regulation is more effective under legislation where it has the force of law, is open and transparent and can bind third parties. The elevation of the *EPA*, by requiring that all State Agreements be subject to its provisions, is an example of the active reduction of the facilitation/regulation conflict. This action reflects changed community standards concerning the environment.

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340. DOIR, *Government Positions on Keating Recommendations,* (2004) <http://www.doir.wa.gov.au/documents/investment/ApprovalsKeatingRecommendationsSummary.pdf>, 11. DOIR, *Schedule of Government Positions and Progress Report on Keating Recommendations,* (2006) <http://www.doir.wa.gov.au/documents/investment/Governments_position_on_recommendations_and_status_v2.pdf>.
341. Auditor General, op cit, n 60, 26.
342. The introduction of the Local Government Protocol has provided for increased transparency in the negotiating process: see DOIR, Department of Local Government and Regional Development & Western Australian Local Government Association, op cit, n 91.
343. Keating Review, op cit, n 2, 131.
344. *Mining Act* 1971 (SA) s 56C(5).

4.5 Ratification

To be effectual, a contract between a developer and the State that attempts to make modifications to existing laws must be ratified. Ratification under Western Australian models, however, does not change the contractual nature of the agreement and is not essential for the exchange of some commitments between the parties. There is no requirement to ratify a contract where legislative power is not being utilised, although it does reduce the risk (however small) that the Crown will be able to avoid its obligations.

4.6 Comment

State Agreements are a legitimate tool yet, as identified in this dissertation, they have numerous limitations. A thorough understanding of these limitations is required before they should be utilised. For example, a great strength of State Agreements is the certainty that they provide for investment. This certainty comes at the expense of flexibility and the developer's autonomy. The project rules are, furthermore, subject to the constitutional framework and are thus vulnerable to unilateral action by the State or Commonwealth.

The fundamental flaw with State Agreements is the inability to determine whether they are the most efficient way of achieving their ends. This means that in most circumstances their use will be inefficient. As a consequence they should only be used as a facilitative means of last resort. A significant element of their facilitative value is based on their ability to operate outside the general legislation. In the long run, government action may be better directed towards improving the existing legislative framework. An efficient system should not require exceptions to be made to it, especially where establishing these exceptions is a 'lengthy and expensive process'.[345]

345. Economics and Industry Standing Committee (LA), op cit, n 185, 49.