ONE MINERAL – MANY LAWS: THE REGULATION OF URANIUM MINING IN THE NORTHERN TERRITORY

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The paper reviews the historical legislative arrangements regarding minerals and then considers the current regulatory regime for uranium production in the Northern Territory. The uranium regime is compared to and contrasted with the current legislative regime in respect of other minerals in the Northern Territory and with that applicable to uranium production in South Australia. The paper argues that the extensive Territory and Commonwealth standard regulatory regimes operative with respect to minerals generally would appear to provide a more than sufficient basis for regulation of uranium production operations.

1. INTRODUCTION

The extraordinary nature of the mineral uranium manifests in many ways. One such manifestation is uranium's potential for the generation of clean and environmentally benign energy counterbalanced by its potential to be the source of devastating pollution and a world destroying weapons source. Another manifestation of the extraordinary nature of uranium (related to the first) is the level of political debate and controversy it can generate. Surely uranium, its production, processing, use and disposal, is more hotly debated in the public arena than any other mineral in history. Finally, uranium, at least in the Northern Territory, has managed to generate a volume of legislation and regulation in extraordinary proportion to the volume of production (perhaps not of the order of c^2 but still extraordinary).

It is this last aspect of uranium that is the focus of this paper. The paper reviews the historical legislative arrangements regarding minerals generally in the Territory prior to self government in 1978 and then moves on to consider the current regulatory regime for uranium production established in the Territory since 1978. These several regimes are compared to and contrasted with the existing legislative regime in respect of minerals generally in the Northern Territory and with that applicable to uranium production in South Australia (the only other Australian jurisdiction engaged in the production of uranium).

The paper concludes by arguing that the extensive Territory regulatory framework for minerals generally that exists in the Territory, together with and the Commonwealth regulatory regime with respect to both other minerals and uranium (the "standard regimes") would appear to provide a more than sufficient basis for regulation of all mineral production (including uranium) in the Territory. For, if the standard regimes *do* provide a sufficient basis for the regulation of mineral production generally, then they should also provide a sufficient basis for the regulation of production that includes uranium. If this is not the case then it is a shortcoming in the standard regime itself and it is this that should be rectified. The project specific operational requirements of the standard regimes allow for the tailoring of any monitoring or control requirements appropriate for any hazardous mineral production, without the need for additional uranium specific production control regimes.

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2. LEGAL FOUNDATION OF URANIUM MINING REGULATION IN THE NORTHERN TERRITORY

To understand the contemporary legislative regimes in place both with respect to Uranium and other minerals in the Northern Territory it is necessary to briefly recount the history of mining regulation in the Territory.[1]

2.1 Early History

While originally within the boundaries of New South Wales on 6 July 1863 the Northern Territory was annexed as a Province of South Australia. The surrender of the Northern Territory by South Australia and its acceptance by the Commonwealth under s 111 of the *Constitution* was effected by inter-governmental agreement, as approved by the *Northern Territory Surrender Act 1907* (SA) (the *Surrender Act)* and the *Northern Territory Acceptance Act 1910* (Cth) (the "*Acceptance Act*") which took effect from 1 January 1911. By this method the Northern Territory became a territory of the Commonwealth pursuant to s 122 of the *Constitution* and the Commonwealth acquired an exclusive jurisdiction over the Territory; including its lands and minerals. The surrender and acceptance was expressed under the Surrender Act to be subject to "all freehold, leasehold, or other estates or interests in or agreements, securities, or rights in respect of land within the Territory in existence at the time of the acceptance of such surrender by the Commonwealth". In a similar vein all estates or interests held from the State of South Australia at the time of acceptance continued to be held from the Commonwealth on the same terms and conditions pursuant to s 10 of the *Acceptance Act*.

Early grants of Crown land from the Territory's provincial days did not reserve property in minerals to the Crown and the surrender and acceptance arrangements served to preserve existing private mineral interests in the Territory.

There were two legislative responses to the uncertainty thus created. The first was the passage of the *Atomic Energy (Control of Materials) Act 1946* (Cth).[2] The Act declared property in prescribed substances to vest in the Commonwealth subject to any grant after the commencement of the Act. Prescribed substances where defined to mean:[3]

> prescribed substance means:
>
> (a) uranium, thorium, an element having an atomic number greater than 92 or any other substance declared by the regulations to be capable of being used for the production of atomic energy or for research into matters connected with atomic energy; and,
>
> (b) any derivative or compound of a substance to which paragraph (a) applies.

In 1953 the Legislative Council of the Northern Territory adopted a similar solution to the more general issue with the enactment of the *Minerals Acquisition Ordinance 1953* (NT). The legislation vests all minerals (other than prescribed nuclear minerals) in the Crown and converts any extant rights in those minerals to a right to compensation.[4] Thus, by 1953 the Commonwealth had acquired property in all minerals (prescribed substances and others) in the Territory. The

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1 G R Nicholson, "*Legislative Regulation of Mining in the Northern Territory – Some Constitutional and Legal Aspects"* (1991) 10 AMPLA Bulletin (No 3) 176.

2 Which was later repealed and replaced by the *Atomic Energy Act 1953* (Cth) (the "*Atomic Energy Act*").

3 Section 5. The definition is the same as that contained in the current *Atomic Energy Act 1953* (Cth).

4 Sections 3 and 4 respectively.

position in the Territory at this stage put the Commonwealth in essentially the position as the States.[5]

2.2 Self Government

However, in 1978 with the coming of self government to the Territory uranium was again put into a distinct class. Subsection 69(4) of the *Northern Territory (Self-Government) Act 1978* (Cth) (the "*Self-Government Act*") deals with the ownership of minerals in the Territory and provides:

> "All interests of the Commonwealth in respect of minerals in the Territory (other than prescribed substances within the meaning of the *Atomic Energy Act 1953* and the regulations made under that Act and in forced immediately before the commencing date are, by force of this section, vested in the Territory on that date."

While the ownership of uranium was made distinct from other minerals, the arrangements with respect to management were even more extraordinary. Section 6 of the *Self-Government Act* provides for the Territory Legislative Assembly to have the power to make laws for the peace order and good government of the Territory in the usual fashion. However, s 35 specifies that: "[t]he regulations may specify the matters in respect of which the Ministers of the Territory are to have executive authority."

Regulation 4(1) of the *Northern Territory (Self-Government) Regulations 1978* (Cth) (the "*Self-Government Regulations*") provides that:

> "subject to subregulation 4(2)… the Ministers of the Territory are to have executive authority under section 35 in respect of the following matters [inter alia]…mining and minerals".

In turn subreg 4(2) provides:

> "Subject to subregulation (6), a matter specified in subregulation (1) shall not be construed as including or relating to:
>
> (a) the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act 1953* and regulations under that Act as in force from time to time;"

Subregulation 4(6) provides that subreg 4(2) shall not apply to a matter that is specified in subreg 4(5). Subregulation 4(5)(f) provides that Territory Ministers *are* to have executive authority with respect to:

> "agreements and arrangements between the Territory and the Commonwealth or a State or States, including the negotiation and the giving effect to any such agreement or arrangement by the Territory by way of enactment, regulations or other instrument, or otherwise."

There have been six versions of the "Memorandum of Understanding between the Commonwealth and the Northern Territory in relation to Working Arrangements for the Regulation of Mining in the Northern Territory"(the current "MoU"). The most recent version was executed in May 2005. It is upon these agreements that the executive authority of the Territory with respect to uranium (and other prescribed substances) is founded. Before looking at the scope of the agreements though, there is one other final piece of the regulatory jigsaw that need be noted.

Section 175 of the *Mining Act 1980* (NT) (the "*Mining Act")* and subss 34(3) and (4) of the *Mining Management Act 2001* (NT) (the "*Mining Management Act*") operate to provide the

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[5] The distinction being that the Commonwealth retained some control (but not ownership) of prescribed substances in the States, whereas in the Territory the Commonwealth had control and ownership.

domestic legislative foundation for the retention by the Commonwealth of the ultimate executive control of uranium production as enunciated in the various subreg 4(5) agreements. Relevantly, s 175 of the *Mining Act* is in the following terms:

> "(1) Subject to subsection (2), but notwithstanding anything elsewhere contained in this Act (other than subsection (3)) or the Regulations, in respect of a prescribed substance within the meaning of the *Atomic Energy Act 1953* of the Commonwealth, the Minister –
>
> (a) shall exercise his powers in accordance with, and give effect to, the advice of the Minister of the Commonwealth for the time being administering section 41 of that Act; and
>
> (b) shall not exercise his powers otherwise than in accordance with such advice.
>
> (2) Subsection (1) does not operate to prevent the Minister from acting without advice, or to require the Minister to take or give effect to advice, in relation to a matter arising under Part IV."[6]

Section 34(3) and 34(4) of the *Mining Management Act* provides as follows:

> "(3) Before exercising a power or performing a function under this Part in relation to an Authorisation that relates to uranium or thorium, the Minister -
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> (a) must consult with the Commonwealth Minister about matters agreed in writing between them relating to the mining of uranium or thorium; and
>
> (b) must act in accordance with any advice provided by the Commonwealth Minister.
>
> (4) In granting or varying an Authorisation that relates to the Ranger Project Area, the Minister must ensure that the Authorisation incorporates or adopts by reference (with the necessary modifications) the Ranger Project Environmental Requirements.
>
> (5) In subsection (4) -
>
> 'Ranger Project Area' has the same meaning as in the *Atomic Energy Act*;
>
> 'Ranger Project Environmental Requirements' means the environmental requirements relating to the Ranger Project Area as set out in Appendix A to the Schedule to the authority under section 41 of the *Atomic Energy Act* and dated 14 November 1999."

In summary then, following self government the grant (pursuant to the *Mining Act*) and operation (pursuant to the *Mining Management Act*) of a mining interest in respect of uranium (and other prescribed substances) is subject to Territory law, but in exercising a discretion pursuant to that law the Territory Minister must abide the wishes of the Commonwealth Minister.

2.3 The Challenge

The legal efficacy of the scheme as described above was challenged in *Yvonne Margarula v Minister for Resources and Energy & Ors*.[7] The proceedings concerned the validity of a mining lease under the *Mining Act* granted in 1982 by the Northern Territory Mines and Energy Minister to the predecessor in title of Energy Resources Australia Ltd. The mining lease permitted the exploitation of uranium ore on lands at Jabiluka which is within the Ranger Project Area as defined in the *Atomic Energy Act 1953* (Cth). Yvonne Margarula, the applicant, was (and is) the principal custodian of those lands under Aboriginal tradition. She challenged the power of the

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6 Part IV of the *Mining Act* provides for the grant of exploration licences.

7 (1998) 86 FCR 195.

Northern Territory Minister to grant the lease on various bases. The applicant was unsuccessful at first instance with Sackville J dismissing the application.[8] The applicant appealed and the matter was heard by Beaumont, Lindgren and Emmett JJ. Their Honours delivered a joint judgment.

The main ground of appeal was a challenge to the efficacy of the arrangements founded on the Self-Government Regulations and described above. Thus while the challenge was aimed at the Territory Minister's power to grant a mineral lease, the scope of the challenge would extend to the validity of the Territory's management of the operation of a mineral lease under the *Mining Management Act*.

In response to this attack the court responded:[9]

> "[t]he question arises whether, on its proper construction, the Mining Act authorises the grant of a lease in relation to Commonwealth property. In this connection, the respondents rely upon, inter alia, the provisions of s 175 of the Mining Act. It will be recalled that s 175 provided that, in respect of a prescribed substance within the meaning of the Atomic Energy Act, the Territory Minister: (a) shall exercise his powers in accordance with, and give effect to, the advice of the Commonwealth Minister administering s 41 of the Atomic Energy Act; and (b) shall not exercise his powers otherwise than in accordance with such advice.
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> On behalf of the appellant it is submitted that the presumption that the Mining Act was not intended to bind the Crown in right of the Commonwealth meant that the Territory's Legislative Assembly did not intend to confer power on the Territory Minister administering the Mining Act to dispose of interests vested in the Commonwealth.
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> In our opinion, the Mining Act was clearly intended to bind the Crown in right of both the Commonwealth and the Territory. Section 60 of that Act authorised the grant by the Territory of a mineral lease for the mining of the mineral or minerals specified in the lease document. 'Mineral' was defined (s 4(1)) so as to include a 'naturally occurring ... inorganic element or compound ... obtainable from land by mining ...' . This would include a 'prescribed substance' within the meaning of the Atomic Energy Act. In this context, s 175 specifically regulated the manner in which the Territory Minister was to exercise his powers in respect of these prescribed substances. Further, s 175 made specific reference to the Atomic Energy Act. That Commonwealth Act both vested the prescribed substances in the Commonwealth (s 35(2)) and made the Commonwealth's title 'subject to any rights granted ... by or under the law of a Territory of the Commonwealth, with express reference to that substance ...' (s 35(4)). We agree with the first and second respondents' submission that s 175 could not be given any meaningful operation unless s 60 were interpreted as authorising the grant of a mineral lease binding on the Commonwealth in respect of a prescribed substance."

An application for special leave to appeal to the High Court was refused on 20 November 1998. It would appear beyond doubt then, that the complex inter-relation of Territory law and the Commonwealth's *Self-Government Act* and *Atomic Energy Act* resting on the nexus of the agreement between the Territory and the Commonwealth is legally sound.

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8 *Margarula v Minister for Resources and Energy* (unreported, Federal Court, Sackville J, No NG 448 of 1997, 11 February 1998).

9 (1998) 86 FCR 195 at 204.

3. THE ELEMENTS OF URANIUM MINING REGULATION IN THE NORTHERN TERRITORY

The elements of uranium mining regulation in the Northern Territory can be broadly characterized into three components. The first of these are those Territory laws which apply to all mineral production activity in the Territory. The relevant legislation here is the *Mining Act*, the *Mining Management Act* and the *Environment Assessment Act 1982* (NT) (the "*Assessment Act*"). The second is Commonwealth lawwhich applies to uranium production wherever it occurs in Australia. The legislation making up this component is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the "EPBC Act") and the Atomic Energy Act. The third component is the Commonwealth legislation which applies only to uranium production in the Northern Territory. The main piece of legislation in this component is the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth). However, usefully considered under this heading are also the structures created pursuant to the current MoU. Finally, by way of contrast, the elements of uranium mining in the Northern Territory will be contrasted with those in force in South Australia.

3.1 Generally Applicable Territory Laws

3.1.1 Mining Act

The *Mining Act* is primarily concerned with the regulation of the granting of minerals tenures. It is not primarily concerned with the environmental management of such tenures. Regulation of these matters is set out in the operational control regime found in the *Mining Management Act* (discussed below). However, the *Mining Act* does contain provision for the insertion of conditions on the grant of minerals tenures and these conditions have an environmental management function. Relevant to mineral leases, the provisions relating to the insertion of conditions are found in ss 66, 66A and 166 of the *Mining Act*. Section 66 imposes a range of general conditions but, relevant to the current discussion, includes a provision that a mineral lease is granted subject to the condition that the lessee will: "comply with the provisions of, and directions lawfully given under, this Act and all other laws in force in the Territory, in relation to his activities on and occupation of the lease area."[10] Section 66A deals with conditions imposed to minimize the impact of the grant of a mineral lease on native title rights and interests. Section 166 is a provision that imposes a range of conditions on mineral tenures (not just mineral leases) generally. Relevantly s 166(1) provides that all mineral leases are subject to:

> "such other conditions, not inconsistent with this section or the specific provisions of this Act imposing conditions..., as the person granting the [mineral lease]…, thinks fit and endorses on the grant document."

Thus, explicit provision exists under the *Mining Act* to provide as a condition of the grant of a mineral lease that the lessee will comply with all relevant laws, lawful directions and any specific conditions endorsed on the grant document. It has of course been explained above that any discretion as to the exercise of lawful directions or the endorsement of particular conditions on mineral leases involving the production of uranium can only be exercised in accordance with the advice of the Commonwealth Minister.

3.1.2 Mining Management Act

The *Mining Management Act 2001* came into operation on 1 January 2002. Originally environmental, health and safety issues in the mining industry were coalesced under this single

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[10] *Mining Act* s 66(k).

Act. However, recent proposed amendments to the *Mining Management Act* would see the health and safety regulation functions stripped from the legislation and replicated under general work health legislation.[11] Occupational health and safety aside, the *Mining Management Act* has two main environmental functions. The first is to create a regime for operational control of mineral exploration and mineral production activity in the Northern Territory. This regime is enlivened by the requirement imposed pursuant to s 35 on any mining activity (or mineral exploration activity) that may cause a "substantial disturbance" that such activity is conducted in accordance with an Authorisation granted under s 36 of the Act. The second is to create a regime of environmental offences. This latter function will not be explored in the current discussion.

An application for Authorisation under s 35 of the *Mining Management Act* requires the proposal by the mine operator and approval by the Minister of a Mining Management Plan ("Plan"). A Plan must include:

- a description of the activity to be carried out;
- safety, health and environmental issues relevant to the activity[12];
- the management system to be implemented at the site;
- a plan and costing of closure activities[13].

An Authorisation is subject to the condition that the operator complies with the approved Plan (s 37(2)(a)) and any additional conditions imposed (s 37(2)(b)). Section 37(3) is particularly directed at the imposition of environmental conditions and provides that, without limiting the generality of conditions that may be imposed under s 37(2), the conditions may relate to:

(a) the protection of the safety and health of persons or the environment;

(b) the outcomes of any environmental assessment of mining activities undertaken under the *Environmental Assessment Act*;

(c) the requirement for security, for the purposes of s 43, in the form and amount and on the terms specified in the condition;

(d) the form and frequency of periodic reports to be submitted in relation to the mining activities to which the Authorisation relates.

In the context of the McArthur River Mine expansion conditions imposed on the *Mining Management Act* included the funding by the operator of environmental monitoring programs.

The *Mining Management Act* also provides for, but imposes some restrictions upon, the variation of any conditions subject to which an Authorisation is granted.[14] Again, as noted in the previous section of this discussion, pursuant to s 34(3) any Authorisation granted with respect to uranium or other prescribed substances can only be granted in accordance with the advice of the Commonwealth Minister. Further, any Authorisation granted in the Ranger Project Area under the *Atomic Energy Act* must be in accordance with the Ranger Project Environmental Requirements as set out in the relevant authorisation under s 41 of the *Atomic Energy Act* (discussed below).

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11 *Law Reform (Work Health) Amendment Bill 2007* (introduced 18 October 2007).

12 As noted earlier the *Law Reform (Work Health) Amendment Bill 2007* proposes to remove occupational health and safety from the scope of a Mine Management Plan.

13 Section 40 *Mining Management Act.*

14 Sections 38, 41 *Mining Management Act.*

3.1.3 The Assessment Act

The stated object of the Act is to ensure that each matter affecting the environment which could be considered capable of having a significant effect on the environment is fully examined and taken into account in relation to the formulation of proposals, carrying out of works, negotiation of agreements and arrangements (with government and non-government bodies), the making of decisions and the incurring of expenditure by any person.[15]

The scheme of the Act and the "Administrative Procedures" promulgated under it[16] is almost identical to the now repealed *Environment (Impact of Proposals) Assessment Act 1976* (Cth). The essential difference is the (potentially) much greater scope of the Territory Act. This greater scope arises from the Territory Government's closer involvement with a greater range of project approvals. The procedures under the *Assessment Act* formerly constituted complementary environment assessment procedures under the Inter-Governmental Agreement on the Environment and now constitute the basis for a bilateral agreement as to environmental assessment procedures between the Territory and the Commonwealth pursuant to s 45 of the EPBC Act.

In summary, the *Environment Assessment Administrative Procedures (1984)* (NT) require a Territory Minister aware of a development proposal (the responsible Minister) to advise the Minister for Environment of the proposal. The Minister for the Environment then contacts the proponent and obtains information to determine if any environmental assessment of the proposal is necessary. The assessment is either an Environmental Impact Statement or a Public Environment Report (for more significant developments). Alternatively, the Minister may direct the holding of an inquiry under the *Inquiries Act 1945* (NT).

The terms of reference of the statement or report are the subject of public notification and comment as is the report or statement itself. The statement or report may be amended to reflect this comment before being submitted to the Minister. The Minister then considers the statement or report and makes "comments, suggestions or recommendations"[17] concerning the proposed action to the responsible Minister.

The Environmental Impact Statement once prepared is made available for public comment. The Statement may be revised in light of these comments. The Territory Environment Minister then considers the (revised) statements and may make recommendation to the relevant Territory Minister regarding the desirability of the project and any restrictions or conditions to be placed upon an Authorisation under the *Mining Management Act.*

The *Assessment Act* complements the *Mining Management Act* for (as is apparent under s 34(2)(b) of the *Mining Management Act*) the *Assessment Act* provides the environmental assessment process in determining the approval of and conditions attached to a Mining Management Plan. Again though it must be emphasised, that in the context of uranium production, a determination about acceptance of the recommendations of an environmental assessment carried out under the *Assessment Act* for the purposes of deciding upon the imposition of conditions in an Authorisation under s 36 of the *Mining Management Act* is one that the Territory Mines and Energy makes in accordance with the advice of the Commonwealth Minister.

In short then in respect of both the grant and ongoing management of mineral leases granted with respect to uranium and other prescribed substances there is a comprehensive regulatory regime in

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15 Section 4 *Assessment Act.*
16 Section 7 *Assessment Act*.
17 Clause 15(2) *Environment Assessment (Administrative Procedures) (1984)* (NT).

place at the Territory level. This regime is the same as that which applies generally to mineral production in the Northern Territory with the exception that the exercise of any discretion created under the relevant legislation[18] is one that is effectively exercised by the Commonwealth.

3.2 Generally Applicable Commonwealth Laws

3.2.1 EPBC Act

The provisions of this legislation are nationally applicable and well known. It is unnecessary to rehearse them here. Suffice to note for the purposes of this discussion that the mining or milling of uranium ore is a "nuclear action" for the purposes of s 22(1)(d) of the EPBC Act and therefore also a matter of "national environment significance" that requires approval pursuant to s 21 EPBC Act to the extent it involves a "significant impact upon the environment".[19] Further, the mining or milling of uranium, to the extent to which it was determined that it was necessary to gain an approval under the EPBC Act, could be subject to conditions imposed by the Commonwealth Minister under that Act. The holder of an EPBC Act approval can of course be sanctioned under the Act for any breach of those conditions.

3.2.2 Atomic Energy Act

The generally applicable aspect of the *Atomic Energy Act* is that contained in s 35 which is to the effect that a person who discovers a prescribed substance must report in writing that discovery to the Minister within one month of the discovery.

There are several other aspects of this Act which have exclusive application to the Territory which are discussed below.

In addition to these pieces of "general legislation" that deal particularly with uranium production it will be recalled that there is "general legislation" of the Commonwealth not specifically addressed to uranium production that can nevertheless impact upon the regulation of uranium production. The customs regulations[20] considered in *Murphyores Inc Pty Ltd v The Commonwealth*[21] are an example of such legislation. [22]

The point that becomes apparent though is that whether through conditions under the EPBC Actor through exercise of powers under trade (etc) legislation the Commonwealth has considerable and effective powers to regulate uranium production in addition to those powers under the somewhat extraordinary arrangements pursuant to the *Self-Government Act* and *Self-Government Regulations*.

3.3 Commonwealth Legislation Applicable Only in the Territory

The main entry under this heading is the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth) although mention will also be made of related structures established under the MoU and particular provisions of the *Atomic Energy Act*.

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18 Except those relating to the conduct of an assessment under the *Environmental Assessment Act.*

19 Section 21 EPBC Act.

20 *Customs (Prohibited Exports) Regulations 1958* (Cth).

21 (1976) 136 CLR 1.

22 In this context it should also be remembered that the proclamations under s 7(8) of The *National Parks and Wildlife Conservation Act 1975* (Cth) as considered in *Newcrest Mining v The Commonwealth* (1997) 190 CLR 513 were found to be an exercise of a general power under s 51 of the *Constitution* and not an exercise of a power under s 122.

3.3.1 Environment Protection (Alligator Rivers Region) Act 1978 (Cth) (EPARR Act)

This is the legislation that establishes the office of the Supervising Scientist for the Alligator Rivers Region.[23] The Alligator Rivers Region is defined in s 3 EPARR Act but essentially means that area within Arnhem Land that contains Ranger, Jabiluka and Koongara mineral leases. However, the definition of the region has more recently been amended to extend the area of the region. It now includes the adjacent Territorial Sea.

The functions of the Supervising Scientist are provided for in s 5 EPARR Act and can be summarised as follows:

- The development and implementation of research and monitoring programs related to uranium mining in the Alligator Rivers region.
- The ongoing supervision, through the provision of advice to the Commonwealth Minister and the development of standards and measures, of uranium mining in the region to ensure that the region's environment is protected from the effects of uranium mining.
- The provision of "scientific and technical advice on environmental matters outside the Region" where requested by the Minister and where such activities fall within the constitutional scope of the Commonwealth.[24]

In addition, the EPARR Act establishes a Region Advisory Committee and a Region Technical Committee[25] both with functions defined largely as suggested by their names.[26]

In summary then the EPARR Act creates a bureaucracy completely distinct from that which administers the EPBC Act and distinct from that which administers the *Mining Management Act.* Notably also s 5B EPARR Act allows similar functions to be undertaken by the Supervising Scientist (at the request of the Minister) in areas outside of "the region" in which the Commonwealth has appropriate constitutional authority.

3.3.2 Atomic Energy Act

This legislation makes a reappearance under this heading mainly because of the terms of Pt III (ss 41 – 42). The seven sections in the Part set out a regulatory regime for the mining of prescribed substances in the Ranger Project Area.[27] Section 41 provides for the (Commonwealth) Minister to grant an Authorisation to mine prescribed substances in the Ranger Project Area. The authority granted under the Authorisation and the conditions to which it may be subject would appear to replicate, but in abbreviated form, the rights and responsibilities pursuant to a mineral lease under the *Mining Act* and Authorisation under the *Mining Management Act.* This impression (of abbreviated duplication) is further supported by the terms of ss 41A – 41E which address issues

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23 Section 4 EPARR Act.
Section 5B EPARR. Act inserted by *Environment Protection (Alligator Rivers Region) Amendment Act 1994* (Cth).

25 Sections 17 and 22B EPARR Act.

26 For example per s 17 EPARR Act the Advisory Committee is (inter alia) to provide a formal forum for consultation with persons and bodies on:
" (i) matters relating to the effects on the environment in the Alligator Rivers Region of uranium mining operations in the Region; and,
(ii) matters relating to environmental research conducted in the Region that are referred to it by the Technical Committee."

27 Defined in s 5(1) as land contained in the second schedule of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In effect then the Ranger Project Area is contained within, but not coincident with, the Ranger Project Area under the EPARR Act.

such as variation and revocation of s 41 authorities and penalties for violation of prescribed conditions.

The legislation would appear to create a parallel regime of regulation to that under the Territory legislation. The major connecting factor between both being that the Commonwealth Minister is the decision-maker in the exercise of any discretion created under both regimes. The major distinction is that the Commonwealth "parallel regime" has a highly abbreviated character when compared to the *Mining Management Act*.

3.3.3 Working arrangements under the MoU

In large part the MoU restates the legislative arrangements described above. In addition it establishes[28] a number of Committees described as Minesite Technical Committees chaired by the relevant Territory Department with membership from the Supervising Scientist, the mine operator and the Northern Land Council. Further, the MoU clarifies that the Territory Department is responsible for "check monitoring" but that the Supervising Scientist's monitoring is to focus on "determining the extent to which the environment of the Region is being protected from the potential impacts of uranium mining."[29]

Other than these provisions the MoU can largely be seen to be an exercise of the Commonwealth's controlling executive authority with respect to uranium and other prescribed substances. Thus, in addition to the requirements of s 34(3) and 34(4) of the *Mining Management Act* the Territory Minister is obliged to consult with the Northern Land Council before exercising a relevant power under the *Mining Management Act*.[30]

In summary then the MoU provisions may provide some operational detail to the various legislative requirements described above but they do not raise an issue of operational control beyond the scope of the *Mining Act*, the *Mining Management Act* (as they apply in the context of prescribed substances) and the EPBC Act. The same conclusion can be drawn with respect to the EPARR Act and s 41 of the *Atomic Energy Act*.

4. SOUTH AUSTRALIA

Finally, let us briefly pause to consider the situation that pertains to the main uranium production facility outside of the Territory – Olympic Dam in South Australia. At the outset it must be remembered that the legislation described under the heading "Generally Applicable Commonwealth Laws" is applicable to South Australia. Beyond this though, the situation is completely different from that applicable to the Territory. Subject to the generally applicable Commonwealth laws "ownership"[31] and control of minerals, including uranium and other prescribed substances, is vested in the Crown in right of South Australia.

Pursuant to s 16 *Mining Act 1971* (SA) (the "*Mining Act* (SA)") property in minerals is vested in the Crown in right of South Australia. Pursuant to s 18 *Mining Act* (SA), property in minerals passes upon the recovery of the mineral and payment of the royalty by a miner. Section 74 of the *Mining Act* (SA) creates an offence of engaging in mining not authorised by the Act.[32] Uranium (and other prescribed radioactive minerals) attracts special attention in the *Mining Act* (SA) pursuant to s 10A which provides relevantly as follows:

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28 MoU cl 7.6.
29 MoU cl 8.3.
30 MoU cl 10.4.
31 Deriving from the Crown's radical title to minerals.
32 The equivalent provision is contained in s 190 of the *Mining Act* (NT).

(1) Subject to this section, no person shall carry out mining operations (other than exploratory operations) for the recovery of any radioactive mineral unless he is the holder of a mining lease or retention lease upon which the Minister has endorsed an authorisation to carry out mining operations for that purpose.

(2) An authorisation to carry out mining operations for the recovery of a radioactive mineral may be granted upon such conditions as the Minister thinks fit and may be revoked upon breach of any condition.

In practice however the massive Olympic Dam project is regulated pursuant to the *Roxby Downs (Indenture and Ratification) Act 1982* (SA) (the "*Roxby Project Act*"). The legislation is classic "project legislation". Section 7 makes various other statutes (including the *Mining Act* (SA) subject to the provisions of the Indenture Agreement. In turn the Indenture Agreement (which is reproduced as a schedule to the *Roxby Project Act)* provides for a range of project specific legislation. For example cl 10 and cl 11(1) is in the following terms:

10. COMPLIANCE WITH CODES

(1) Notwithstanding any other provision of this Indenture, in relation to the Initial Project or any Subsequent Project, the relevant Joint Venturers shall observe and comply with the undermentioned codes, standards or recommendations and any amendments thereof or any codes, standards or recommendations substituted therefor—

(a) "Code of Practice on Radiation Protection in the Mining and Milling of Radioactive Ores, 1987", published for the Commonwealth Department of the Arts, Sport, the Environment, Tourism and Territories in 1987 by the Australian Government Publishing Service (International Standard Book Number ISBN 0644 07101 X).

(b) "Code of Practice for the Safe Transport of Radioactive Substances, 1990," published for the Department for the Arts, Sport, the Environment, Tourism and Territories by the Australian Government Publishing Service (International Standard Book Number ISBN 0 644 1186 1).

(c) "Code of Practice on the Management of Radioactive Wastes from the Mining and Milling of Radioactive Ores, 1982", published for the Department of Home Affairs and Environment, by the Australian Government Publishing Service (International Standard Book Number ISBN 0 644 02066 0).

(d) Codes based on scientific studies and scientific assessment presently issued or to be issued from time to time by the National Health and Medical Research Council of Australia.

(e) Codes or recommendations presently issued or to be issued from time to time by the International Commission on Radiological Protection or the International Atomic Energy Agency.

(2) Notwithstanding the provisions of sub-clause (1) of this Clause, the relevant Joint Venturers shall, at all times, use their best endeavours to ensure that the radiation exposure of employees and the public shall be kept to levels that are in accordance with the principles of the system of dose limitation as recommended by the International Commission on Radiological Protection (publication number 26 of 1977) as varied or substituted from time to time.

(3) Where, by or under an Act of the Parliament of the State or Commonwealth provision is made in respect of a matter contained in a code, standard or recommendation described in sub-clause (1) of this Clause, the relevant Joint Venturers shall comply with that provision.

(4) The State shall not, in relation to the Initial Project or any Subsequent Project, seek to impose on the Joint Venturers or any of them or an associated company any standard relating to the mining, treatment, processing, handling, transporting or storage of radioactive ores, residues, effluents, wastes, tailings, concentrates or Product which is more stringent than the most stringent standards contained in any of the codes, standards or recommendations referred to in sub-clause (1) of this Clause.

11. PROTECTION AND MANAGEMENT OF THE ENVIRONMENT

(1) Within a reasonable time after giving a Project Notice in respect of the Initial Project or any Subsequent Project and at three yearly intervals thereafter the participating Joint Venturers shall submit to the Minister a three year program for the protection, management and rehabilitation (if appropriate) of the environment in respect of that Project including arrangements with respect to monitoring and the study of sample areas to ascertain the effectiveness of such program.

Without considering the content of the programs and codes referred to in the preceding clauses (in the same way as this discussion has not considered the content of Mining Management Plans but only their legislative basis), and again noting the Commonwealth laws of general application as described earlier, the foregoing discussion under the heading "South Australia" appears to provide the totality of uranium specific legislative regulation of the Roxby Downs/Olympic Dam facility in South Australia.

5. CONCLUSION

Olympic Dam/Roxby Downs comprises approximately two thirds of Australia's reasonably assured resources of Uranium. The Territory, in the Alligator River Region deposits, holds about one sixth of reasonably assured resources. The legislative foundation to the regulation of uranium production in Australia's largest uranium mine is basically a combination of mining legislation of general application and Commonwealth environmental legislation of general application. The Commonwealth environmental legislation (and other general legislation relating to export control) provides for the effective imposition of Commonwealth conditions on the uranium production process in South Australia. There is project legislation regulating Roxby Downs which allows for the South Australian government to have input into the management of the project. In general though this project specific legislation specifies adherence to general industry standards and a project defined environmental management plan.

The contrast with the situation in the Territory is stark. In the Territory, the Northern Territory Government has no determinative control of the management of uranium production within its jurisdiction. The sole independent input comes by means of the Territory Environment Minister's recommendation arising out of any assessment under the *Assessment Act*. Even this has no greater status than (potentially) a "relevant consideration" in the exercise of a discretion under the EPBC Act by the Commonwealth Minister.

By contrast the Commonwealth retains, under the self-government arrangements, control over the grant and operation of a mineral lease relevant to uranium or other prescribed substances pursuant

to the *Mining Act* and the *Mining Management Act*. The Commonwealth also possesses the ability to impose conditions on any "uranium mining or milling" pursuant to the EPBC Act. In the case of a project in the Alligator Rivers Region there is a further discretion to grant (or not) and determine the conditions of an authorisation under s 41 of the *Atomic Energy Act.* Finally, the Commonwealth also maintains a distinct environmental monitoring and policy advice bureaucracy in the form of the (office of) the Supervising Scientist.

In light of this summary the conclusions of this discussion are not hard to identify. Why is the relatively (to Roxby Downs) small resource in the Territory subject to such extravagant legislation? If the rationale is supposed to lie in the Territory resource's proximity to a Commonwealth National Park or in being Aboriginal Land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) then is there a deficiency in the legislation controlling general mineral development of such areas? If there *is* a deficiency should it not be addressed on a more general basis? Finally, given that the Commonwealth currently has several different legislative opportunities for intervening to control uranium production in the Territory, even if one accepts that some level of Commonwealth regulation is desirable could this perhaps be contained to one point of regulation?

These rhetorical questions aside, the fundamental conclusion suggested by this discussion is as follows. The regulation of uranium production activities by the Commonwealth in the Territory that may have seemed appropriate nearly thirty years ago when commercially viable uranium was a newly discovered resource and the Territory was an untested jurisdiction may not be so today. Further, the likely prospect of the expansion of uranium production activities beyond areas that have been exploited for the last 30 years suggests that a review of the current regulatory arrangements in the Territory is timely indeed perhaps imperative.