COMMENTARY ON THE ROXBY DOWNS INDENTURE

By G. R. Witham*

I should commence these comments on Leigh Warnick's excellent paper with the now familiar disclaimer that both my spoken and written commentary are personal observations only and should in no way be interpreted as reflecting the views of Western Mining Corporation. Further, and in justice to my employer's co-venturers BP Australia and BP Petroleum Development, I should add that my comments should not be interpreted as coinciding with the views of either of those companies.

I must admit to having experiencd some difficulty in determining what form this commentary should take and have decided to deal with a series of matters roughly in the sequence in which they arise in the written paper. Strictly speaking most of the issues discussed fall into a commercial rather than a legal category and for those who have attended in the hope of hearing a legal treatise, I beg your indulgence.

HISTORICAL BACKGROUND

Warnick is to be applauded for the extent of research which he has undertaken in this area and there is little which I can add to the facts as outlined.

There are however two statements upon which some comment might be useful. The first of these is 'the Joint Venturers took the view that the right time for an Indenture was sooner rather than later' and the second is 'the Joint Venturers for their part made their position clear: without the security that only the Indenture could give them, they would not proceed with further evaluation but would place the project on a care and maintenance footing'. It would be easy, but I suggest unfair in the circumstances, to pass these comments off as a posture to be adopted in the negotiation process.

We have heard in the introduction to the paper something of the size and nature of the orebody which exists at Olympic Dam. It has been said that this particular development will require a greater pre-feasibility expenditure than any other resource project ever undertaken in Australia, including the North-west Shelf; the current rate of expenditure can be counted in millions of dollars per month. Given these very large expenditures it is not unreasonable to wish to know what rules will apply once those expenditures have been made. I suggest it would be a brave board of directors which would be prepared to expend such large sums without any certainty that the conditions regulating eventual development were commercially acceptable.

There is however a more prosaic reason for the timing of the Indenture. The deposit is located in semi-desert in a remote area with no available facilities whatsoever. It therefore follows that as part of any project it will be necessary to construct an entirely new town where none existed previously and to ensure that adequate supplies of power and water are available for both the town and the mine. The cost of providing this infrastructure is huge and it is critical from a feasibility

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point of view to clearly define the extent of the Joint Venturers' obligations both in respect of the provision of infrastructure facilities and the maintenance of those facilities. It would, quite frankly, be a futile exercise to attempt the preparation of a bankable feasibility study unless these matters are clearly defined as they will form important parameters in the preparation of the feasibility study. This definition of responsibility was one of the goals of the Indenture and of necessity the Indenture had to precede the feasibility study.

THE RATIFYING ACT

The legal effect of statutory endorsement of State Agreements was exhaustively covered by Warnick in his paper to this Association's conference in 1982 and I do not believe that I could improve upon that address. If one wishes to categorize the endorsement scheme adopted in this particular legislation there is no doubt that it falls within group 3 (as defined in Warnick's 1982 paper) which might be termed the 'Cooper Basin' category.

In providing an authority to perform the Agreement this legislation, as does the Cooper Basin Agreement, authorizes, empowers and requires the Government of the State and the Ministers to do all things necessary or expedient for the carrying out and the giving of full effect to, the Indenture. Section 6(2) of the Roxby Downs ratifying Act goes somewhat further and places this obligation on statutory bodies and authorities and on local authorities.

I suggest that since these various government instrumentalities and bodies are required by the section to do all things necessary for the purposes of the Indenture, that these obligations cease to be contractual in nature and take the form of a statutory obligation. The consequences of this are that when one comes to interpret the document to ascertain what obligations the State and its various instrumentalities have undertaken, it is necessary to apply the rules of statutory interpretation. At the same time, the ratifying Act does not confer a statutory obligation on the Joint Venturers and therefore to determine what their obligations are one should apply the rules of construction normally employed in the interpretation of contracts.

There is a further consideration which flows from the fact that the State and its instrumentalities are required to do all things necessary or expedient to carry out, or give full effect to, the Indenture. Given this statutory obligation, would it be possible for a Government instrumentality to refuse an approval which was required by the Joint Venturers to enable them to fulfil their obligations under the Indenture? When the question is put in those clear terms I suggest that there would be no power to refuse the approval sought, although the instrumentality would of course be free to impose such conditions as might be appropriate in the particular case. There is an infinite number of shades of grey in this type of situation however and there might be circumstances in which a requested approval could properly be refused.

Turning to the statutory base, provided by section 7 of the ratifying Act, for the centralized approvals system contained in clause 7 of the Indenture, I would point out that clause 7 when combined with the various provisions of the ratifying Act, has the effect of changing both the method of application and the type of approval granted in any particular case. Applications under clause 7 of the Indenture are not the same as applications under a particular statute and as such are not subject to the procedures one would normally expect to apply to the appli-

cation. For example, in the case of an application for planning approval, the requirements relating to advertising of an application do not apply. Even if the particular statute provides a time limit within which an application must be decided, clause 7 provides a maximum period of time in every instance and the usual time limits do not apply. The only provisions relating to the form of application are those contained in sub-clause 2 which provides that every application pursuant to the clause shall be in the form and provide the information and details required by the legislation applicable.

Also, it should be noted that an approval under clause 7 of the Indenture is not an approval under the particular legislation and consequently rights such as appeals by third parties will not be appropriate in the case of an approval granted under clause 7.

THE INDENTURE

Clauses 6, 8, 9 and 53

It has been pointed out that the Indenture does not contain a provision for the Government to stop the development process once the Joint Venturers have decided to commit. Let me say that this was a very conscious decision on the part of the Joint Venturers. As I have pointed out previously the level of expenditure in the pre-feasibility stage is huge and once the commitment step has been taken, that level of expenditure will escalate rapidly. In light of this, it would be commercially unwise, to say the least, for any company to expend large amounts of money in a pre-feasibility stage, commit to a project and undertake all sorts of contractual obligations as a result of that commitment, only to find that the Government then says 'No, I'm sorry, you can't continue'. I think it would be fair to say that in circumstances such as I have described, Governments are not known for their willingness to recompense developers for the expenditure they have made prior to the particular development being stopped. The Fraser Island saga is a case in point.

The infrastructure obligations of both parties are limited under the Indenture to those required for a project producing 150,000 tonnes per annum of contained copper and that in the event of production exceeding that figure, negotiations are required in relation to any additional infrastructure which may be appropriate. If no agreement is reached, the paper rightly points out that the Joint Venturers, from a legal point of view at any rate, would themselves be obliged to provide further infrastructure and in doing so would have to comply with the general law of the State. I agree with that assessment, but note that the approvals mechanism provided under clause 7 of the Indenture would be available to the Joint Venturers in relation to their complying with the general law of the State in providing that further infrastructure.

Clause 7 — Approvals

In relation to section 7(3) of the ratifying Act, I should like to clarify that the Minister administering the Indenture is only required to consult with another Minister where that other Minister has vested in him the right to grant the approval requested, or where he has a statutory or other right to control or direct the instrumentality which would normally grant the approval. For example, in the case of an

application to the Electricity Trust of South Australia, which is not subject to Ministerial control or direction, an application under clause 7 could be made to the Minister and section 7(3) would have no application.

A further point in relation to clause 7 of the Indenture is the requirement that if the Minister imposes conditions in relation to any approval, or refuses an application, he is obliged to disclose his reasons. I believe that this is an extremely worthwhile provision, not only because it places, if you like, some fetter upon rampant public servants, but also because it provides the applicant with an understanding of what the particular regulatory authority advising the Minister is attempting to achieve. I must say that experience to date has shown that by disclosing reasons in response to an application where conditions have been imposed, it has made the job of reaching a satisfactory arrangement much easier than the case where no reasons are given.

Clause 11 — Environmental Management

Reference has been made to sub-clause 9 which provides that if environmental standards become substantially more costly to the Joint Venturers, the State will 'give due consideration to ameliorating the adverse effects of such costs'. At first glance, this may appear to be a substantial concession in favour of the Joint Venturers but contrast the words of the Stony Point Indenture which reads:

> the State shall upon request of the Producers give sympathetic consideration to ameliorating the adverse effects of such additional costs *by effecting a reduction in charges and levies payable by the Producers to the State pursuant to this Indenture or in such other manner as may be agreed between the State and the Producers.*

I suggest the Olympic Dam clause is not as favourable a provision as has been agreed to by the State in previous instances.

Clause 16 — Railway Facilities

For those familiar with the approach of the Queensland Government to the use of railway facilities by resource developments, it may seem that this clause is rather lacking in detail because as you will know, railway freight agreements in Queensland are generally complex and detailed documents.

The short answer in this instance is that as a result of the Railways (Transfer Agreement) Act, 1975, most railways within the State of South Australia are owned and operated by the Commonwealth of Australia and consequently any detailed agreement falls outside the ambit of the Indenture.

Clause 19 — Special Mining Leases

In relation to the exclusive right of possession conferred upon the holders of a Special Mining Lease by sub-clause (6), I would like to point out that one of the considerations for requesting this from the Government was to assist the Joint Venturers in ensuring that they had some legal basis for excluding members of the public from the mining areas, bearing in mind that the relevant radiation codes require the implementation of approved procedures to ensure the safety of the public.

Clause 32 — Royalties

Under this heading I should like to make some comments which are not

directed to royalty payments under the indenture but rather to the resources rent tax which is anticipated by the industry bearing in mind the policies of the current Federal Government.

Those of you who were present at the AMPLA Seminar in Sydney on 29 April will recall that during the luncheon we were addressed on the subject of a resources rent tax and were treated to an exposition of the situation which exists in Papua New Guinea. As a general statement it is probably fair to say that any resources rent tax which might be imposed on the Industry in the future will be based upon an allowable or threshold rate of return on funds employed before any liability to the tax arises.

If this is to be the case then I would like to suggest that in calculating the allowable or threshold rate of return on funds invested, that the scheme imposed allows for the funds invested to be inflated or escalated to the same dollars as comprise the return upon the investment. What I am saying is this — to calculate what rate of return revenue received in, say, 1986 *i.e.*, 1986 dollars, represents in relation to funds invested in the project, I believe it is fair and equitable that the funds invested should be inflated to 1986 dollars. If this is not done, one is comparing unequal value dollars and consequently one does not obtain a true rate of return, in fact the rate obtained is higher than the true rate.

However, whilst this argument may espouse the principles of fairness, equity and logic I am reminded of the first lecture on income tax which I attended as a student. My lecturer was a member of the middle bar in Queensland — now a senior silk — and the gist of what he said was this: you must remember that the prime purpose of this piece of legislation (holding aloft a copy of the Income Tax Assessment Act) is to procure revenue for the Federal Government and if you have any ideas that the Parliament has passed this legislation, having regard to the principles of fairness and justice, forget them immediately. These are seemingly harsh words, but perhaps their apparent harshness can be judged in the light of the resources rent tax scheme eventually imposed upon the industry.

GENERAL

I should like to turn very briefly to the question of security against State legislative action and the question of entrenchment generally.

This and previous papers admirably express the current legal situation and I would suggest that courts appear, certainly in recent cases, to be firmly of the view that the ability to fetter the future legislative authority of any parliament is very minimal indeed.

I am prepared to accept that this is, to use what is probably a popular expression, 'well established law' and I do not wish to quarrel with the legal correctness or otherwise of this view. What I would like to raise is whether, in this day and age, given the dependence of economies upon projects such as Olympic Dam and the huge amounts of money developers are required to invest in those projects, it is a principle which this country can afford. So far as I am aware the principle of no fetter upon the legislative authority of Parliament springs from the murky depths of English legal history and is closely bound up with that all embracing and delightfully vague principle of 'the public benefit'. So much for history! But is history justification? Once it was the inalienable and unquestioned right of a person convicted of a criminal offence to make an unsworn statement from the dock and he was not liable to cross-examination on any part of that statement. This

inalienable and hitherto unquestioned right is now under close scrutiny and it may be reasonable to expect that this right will shortly disappear in this State. If rights such as these, which have always been regarded as fundamental to the proper administration of justice — and I do not mean to question the correctness or otherwise of removing this right — can be removed, why cannot the principle of fettering the legislative authority of the Parliament also be varied — at least in so far as it relates to contractual obligations entered into with the express approval of the Parliament.

At the present time it seems to me that the only form of check and balance which prevents any Government from unilaterally varying or overturning any Indenture is the political consequences which that Government perceives might follow its action. I would like to suggest that in this day and age, that is no longer good enough and I do not believe that any Government should have a totally uncontrolled right to break its contracts. As noted, payment of compensation is not a matter near and dear to the hearts of governments.

On this question of inconsistent legislative action, reference has been made to clause 52 which gives to the Joint Venturers a right to terminate the Indenture in the event of certain activities by the State. I wonder, however, if the protection which clause 52 offers is more illusory than real. If a Parliament is prepared to overturn an Agreement which was freely entered into and which it had specifically ratified, what guarantee can there be that in passing the legislation to effect its purpose it will not incorporate into that legislation a provision which renders clause 52 type provisions null and void. I suggest there is none and that is indeed the measure of the extent to which development expenditure in this country is currently at risk.

The paper has suggested that the Government negotiating team in this particular instance took a relatively reasonable and open-minded approach to the Joint Venturers' draft document. Let me assure you that that indeed was the case and if the judgment of our peers is that this Indenture is, in the words of our speaker, 'as a commercial document . . . a fairly well balanced deal', that result is in large measure due to the reasonable and open-minded approach of the Government negotiating team. It is also suggested that the Indenture is a battle won for the Joint Venturers without being a battle lost for South Australia. At the risk of sounding trite, I would prefer to describe the Indenture as a battle jointly won by the Joint Venturers and South Australia. There is no doubt that both parties had a common goal and I believe, or at least certainly hope, that it has been achieved.

There are two final points I would like to mention. The first is that the paper has commented on several occasions on the degree of security which the Indenture affords to the Joint Venturers in the context of borrowing funds to finance the development. My fondest hope is that the main speaker represents the lenders in the battle he describes as yet to be joined.

The final point concerns the men in the hard hats and their battle to get a mine up and running. I believe I can do no better than to quote the words of my Executive Director: 'Engineers keep telling me that, given enough money, they can do anything'. Perhaps we should send them into bat against the lenders' lawyers.