Development Consents and Mining in New South Wales

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INTRODUCTION

This paper is a consideration of the legal issues relevant to securing mining approvals (with particular emphasis on coal) and includes a lawyer's practical overview of the path to mining under the *Mining Act* 1992 and its relationship to the planning and environmental legislation in New South Wales.

The path to opening a mine in New South Wales can be long, complex and expensive. The unreliability of the prediction of mining costs, wages, commodity prices, interest rates and the uncertainty of market projections make the task of determining the viability of a project difficult. Added to these challenges is the need to assess accurately the costs of compliance with environmental controls and the timing of, and the path to, mining approvals. If the path to the approvals is misread or the conditions not correctly anticipated the rate of return for the project can be considerably reduced.

The results of misreading the path to, and the terms of, approvals can be delay, added costs of the process, unanticipated "up-front" capital expenditure and conflicting conditions in approvals. Most dramatically, it can mean the failure to obtain a necessary approval. Dangerously, the refusal could be one of the later approvals such as an export licence from the Commonwealth government. Even worse is the prospect of potentially invalid or unworkable approvals.

Overview and Interaction

In 1994 mining produced $38 billion in export revenue for Australia of which coal mining, Australia's largest single mineral export, contributed some $7 billion.

Modern mining is large in scale and potentially polluting. Although a temporary land use, mining comes into conflict, and competes with, other land uses during the mining process. The fundamental purpose of the planning and environmental legislation is the rationalisation of the competition for land use and the protection of the environment. These issues are put into sharp focus in the Hunter Valley region of New South Wales where there is a very large coal resource in a closely settled area.

The Reason and Basis for the Controls

The planning legislation is politically and economically motivated. It is intended to reflect the priorities of the community to resolve the competition for land use. The success or failure of the legislators to

provide a solidly based logical procedure for the weighing of the balance will determine the viability of the process. A well structured process can assist in resolving issues for the benefit of the wider community and directly impacted individuals. A badly structured process can add to the inherent difficulties of the resolution of the issues and create frustration for all parties leading to overt conflict and economic loss to both individuals and the community.

The mining legislation is directed towards the safe and orderly winning of the mineral resource providing for the issue of authorities to prospect and mine and the regulation of the method and process of mining.

The pollution legislation's objective is the prevention of pollution other than controlled pollution. Generally, pollution is prohibited other than in accordance with the terms of a licence which the Environment Protection Authority may issue and which must be renewed annually.

The path to mining approvals in New South Wales requires the miner to traverse these three legislative and administrative regimes. In New South Wales these three areas are covered by separate legislation, the responsibility of three separate Ministers and are administered by three different departments. The legal, social and political imperatives of all three, which come into conflict, have to be satisfied to secure the required approvals for mining.

The Need for a Clear Path

Australia competes in the world market for sales of its mining product. Assuming comparable quality the determining factors in achieving sales are price, reliability of supply and predictability of performance. An efficient approvals process will advance these objectives and the converse is also true.

Australian mining depends upon international joint venture capital to overcome a local shortage of capital and to establish long-standing relations with the markets for our mineral exports.

To enable Australian miners to achieve world best practices, competitive pricing for the product and the confidence of international investors it is essential that the approvals process be clear, predictable as to its path, effective and that the process results in workable and enforceable approvals.

For decades miners have sought resource security to assist them in these objectives. These requests have had very limited response from government. Within the concept of resource security is the need for certainty and predictability of the path to approval and of the approvals themselves.

The Position and Power of the Government

Any appreciation of the path to mining approval must proceed from the basis that government has the pivotal position in determining

whether mining will occur or not and, if so, on what terms and conditions. The relevant Minister is the ultimate decision-maker subject to compliance with the procedures established under the legislation. There is often no right of appeal against a determination but the due process must be followed by the authority whose actions are open to judicial review under natural justice and the Wednesbury reasonableness principles.[1]

Whether the course to mining approval is effective, efficient and logical is, therefore, in the hands of the government by virtue of its legislation as administered by its departments and applied by its Ministers.

Whilst the courts can become an important part of the process, the extent to which they do so can be either reduced or increased by the effectiveness of the path and the legislation that creates and controls it. It is, of course, proper that the courts have the power to review the application of the procedure provided by the legislature and the administrative process. However the extent to which parties need to have recourse to the courts must be reduced to the greatest extent possible. Issues can only come to the courts if there is uncertainty in the process created by either the legislative framework or its administration. Recourse to the courts can only increase the uncertainty, cost and time for the process and this cannot be in the interests of anybody whether that be the landowner, the community or the miner. Whilst judicial review must always be available the process should be such that recourse to it is needed rarely.

The Need for Mining Authority

The first legislation in relation to mining in New South Wales was in 1854 with "An Act for the Registration and Inspection of Coal Mines in the Colony of New South Wales" passed due to the "fact that the coal deposits of New South Wales were being actively sought after and many of the known seams are extensively worked to satisfy the increasing demand for coal".[2]

The first codification was the *Mining Act* 1906 which controlled all the aspects of the mining of all minerals in New South Wales until coal was separated from other minerals by the proclamation of the *Mining Act* and *Coal Mining Act* both of 1973.

The *Mining Act* 1992 returned the control of all mining to the one Act but with some special provisions relating only to coal. Some of the philosophies relevant in the 19th century remain in the 1992 Act despite the considerably different nature of mining at this end of the

1. *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 233; *Parramatta City Council v Pestell* (1972) 128 CLR 305; *Hale v Parramatta City Council* (1982) 47 LGRA 269 (McClelland CJ) affirmed on appeal in *Parramatta City Council v Hale* (1982) 47 LGRA 319; *Rosemount Estates Pty Ltd v Cleland, Minister for Planning and Bengalla Mining Company Pty Limited* (unreported, NSW Land & Environment Ct, 24 January 1995).
2. 18 Victoria No 32.

20th century. The retention of these concepts, which relate particularly to the exclusion of certain areas from mining leases and aspects of compensation, has done nothing to resolve the essential conflicts that can and do arise in the path to and the conduct of mining.

The Philosophy of the Mining Legislation

The basic philosophy of the mining legislation in New South Wales is that the mineral wealth of the country is a national resource, the exploitation of which should be controlled by the community. On this basis our legal system permits the granting of an authority to mine over the top of the freehold without the consent of the landowner subject only to notification, some exempted areas, compensation and a right of objection.

The objective of the legislation controlling the issue and exercise of mining authorities must be, and sets out to be, a reconciliation of the competing interests of the miner, the economic and environmental interests of the wider community and the interests of the affected landowner. It is questionable whether the current structure of the legislation and its administration in New South Wales satisfactorily achieves the required balance. In my opinion the achieving of these objectives is impeded by the overlapping and sometimes conflicting rights, powers and responsibilities of the mining, planning and environmental administrators. This is compounded by the overlaying federal controls being extended.

THE MINING ACT 1992

The *Mining Act* 1992 provides for the creation of authorities to empower a miner to (and without which he or she cannot) prospect or mine. The Act prescribes the steps to obtain those authorities and regulates the rights and obligations of the miner holding an authority. The *Mining Act* 1992 creates an exploration licence, assessment lease and a mining lease, on which this paper will concentrate, as well as an opal prospecting licence and mineral claims. Generally (and always in relation to coal mining) there must be an authority held by the miner before he may prospect or mine.[3]

Mineral Allocation Areas

The concept of mineral allocation areas came into existence with the *Mining Act* 1992. The Act provides for the gazetting by the Governor of any land as a mineral allocation area[4] which may be constituted for all minerals or for specified minerals or groups of minerals.[5]

3. *Mining Act* 1992, s 5.
4. Section 368(1).
5. Section 368(2).

The only mineral allocation area gazettal is that proclaimed on 19 August 1992 by the Governor which constituted lands in the Sydney/Gunnedah basin and the Oaklands basin as a mineral allocation area for Group nine minerals which are coal and oil shale.[6] The major consequence of a proposed mine being in a mineral allocation area is that a miner may not apply for an exploration licence without the consent of the Minister[7] but once an exploration licence is held the miner has the right to apply for the next level authority which may be an assessment lease or a mining lease.

The creation of mineral allocation areas seems to be a response to industry demands for resource security however its effect is limited by policies adopted by the Department of Mineral Resources which includes that a mine plan, approved by the Minister, must be provided with an application.[8]

Exploration Licence

Part 3 of the *Mining Act* 1992 deals with the process for the granting and control of exploration licences. It is not possible to prospect for, or mine, a publicly owned mineral or coal without an appropriate authority.[9] The position with privately owned minerals other than coal[10] can be different if the miner is the owner of the land and there are no conflicting authorities or rights in respect of that mineral.[11]

The rights under an exploration licence may not be granted over certain areas of land without the consent of some other person. These include in respect of an opal prospecting area, a reserve under s 367,[12] an area for which there is already an authority or application in force,[13] land on which there is already private mining operations[14] and a colliery holding.[15]

An exploration licence may not be issued for a term in excess of five years,[16] it may not be granted over an exempted area[17] and may not be exercised, without the consent of the owner, over land on which there is a dwelling or on which there is a substantial improvement.[18]

The *Environmental Planning and Assessment Act* 1979 is overridden by the provision in the *Mining Act* 1992 that nothing in or done under the *Environmental Planning and Assessment Act* 1979 or an

6. *Mining (General) Regulation* 1992.
7. *Mining Act* 1992, s 13(4).
8. Department of Mineral Resources, "*Policy Guidelines for Coal Assessment Lease Applications*" (1992).
9. *Mining Act* 1992, s 5
10. Section 9.
11. Sections 6, 7, 8.
12. Section 18.
13. Section 19.
14. Section 20.
15. Section 21.
16. Section 27.
17. Section 30.
18. Section 31.

environmental planning instrument operates to prevent the holder of an exploration licence from carrying on prospecting,[19] resulting in it not being necessary to obtain a development consent for prospecting.

The environmental imperative is dealt with by providing that the Minister for mines is required, in deciding whether or not to grant an authority or mineral claim, to take into account the need to conserve and protect flora, fauna, fish, fisheries and scenic attractions and the features of Aboriginal, architectural, archaeological, historic or geological interest, in or on the land over which the authority or claim is sought.[20] Additionally, the Minister is empowered to cause such studies (including environmental impact statements) to be carried out as the Minister considers necessary to enable such a decision to be made.[21]

Assessment Lease

Part 4 of the *Mining Act* 1992 deals with assessment leases containing similar provisions to Pt 3. This new authority was created by the *Mining Act* 1992. It is designed to cater for situations where a resource has been proven and the feasibility of mining established but where project economics are marginal. The assessment lease is designed to allow the miner to maintain a title over the potential project area, without necessarily having to commit to further exploration, as would be normally the case with the retention of an exploration licence.[22] The creation of this new authority is said to be a further movement towards providing some level of resource security for the miner.

The Minister may not grant an assessment lease without complying with Pt 1 of Sch 1 to the *Mining Act* 1992[23] which requires the Minister to give notice of his or her intention to grant an assessment lease to government departments and the local council which are given the right to object to the grant. There is no requirement for notification of the public.

Mining Lease

Part 5 of the *Mining Act* 1992 deals with the application for the grant of, and control and exercise of, rights under a mining lease. Within a mineral allocation area the holder of an exploration licence or an assessment lease may apply for a mining lease without the consent of the Minister.[24] Provision is made for the invitation for tenders for a mining lease,[25] the exclusion of certain areas,[26] and restrictions on the grant of leases.[27]

19. Section 381.
20. Section 237(1).
21. Section 237(2).
22. Op cit, n 8.
23. *Mining Act* 1992, s 41.
24. Section 51(4).
25. Section 52(1), 53.
26. Section 55.
27. Division 2.

A mining lease may not be granted otherwise than in accordance with Pt 2 of Sch 1 of the *Mining Act* 1992[28] which makes extensive provision for the notification of government authorities, the public and landowners all of whom have rights of objection and which imposes considerable notification obligations on the miner.[29]

Areas exempted from Authorities

It has already been mentioned that mining authorities prevail over the freehold or leasehold rights of the landowner and/or occupier. There are two important exceptions to the power of the Minister to issue a mining lease over those rights.

Agricultural Land

A landowner may object[30] to the grant of a mining lease over "agricultural land". If the landowner does not object within the appropriate time the protection lapses. Any dispute as to whether land is "agricultural land" is referred to the Director-General of Agriculture for determination[31] in accordance with the principles in Sch 2.[32] If the land is determined to be "agricultural land" it may not be included within a mining lease without the written consent of the land owner and/or occupier.[33]

Improvements

Also exempted from the area over which the Minister may issue a mining lease, unless the landowner and/or occupier consents in writing, is land on which there is a principal place of residence and the area within a radius of 200 metres surrounding it, a garden and the area within a radius of 50 metres surrounding it and land on which there is situated any improvement being a substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure.[34]

The Exempted Areas

The response of the Minister for Mines to these provisions can be to scollop the relevant area out of the mining lease leaving it as an island surrounded by the mining lease. In relation to agricultural land the result is unsatisfactory for both the farmer and the miner neither of whom can effectively carry out their respective activity due to the constraints created by the mining title situation. The result is even less logical with regard to s 62 improvements which can see a home, with

28. Section 63(4).
29. Part 2 Sch 1, cll 5, 6, 7, 13, 17, 21, 24, 25.
30. Clause 22(1), Sch 1.
31. Clause 22(5), Sch 1.
32. Clause 22(5), Sch 1.
33. Clause 23, Sch 1.
34. Section 62.

a 400 metre circle around it, surrounded by an open cut mine producing impacts of dust and noise that exceed pollution legislation requirements. As ridiculous as this, is a farmer's dam or hay shed left isolated in the centre of open cut mining activity. The improvement is then of no use to anyone and constrains the mining.

The need to resolve this section is increased by the doubt created by the drafting of s 62. A major problem is the use and meaning of the word "valuable". Is it to be interpreted in monetary or in use terms? In either case, to what extent must the improvement have monetary cost or usefulness to be ascribed as valuable?

These provisions are, in substance, unchanged since the 1909 *Mining Act* and are incompatible with the context of open cut mining today. The provisions remain, it is suggested, due to the inability or unwillingness of the legislators to deal with the rural lobby. The current position is unacceptable and serves neither the landowner nor the miner. These two concepts may have had some merit in the 1900s but in the context of today's mining methods and scale they are not only anachronistic but in fact provide an added source of uncertainty and conflict between landowners and miners neither of whom are able to pursue their purpose effectively.

An accurate risk analysis on this issue is critical to the prudent planning of the course to opening a mine. An incorrect assessment may affect the ability to mine, the cost and path of the consent process, the capital cost of the establishment of the mine or may frustrate the project.

It is generally accepted that open cut mining land and a considerable area of surrounding land must be purchased by the miner. These anachronistic provisions in the legislation confuse the position and create artificial bargaining platforms for the negotiation of the price to be paid by the miner but still leave the landowner in his or her position of uncertainty. The provisions do not provide a resolution but a constraint to effective and satisfactory operation of the business of both the farmer and the miner.

Amendment to the legislation must be based on the provision of compensation and the requirements for rehabilitation and realistic proposals in the context of the scope and methods of modern mining and farming.

Compensation

The other side of the coin of the right of the miner to enter land and prospect or mine under a mining authority is the obligation of the miner to pay and the right of the landowner to compensation for which provision is made in Pt 13 of the *Mining Act* 1992.

The landowner is entitled to compensation for loss caused or likely to be caused by damage to the surface of land to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works. Compensation is also given for the deprivation of

the possession or use of the surface of land, the severance of land from other land, or the loss of surface rights of way and easements and the destruction or loss of or injury to, disturbance of or interference with stock as well as damage consequential to any of those matters.[35]

An assessment of compensation cannot exceed the market value (for other than mining purposes) of the land and its improvements.[36] However, provision is made for the Warden to provide further compensation at a later time.[37]

Compensatable loss is exclusively defined. It can be argued that this is not an adequate provision for compensation for a landowner who is not able to sell his or her land or use it effectively. The concept is perhaps out of date and is the reason for the imposition of land purchase conditions in development consents. This is an example of where the shortfalls of one legislative regime based upon one philosophy has an impact upon the administration of another which is based upon different philosophy. Such conditions with the attendant problems that they have may well not be necessary if there was better provision for compensation or even land purchase in the *Mining Act* 1992.

The entitlement to compensation arises on the grant of the mining lease.[38] A miner and a landowner may agree the quantum of compensation but it must be in writing and lodged with the Director-General.[39] The Warden may determine the compensation if the parties cannot agree.[40] The miner is not able to carry out any mining on the surface unless compensation has been first agreed or determined by the Warden.[41]

Clearly the compensation provisions of the *Mining Act* 1992 are not accepted by the community as sufficient for the affectation of modern mining. Land owners have generally not availed themselves of their rights under Pt 13 but have directed themselves to the planning legislation and the terms of the development consents under which they have rights to participate actively in the process. The result is non-complimentary compensatory provisions in the mining and planning legislation which certainly cannot assist the cause of certainty for all concerned.

Public Consultation under the Mining Act 1992

A mining lease may not be granted otherwise than in accordance with the public consultation provisions of the *Mining Act* 1992.[42] Part 2 of

35. Section 262.
36. Section 272(1)(c).
37. Section 276.
38. Section 265(1).
39. Section 265(2).
40. Section 265(3).
41. Section 265(4).
42. Section 63(4).

Sch 1 requires the notification of government agencies,[43] the director of planning,[44] the Dam Safety Committee,[45] controlling bodies of exempted areas,[46] councils,[47] owners and occupiers of certain land[48] and the general public.[49] It provides rights for objections by authorities,[50] councils,[51] landowners[52] and the public generally.[53]

The right to object under the *Mining Act* 1992 is removed if there is a right under the *Environmental Planning and Assessment Act* 1979 to make any submissions in relation to the granting of development consent.[54] This virtually removes the objection rights under Sch 1 of the *Mining Act* 1992 if there is to be a development application. This means of avoiding dual inquiries under the mining and planning legislation, a worthwhile objective, is not entirely appropriate. It is not possible to cogently argue that an objection that relates to the technicalities or requirements of the *Mining Act* 1992 are appropriately dealt with under the objection processes provided for in the *Environmental Planning and Assessment Act* 1979. An inquiry under s 119 of the *Environmental Planning and Assessment Act* 1979 has no charter, or power, to deal with objection issues under the *Mining Act* 1992 its power being limited, as we will see later, to inquiring into the environmental aspects of a project.

Importantly there is no need to have, as is otherwise required for any development application, the consent of a landowner to the development application under Pt 2 of Sch 1.[55]

Development Consent

The Minister cannot grant a mining lease unless an appropriate development consent is in force.[56] This repeats the general requirement of the *Environmental Planning and Assessment Act* 1979.

The *Mining Act* 1992 provides that any special purpose condition imposed in a development consent is void[57] and the development consent (to the extent only to which it relates to the use of the land concerned for the purpose of obtaining minerals) is taken to have been given free of the condition.[58]

43. Schedule 1, Pt 2, cl 5.
44. Sch 1, Pt 2, cl 6.
45. Sch 1, Pt 2, cl 7.
46. Sch 1, Pt 2, cl 8.
47. Sch 1, Pt 2, cl 17.
48. Sch 1, Pt 2, cl 21.
49. Sch 1, Pt 2, cl 24.
50. Sch 1, Pt 2, cl 9.
51. Sch 1, Pt 2, cl 18.
52. Sch 1, Pt 2, cl 21.
53. Sch 1, Pt 2, cl 26.
54. Sch 1, Pt 2, cl 28.
55. Sch 1, Pt 2, cl 14.
56. Section 65(2).
57. Section 65(3)(a).
58. Section 65(3)(b).

A special purpose condition is one that relates to the preparation of land for mining, the mining methods, rehabilitation, safety measures or security to be given for those matters.[59] These issues, which are critical to a proper planning and environmental analysis of a mine, are removed from the jurisdiction of the planning authorities.

Before granting a mining lease the Minister is required to notify the consent authority and ask it to advise the conditions (including special purpose conditions) which the authority wishes to have included in the mining lease.[60]

It is clear that the intention of the *Mining Act* 1992 is that the consent authority should liaise with the Department of Mineral Resources and advise the special purpose conditions it wishes in the mining lease. The intention of the *Mining Act* 1992 is that the project would then be assessed on the basis of the intended lease containing the special purpose conditions to deal with the prescribed matters.

As far as I know this does not happen. The consent authority does not respond to the request for lease conditions and proceeds to consider the project under the whole of the requirements of s 90 of the *Environmental Planning and Assessment Act* 1979 many of which overlap the special purpose conditions. In reality how can it do otherwise? The request from the mining authority to the consent authority comes before the consent authority has the development application and the Environmental Impact Statement (EIS). At that stage it does not know the nature and scope of the project. Even if it did how can it address such issues other than in the most general of terms?

The development consent issued often directly, and sometimes implicitly, prescribes as to matters that fall within "special purpose conditions" resulting in potential jeopardy to the integrity of the consent. The prescribed procedure is not adhered to and one must ask whether, in fact, it can be effective under the overlapping provisions and requirements of the mining and planning legislation.

THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

Consent and Existing Use

As a general proposition it is true to say that most mines (and all new ones) require development consent. However an exception to the rule that development consent is required for mining[61] is the right to continue a lawful purpose for which land was being used immediately before the coming into force of the planning instrument that requires the consent.[62]

59. Sch 1, Pt 2, cl 15.
60. Sch 1, Pt 2, cl 13.
61. *Environmental Planning and Assessment Act* 1979, s 76(1).
62. *Environmental Planning and Assessment Act* 1979, s 109; *Environmental Planning and Assessment Regulation* 1994, Pt 5.

The decision of the New South Wales Court of Appeal in *Vaughan-Taylor v David Mitchell-Melcann Pty Ltd & Anor*[63] restricted the previously perceived position of the existing use exception under s 109 of the *Environmental Planning and Assessment Act* 1979 and resulted in the promulgation of State Environmental Planning Policy (SEPP) 37. SEPP 37 allows existing mines and extractive industries to continue to operate without consent for a registration period of three months, and a moratorium period of two years provided operation is restricted to substantially the same level at which they have operated since 1 July 1986. During that period a development consent must be obtained.

The consequences of the *Vaughan-Taylor* decision are not perhaps as broad as was first thought. The need for a miner to register under SEPP 37 must be considered in the context of s 74 of the *Mining Act* 1992 and cl 35 of the model provisions established under the *Environmental Planning and Assessment Act* 1979. Section 74 provides that while a mining lease has effect, nothing in, or done under, the *Environmental Planning and Assessment Act* 1979 or an environmental planning instrument operates so as to prevent the holder of the mining lease from carrying on mining operations in the mining area. It goes on to provide that to the extent to which anything in, or done under that Act, or any such instrument would so operate, it is of no effect in relation to the holder of the mining lease.[64] Section 74 ceases to apply to a mining lease if mining operations under the lease have not begun within five years after the date the development consent is given.[65]

Clause 35 of the model provisions, adopted in many local environmental plans, provides that nothing in the local environmental plan shall be construed as restricting or prohibiting or enabling the consent authority to restrict or prohibit the carrying out on the mine (other than a mineral sands mine) any development required for the purposes of a mine.[66]

The Consent Authority

Councils have largely been displaced as the consent authority for mines by the Minister (for Planning). This is the result of the operation of s 101 of the *Environmental Planning and Assessment Act* 1979 and State Environmental Planning Policy (SEPP) 34.

Section 101

Where the Minister is of the opinion that it is expedient in the public interest (having regard to matters which in the opinion of the Minister are of significance for State or regional environmental planning) the Minister may give a direction in writing to a consent authority to refer

63. (1991) 25 NSWLR 580.
64. *Mining Act* 1992, s 74(1)
65. Section 74(2).
66. Model Provisions, cl 35.

to the Secretary for determination by the Minister in accordance with s 101 a particular development application or a development application of a class or description of development applications.[67]

"This section is directed at reducing the risk of losing opportunities and worthwhile development of significance to the state due to local government supporting parochial interests."[68] On 4 June 1987 the current Premier [the then Minister] directed specified councils to refer to the secretary of the Department of Environment and Planning for determination by him all development applications for new coal mines that require new mining [coal] leases.[69]

The control of regional development by the Minister was increased by the introduction of s 100A of the *Environmental Planning and Assessment Act* 1979 which specifically gives the Minister power to consent to prohibited development.

The purpose of the s 100A direction was to extend the Minister's existing power under s 101, where it is expedient in the public interest and he or she (the Minister) is of the opinion that the matter is of State or regional significance, to consider development that is prohibited by an existing planning instrument. This enables the State to act without unnecessary delay to foster and encourage significant, acceptable development that is in the interest of the community. The Minister's [new] power is balanced by a right available to the public, the council and the applicant to insist that a public inquiry be held before the Minister makes his or her decision.[70]

The s 101 direction therefore applies to all coal mining covered by its terms whether it be "permissible" or "prohibited" development.[71] The interactions of ss 101 and 100A is a clear example of the implementation of political and economic objectives of government by the use of planning legislation.

When the Minister becomes the consent authority under s 101 of the *Environmental Planning and Assessment Act* 1979[72] there is no merit appeal from his or her determination[73] but he or she must however follow the required procedures and he or she is bound by the principles of natural justice.[74] Where an inquiry has been sought by an objector[75]

67. *Environmental Planning and Assessment Act* 1979, s 101.
68. Honourable Robert Carr, Minister for Planning and Environment, Second Reading Speech, NSW Legislative Assembly, 26-27 November 1985.
69. *Environmental Planning and Assessment Act* 1979, s 101, Direction 4 June 1987.
70. *Environmental Planning and Assessment Act* 1979, s 101(5).
71. *Environmental Planning and Assessment Act* 1979, s 100A; *ACR Trading Pty Ltd v Fat-sel Pty Ltd* (No 3) (1987) 11 NSWLR 67 (NSW Court of Appeal).
72. Section 101(11).
73. Section 101(9).
74. *Associated Provincial Picture House Ltd v Wednesbury Corp* (1948) 1 KB 233; *Parramatta City Council v Pestell* (1972) 128 CLR 305; *Hale v Parramatta City Council* (1982) 47 LGRA 269 (McClelland CJ) affirmed on appeal in *Parramatta City Council v Hale* (1982) 47 LGRA 319; *Rosemount Estates Pty Ltd v Cleland, Minister for Planning and Bengalla Mining Company Pty Limited* (unreported, NSW Land & Environment Ct, 24 January 1995).
75. *Environmental Planning and Assessment Act* 1979, s 101(5).

he or she cannot determine the application until he or she has a report from the Commissioner.[76]

State Environmental Planning Policy (SEPP) 34

SEPP 34 is another example of the political manifestation of planning law. It is entitled "Major Employment—Generating Industrial Development" and its aims and objectives include the promotion and co-ordination of orderly and economic use and development of land and the economic welfare of the State, the facilitation of certain types of major employment and generating industrial development of State significance.

SEPP 34 applies (inter alia) to mining which will employ 100 or more persons on a full time basis or has a capital investment value of $20 million or more (excluding land) and requires that any application for development consent that is caught by its terms has to be referred to the Minister who becomes the consent authority.

Who gives consent to mining

The result of the s 101 direction and SEPP 34 is effectively that the Minister becomes the consent authority for significant mining proposals.

To maintain some local control over mining development some councils have included in their local environmental plans merit issues to be determined before a conclusion can be reached as to whether a project is, in the legal sense, a permissible or prohibited development. As the Minister has power to give a consent to prohibited development under s 100A this does not change the course for development that is subject to a s 101 direction but it does cause confusion as it creates the need to do a merit assessment before the permitted use of the land can be determined.

The Minister whose department is required to approve of local environmental plans, will have to guard against these provisions which fracture the structure of the process under the *Environmental Planning and Assessment Act* 1979. Such a situation also creates a need for a re-examination of the legislation and in particular the procedures applicable under s 101 of the *Environmental Planning and Assessment Act* 1979.

DESIGNATED DEVELOPMENT

A development application for designated development must be accompanied by an environmental impact statement.[77] Mining is generally designated development being either a "coal mine" or an

76. Section 101(7); *Rosemount Estates Pty Ltd v Cleland, Minister for Planning and Bengalla Mining Company Pty Ltd* (unreported, NSW Land & Environment Ct, 24 January 1995).
77. *Environmental Planning and Assessment Act* 1979, s 77(3)(d).

"extractive industry" referred to in Sch 3 to the Regulations.[78] Mining may also be categorised as designated due to being so prescribed in the relevant environmental planning instrument.[79]

Extension of or changes to mining is not designated if, in the opinion of the consent authority, the alterations or additions [to the mine] do not significantly increase the environmental impacts of the total development.[80] This is discussed in *Wellfare and others (t/a Sylvania Marina) v Sutherland Shire Council* and others particularly by Cripps J.[81] Whether development is designated or not was considered in detail by Hemmings J in *Jungar Holdings Pty Ltd v Eurobodalla Shire Council and Dublee Holdings Pty Ltd*[82] and the issue was again discussed, specifically in the context of an extractive industry, by Stein J in *Penrith City Council v Waste Management Authority of New South Wales.*[83]

The Environmental Impact Statement

The Environmental Impact Statement (EIS) must be in the prescribed form[84] and must comply with the objectives set out in s 5 of the *Environmental Planning and Assessment Act* 1979. It must enable the determining authority to fulfil the task of making a fully informed and well considered decision by having before it the relevant facts and circumstances. It must provide members of the public with the opportunity to exercise their statutory rights of objection.[85] It does not need to discuss highly speculative or remote and conjectural consequences.[86]

Legal Compliance with the Environmental Impact Statement

The EIS is sufficiently comprehensive in its treatment of the project if it contains sufficient information to alert lay persons and specialists to problems inherent in the carrying out of the project and it is sufficiently specific if it directs a reasonable, intelligent and informed mind to the possible potential environmental consequences of carrying out, or not carrying out, the project.[87] An EIS is required to consider

78. Section 158.
79. Section 29.
80. *Environmental Planning and Assessment Regulation* 1994, Sch 3 Pt 2.
81. *Wellfare & others (t/a Sylvania Marina) v Sutherland Shire Council* (1983) 49 LGRA 394 at 398.
82. (1989) 70 LGRA 79.
83. (1990) 71 LGRA 108.
84. *Environmental Planning and Assessment Act* 1979, s 77(3)(d).
85. *Farley & Lewers (Qld) Pty Ltd v Tweed Shire Council* (unreported, NSW Land and Environment Ct, 12 March 1985).
86. *Save Lake Washington v Frank* 641 F 2d 1330 at 1335 (9th Cir).
87. *Prineas v Forestry Commission of New South Wales* (1983) 49 LGRA 402 at 417.

the existing environment, the proposal, the impact of the proposal on the environment and the measures to be taken to mitigate the impact.[88]

The applicant is required to consult with the director as to the requirements as to the form and content of the EIS which at least satisfy the requirements of Schedule 2 to the Regulation.

The current Sch 2 came into force with the *Environmental Planning and Assessment Regulation* 1994 and requires the EIS to address the principles of ecologically sustainable development which are the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity and improved valuation and pricing of environmental resources.

Scope of the Environmental Impact Statement

A development application is (and was always intended to be) an application for approval to conduct a development on broader planning terms. It is the precursor to a more detailed application to actually perform the works. The best example of this is perhaps the development application for a building which must be followed by the actual building application which sets out the technical detail of the building. Similarly a miner must have a mining lease and, under the lease, approval to the mining plan.

Practically, there is a general expectation for detail beyond what might (arguably) be the strict legal requirement. The requirement for provision of too much detail in an EIS can result in the development consent that follows being detailed beyond that necessary to deal with planning issues. I am not aware of any coal mining development consent granted in the Hunter Valley in the last ten years that has not had to return to the consent authority for a variation to that consent.[89] This fact alone must raise a warning light and raise the question as to whether too much detail is being sought in an EIS for a mining proposal.

The first condition of any mining consent requires the project to be conducted in accordance with the EIS and submissions made by the miner to the inquiry if there was one. The detail included in such a consent leaves little or no room to cater for changing circumstances inevitably encountered in the dynamic process of mining. Certainly substantive changes to the proposal should not be allowed without approval. The question becomes one of where that line is and what the process for approving a change should be in the mining context. Is it necessary for it to be returned to the consent authority for variation under s 102 when in all probability (and, in fact, in most cases) the issues probably relate to a prescribed issue under the special purpose conditions of the *Mining Act* 1992?

88. *Environmental Planning and Assessment Regulation* 1994, cll 84, 85, Sch 2.
89. *Environmental Planning and Assessment Act* 1979, s 102.

Drafting the Environmental Impact Statement

The author of an EIS is faced with a difficult task in that he or she is really addressing three separate audiences. There is a need to ensure that the EIS meets the legal requirements as it must be kept in mind that it may be tested by the courts.

The EIS must also address the political audience as the document must satisfy the policy and administrative imperatives of the various government departments whose technical and policy requirements have to be met. Each of these departments has its own culture, prejudices, goals and objectives which are not limited by the strict requirements for legal validity and not necessarily limited to the strict boundaries of its own empowering legislation.

The EIS must also be directed to the local community and the local council. The difficulties for the general public in wading through the myriad detail involved in an EIS is understandable. Experience indicates that the community reaction to the presentation of an EIS is always one of scepticism. It is critical that details regarding land uses, existence of properties, locations of houses and other such detail be entirely accurate.

Preparation of the Environmental Impact Statement

The mining company must provide a sufficient budget and scope for its consultants with whom it must have effective communication and direct access to the specialist consultants.

There must be effective liaison with the local council and all of the government departments that are involved in the process. The EIS should not be finalised until it addresses all issues raised by these authorities. The Department of Mineral Resources runs an informal liaison process which it calls "Planning Focus". This does not seem to be, in my opinion, particularly effective but it is useful. More effective is one to one communication between the mining company and each separate department.

Roles of the Parties

Over the 15 years of the *Environmental Planning and Assessment Act* 1979 there has been some jostling for position between the environmental consulting industry and the lawyers. I think it has now settled down to the position where it is acknowledged that the lawyers should not drive the process but that they do fulfil an essential role in achieving ultimate compliance of the EIS and the approvals with the legal requirements. To do this the lawyer must have an involvement through the whole process.

COMMISSION OF INQUIRY

Where a hearing is required by any objector to any project that is covered by a s 101 direction the Minister is to direct an inquiry[90] at which the consent authority, the applicant and any person who made a submission under s 87(1) is entitled to appear and be heard.[91] The practice, however, is to allow any person to appear and be heard. The result can be that the inquiry is used as a forum for objectives which are outside the scope of the inquiry which is to inquire into the environmental aspects of the project.

Procedure at the Inquiry

The inquiry is held in public and although the *Environmental Planning and Assessment Act* 1979 allows and provides that evidence may be taken on oath[92] this is rarely done. Evidence is generally given in writing with supporting addresses which cannot be cross-examined or tested in any effective manner. There is the power to summon witnesses and to require the production of books and documents.[93] The procedure is determined by the Commission and it is not bound by the rules of evidence[94] or any other specific procedural rules.

The usual format for the inquiry is for the applicant to open with its description of the project followed by the council, the government departments and then the private objectors with reply submissions in the reverse order.

The attempt to remove the formality to make the process less intimidating often leaves the general public, who are generally unable to assess the integrity of conflicting reports, very confused. The lack of boundaries, rules and terms of reference often results in inquiries becoming public relations and political battlegrounds where the objectives of some parties are far removed from an inquiry into the environmental aspects of the project resulting in a fertile ground for the germination of a natural justice case by an aggrieved objector.

The inquiry process, as presently conducted, has forced the process further and further along the detail path to the extent that the detail presently required for the conduct of an inquiry exceeds that necessary in a planning context and certainly more than is required to complete the charter of inquiring into the environmental aspects of the project.

It seems that close attention should be given to the procedure and objectives of the inquiry process. The legislation clearly intends to have the limited terms of reference set out in s 119. Without clear rules to govern its conduct it has widened to being an expression of democracy in action opening the doors to the potential for challenge on natural

90. Section 101(6).
91. Section 101(6).
92. Section 120(1).
93. Section 120(3).
94. Section 120(9).

justice arguments and to being a forum for the furthering of objectives far removed from a consideration of the environmental aspects of a project. There is an argument for limiting the rights to present argument, the imposition of the rules of evidence, even if in a modified form, and some clear procedural rules to govern the process.

There can be no argument that a lack of formal rules or procedure can be equated with justice. In fact such a situation leads to the unending potential for litigation which can be, and sometimes is, used to frustrate the process rather than facilitate it.

It is suggested that the process should have some controls applied and boundaries provided in regulations so that all involved know what the process is and there are clear rules against which the expectation of parties may be tested. It cannot be established that the lack of rules is tantamount to justice. The contrary may arguably be the case as without clear rules the process can be directionless and is susceptible to being subverted by allegations of the breach of natural justice in the court system.

Report by the Commissioner

Commissioners have been making recommendations as to whether consent should or should not be given and as to the conditions which the Minister should impose in a development consent. This exceeds the charter of the Commissioner who is directed to inquire into "the environmental aspects of the proposed development".[95] The Minister is required to consider the findings and recommendations of the Commissioner[96] however the recommendations refer to the environmental aspects of the project and not to whether or not a development consent should be given.

The Minister considers the Report

While the Minister is not bound by the Commissioner's report,[97] and his decision is final, resulting in there being no merit appeal, the Minister is bound by the procedural aspects of the Act and there is the right to challenge in the courts any failure of the Minister to comply with the requirements of the Act.[98] The Minister must have the Commissioner's report and must consider all of the s 90 matters which go outside the environmental issues on which the Commissioner has reported.

The Minister has the power to give consent whether the project is permissible or prohibited in the terms of the relevant local environmental plan.[99] There are some difficulties in this area with the

95. Section 119(1)(b).
96. Section 101(7).
97. Section 101(8).
98. Section 123.
99. Section 100A.

drafting of the relevant sections of the *Environmental Planning and Assessment Act* 1979 which will need to be rectified by the legislature.

Recently Waddell AJ in *Rosemount Estates Pty Limited v Cleland, Minister for Planning and Bengalla Mining Co Pty Ltd*[100] extended the Wednesbury[101] review principle holding that the court has the power to review the report and recommendations of a Commissioner which gives an aggrieved party the right to have the report of a Commissioner reviewed by the courts before the Minister makes a determination. It could well be argued, I would suggest, that this right could also extend to the report of a town planner to the council prior to it making a decision. It is suggested that this is such an impediment in the consent process that it needs to be addressed by the legislature.

The position of the Minister as he considers the report and determines the application is discussed by Talbot J in *Valley Watch Inc v Minister for Planning*[102] which confirms that the Minister is entitled to consider anything that he has before him from wherever it comes.

THE DEVELOPMENT CONSENT

The development consent must be clear in its terms, enforceable and defendable. Uncertainty and conflict in its terms could lead to dispute and perhaps invalidity which may impugn the mining lease.

Development consents for mining have become longer, more detailed and complex. This has been contributed to by the overlapping and conflict in the terms and application of the planning, mining and environmental legislation.

The proponent is invariably given the opportunity to discuss the terms of any proposed consent with the consent authority before it is issued. This should be actively pursued and no compromise entered into by the miner when it comes to settling the terms of the consent.

Uncertainty in the Terms

Whilst the consent is a legal document and its validity critical to the security of tenure of the miner political considerations inevitably manifest themselves in the terms of the instrument. It is not unusual for conditions to be included to satisfy the political or other agenda of a consent authority. In the case of the government authorities this can be to impose a condition which is really the responsibility of another authority, potentially creating problems with the integrity and application of the consent.

100. Unreported, NSW Land & Environment Ct, 24 January 1995.
101. Op cit, n 1.
102. (1994) 82 LGRA 209.

Unnecessary or Excessive Detail

It is not surprising with this process that there is an increasing tendency for the consent to have a level of detail exceeding that necessary for a development consent. Care should be exercised by those acting for the mining company to protect against this unnecessary level of detail. If it is in the consent the likelihood of breach of the consent increases as does the need for, otherwise unnecessary, s 102 variation applications.

Conflict with other Approvals

A development consent often imposes conditions that relate to the functions and responsibilities of other authorities including the Department of Mineral Resources and the Environment Protection Authority. The consent authority sometimes imposes conditions requiring that the applicant will comply with the terms of the, say *Clean Air Act*, *Clean Waters Act and Noise Control Act*. Such a condition is unnecessary as those Acts must be complied with whether or not the development consent gratuitously requires it.

Sometimes consent will even go further by imposing absolute impact limits for, say dust or noise, when it is the charter of the Environment Protection Authority under the Pollution Control Legislation to deal with such issues.

What is the effect on the validity of a development consent which has as its basis compliance with conditions which are rendered unenforceable by the operation of ss 65 and 74 of the *Mining Act* 1992?

Land Purchase Condition

These conditions were upheld as valid in *Barry v The Minister for Environment and Planning*[103] and now appear in one form or another in all consents for mining and have been used in other consents for other types of designated development. A land purchase condition requires the miner to acquire all of the land which will be affected by surface mining activities although the miner has no power to require the sale of the land by the land owner to the miner.[104]

The land included in the condition is the mining land and land identified by reference to the anticipated level of impact that the project will have. Some consents, in addition to specifying the particular land, generically include any land which may be affected at any time during the project beyond a specified level of, particularly, dust or noise impact. These conditions are of questionable value. From the landowner's perspective, such a condition leaves the land potentially

103. Unreported, NSW Land & Environmental Ct, 7 December 1983.
104. *Carter and Calgaro v Amatek Ltd* (1992) 77 LGRA 303.

blighted by what is seen as an acknowledgment that the project may affect it in the future rendering it either unsaleable or only saleable at a significantly reduced value. It also sets a level of impact to trigger the obligation which may become irrelevant with changing circumstances or standards in the future. In a changing environment who can establish the responsibility for the total noise or air quality environment? How can it be established that dust depositions beyond a stated limit come from any particular development or from the naturally frequently dusty rural environment? Such conditions can cause a mine to be in breach of its consent for reasons not related to its operation. Surely such a situation could be adequately dealt with in an effective compensation provision in the legislation.

For the miner it leaves budgetary uncertainties and also potentially dissatisfied land owners on the boundary of the mine owned land. These people become human monitors and the source of discontent. Further it could be that the condition itself is evidence of incomplete assessment of the impact of the project establishing in the terms of the consent itself that the process has not been completed in accordance with the requirements of the Act.

The need for the land purchase condition in the development consent, arguably would not be as great, or might even be rendered unnecessary if the provisions as to compensation in Pt 13 of the *Mining Act* 1992 were not as restrictive (or perhaps inadequate) as we have seen them to be.

The existence of two compensatory regimes opens the door to double dipping. Unless provision is made in the development consent (and many existing consents do not) there is the potential for a landowner to claim compensation under Pt 13 of the *Mining Act* 1992 and afterwards exercise his or her rights under the land purchase condition.

There is need to consider very carefully the terms of the land purchase conditions. Most are too long and complex in their operation and could be streamlined and simplified.

Capital gains tax creates added difficulties for the miner and the landowner. A landowner, forced by mining to sell will, (if his or her property was purchased after 1985) potentially incur a liability to capital gains tax. The landowner will attempt to pass that liability on to the miner which, the liability being a progressive one, is not possible in absolute terms.

It really must be questioned whether there is justice here for either the landowner or the miner. There is rollover relief in the *Income Tax Assessment Act* 1936 for compulsory acquisitions by government[105] which, it is argued, should be extended to the mining land sale. This issue was considered in *CSR Ltd (trading as CSR Readymix) v Wingecarribee Shire Council & Ors.*[106]

105. *LR Beilbarz Investments Pty Ltd v Darling Harbour Authority* (unreported, NSW Land & Environment Ct, Bignold J, 23 April 1991).
106. Unreported, NSW Land & Environment Ct, 17 December 1990.

MINING ACT APPROVALS

Development consent having been granted the mine receives the mining lease. The last approval required by the miner is consent, or approval, to the mining proceeding. The requirement for this is in the mining lease and additionally for underground mining in the *Coal Mines Regulation Act* 1982.[107]

THE FEDERAL CONTROLS

Time does not permit a discussion of the approvals required at the federal level other than to observe that the project will be scrutinised again if export licences or Foreign Investment Review Board approval is required. The federal environmental authorities have the power to tread the same path as has been travelled by the State authorities even to the extent of another inquiry.

CONCLUSION—WHERE TO FROM HERE

Revenue from mining is important to the Australian economy and, whether this is seen to be desirable or not, it would appear that this will remain the case for decades to come. Australia, while it is presently the world's largest exporter of coal, is a long way down the list when compared with other countries against the benchmarks of total reserves or tonnes mined per year.

Competition for the Asian markets already exists both from within and from outside Asia. If Australia does not achieve world best practices the markets failure to be competitive will diminish exports of coal. Considerable micro-economic reform has been achieved by the coal mining industry in the areas of labour relations, management and operating procedures. It is imperative that there be a reliable, effective and predictable course to mining approvals to maintain the viability of the industry and its attractiveness to international investors.

No one would argue that the requirements for planning and environmental assessment and control can, or should, be reduced to any extent. There can be no argument that the level of scrutiny by the responsible government authorities should be diminished in any way. The requirements for communication with the community and the need to pay due regard to the reasonable requirements of the local community must occur and adequate provision must be made for compensation for the directly affected landowners. The issue becomes to find the means of most effectively achieving this goal.

The brief examination that we have made of the process shows that the framework, provided by the legislature, sets out to adhere to these

107. Sections 138 and 139.

imperatives. The question is whether it does so effectively. It is suggested that it does not and that in fact the deficiencies create problems with the process and its result which, in the final analysis, does not serve the interests of miner, landowner or the community as a whole.

What we have seen is, as is referred to at the commencement of the paper, three separate legislative, administrative and determining structures and entities disregarding Commonwealth government regulation. This may well be the appropriate structure for dealing with development generally but it must be questioned whether it is appropriate to mining. This may not be the case, as evidenced by the legislation itself which contains specific provisions to accommodate the idiosyncratic nature of mining creating exemptions and special provisions to deal with it.

The path to mining approvals is made unnecessarily protracted, expensive and uncertain, by the need of the miner to tread the legal path, separately and at different times, through the planning, environmental and mining legislation, to satisfy the administrative authorities for each area and to reconcile the potentially conflicting provisions of the different approvals and licences.

The attempts to deal with the particular nature of mining with provisions in the *Mining Act* 1992 that override the planning legislation leave difficulties in the application and administration of the process as well as the potential for legal uncertainty and invalidity of the approvals. The result is the failure of any one of the three separate authorities to have an appreciation of the whole of the context of the community requirements for the approval and control of mining.

It is suggested that the legislators need to address this situation as well as a number of areas of the *Mining Act* 1992 to bring the principles that govern mining into line with the mining methods of today. There are parts of the *Environmental Planning and Assessment Act* 1979 that need to be reviewed particularly with regard to the terms of reference and the procedures for inquiries and the provisions with regard to ss 100A and 101.

It is clear that the process takes too long and is susceptible to challenges and delays. The cost of delays in the process is not only a financial cost to miner, landowner and the community but also a human cost. Delay results in uncertainty which is painful for both miner and land owners. The most satisfactory result is an expedited process reducing the level and period of uncertainty to the minimum. Delay jeopardises all concerned. Change such as that which is brought by mining is always painful for some and the shorter the consent process, the less the pain for all.

The legislators need to provide a clearer and shorter path through the mining and planning legislation. It has been suggested in the past that this should be done by providing mining with its own legislative regime for, not only mining which now exists, but also for planning and environmental approvals. The argument against this has been that there is no basis for mining to have its own separate regime when other

industries do not. The answer to this, surely, is that mining already has its own Act which is not the case with most (but certainly not all) other business. The failure of the present legislative regime to deal with the conflicts together with the scope, importance and idiosyncratic nature of mining gives the basis for separate legislative treatment of mining. Whether the legislature adopts such a course is, of course, a matter for it but it does not obviate the need to rationalise the process. In this context it is relevant to observe that there is no other situation where the government takes away a right from a landowner and/or occupier and gives it to another person (the miner) to conduct its own commercial venture and provide the landowner and/or occupier with compensation rights from the miner. Normally when the government does take away a right in respect of land it provides the compensation.

There seems to be a view abroad today that openness in a hearing can only be achieved if there are minimal or no rules. This is not, with respect, necessarily the case. The fewer the rules the greater the potential for confusion and ability to litigate. It is suggested that there should be more clear rules for the conduct of inquiries to provide some limits and guidelines for their conduct. It is arguable that to provide for an inquiry without providing rules and procedures is to cast too great a responsibility or burden upon the Commissioner.

The regime of *Mining Act* 1906 was overhauled and modernised by the 1970 amendments which were the basis for the *Mining Act* 1973 and the *Coal Mining Act* 1973. This overhaul modernised, and brought up to date, the treatment of mining titles but did not address the inadequacies of the *Mining Act* approach to the difficulties which have been identified earlier in this paper. Since 1973 the planning regime was rebuilt by the *Environmental Planning and Assessment Act* 1979 and the substance of our current pollution control legislation and regulation has developed. It is argued that it is time for a new review insofar as mining is concerned particularly due to the dramatically changed and escalated scope of mining. In doing this we will have to come to grips with what we do about global warming and greenhouse. Already there has been one challenge to a development consent based upon failure to address the principles of ecologically sustainable development.[108] That attack failed but it was prior to the adoption of the new Sch 3 to the *Environmental Planning and Assessment Regulations* which specifically require an EIS to address the ESD principles.

A final comment it seems appropriate to observe that the existing duplication will be exacerbated by the escalating role of the federal authorities.

108. *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd and Singleton Council* (unreported, NSW Land & Environment Ct, Pearlman CJ 10217 of 1994).