State Agreements and the Regulation of Water Resources

Natalie Brown LLB (Hons 1)
University of Western Australia PhD Candidate

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Overview

• What is a State agreement
  ▫ Example Hamersley Range agreement
• Sovereign Risk: Binding the government
  ▫ Example Hamersley Range agreement
• State Agreements and legislation regulating groundwater management
  ▫ Express and Implied terms relating to groundwater abstraction and use
    ◦ Example Collie Coal Mining and the Upper Collie Water Allocation Plan
  ▫ Environmental Protection Act 1986
  ▫ New water legislation and State agreements
State agreements: definition

• State agreements are contracts between the executive government and private party ratified by an Act of parliament
• The contract is scheduled to the ratifying Act
State agreements: ratification

In Western Australia two forms

1. The scheduled contract is deemed ‘as if enacted’ by the ratifying Act
   ▫ The contract terms have the force of law (statutory duties)

2. The agreement takes effect notwithstanding any other Act or law
   ▫ The contract terms are governed by the law of contract
   ▫ The Government Agreements Act (WA) s 3 standardised this ratification form by applying it to retrospectively to agreements before 1979
Current State Agreements

1. Iron Ore (Hamersley Range) Agreement Act 1963
2. Iron Ore (Mount Goldsworthy) Agreement Act 1964
3. Iron Ore (Mount Newman) Agreement Act 1964
4. Iron Ore (Robe River) Agreement Act 1964

5. Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972
7. Iron Ore (Mount Bruce) Agreement Act 1972
8. Iron Ore (Goldsworthy-Nimingarra) Agreement Act 1972


12. Iron Ore (Channar Joint Venture) Agreement Act 1987
13. Iron Ore (Marillana Creek) Agreement Act 1991
15. Iron Ore (Yandicoogina) Agreement Act 1996

16. Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002
17. Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006
18. Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010
Mining projects under State agreements

A State agreement allows for multiple projects under the one agreement

• Supplementary agreements scheduled to the ratifying Act
  ▫ Allows for different agreement terms

• Additional proposals clause in principal agreement
  ▫ Allows for new developments on the same terms
Iron ore (Hamersley Range) Agreement Act 1963 (WA)

Principal agreement no additional proposals clause

Schedules:
1. Sch 1 Mount Tom Price (1963)
2. Sch 2 Paraburdoo (1968)
5. Sch 10 Nammuldi (2000) part of Brockman 2
6. Sch 12 cl 4(2) (2010) inserts cl 8A additional proposals clause in principal agreement
8. Western Turner Syncline (2012) (additional proposal)
Sovereign Risk

1. Binding legislature
2. Binding the executive government discretionary actions

McCawley Principle

- Parliament cannot fetter the actions of a subsequent parliament
- Later legislation prevails over earlier legislation to the extent of the inconsistency
- Inconsistency must be clear and apparent
- Other applicable doctrine
  - Presumption against disturbing common law or statutory rights.
Sovereign risk: binding legislature

Binding a future legislature by contract

- A State agreement contract term cannot bind parliament
- Unilateral amendment of a State agreement term by legislation will not be a breach of the term
  - Therefore there is no contractual remedy for the private party
- But later legislation amending a contract term:
  - must be clear and apparent; and
  - rebut the presumption of common law or statutory rights
Sovereign Risk: binding the executive

Doctrine of executive necessity

- The doctrine of executive necessity does not apply to agreements endorsed by statute
  - SA’s bind discretionary executive Acts under laws existing at the time of the agreement
- Can the State agreement bind executive actions under later laws?
  - A question of statutory interpretation
  - Government Agreements Act 1979 may apply prospectively
SA's and legislation regulating groundwater management

Mining Act 1904 (repealed)
Rights in Water and Irrigation Act 1914 (WA)
Iron Ore (Hamersley Range) Agreement Act 1963
Iron Ore (Mount Goldsworthy) Agreement Act 1964
Iron Ore (Mount Newman) Agreement Act 1964
Iron Ore (Robe River) Agreement Act 1964
Environmental protection Act 1971 (repealed) Did not apply to State agreements
Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972
Iron Ore (Mount Bruce) Agreement Act 1972
Iron Ore (Goldsworthy-Nimingarra) Agreement Act 1972
Iron Ore (Wittenoom) Agreement Act 1972
Mining Act 1978 (WA)
Government Agreements Act 1979
Environmental Protection Act 1986 (WA) (EP Act) exempts pre-1972 agreements
Iron Ore (Channar Joint Venture) Agreement Act 1987
Iron Ore (Marillana Creek) Agreement Act 1991
Iron Ore (Hope Downs) Agreement Act 1992
Iron Ore (Yandicoogina) Agreement Act 1996
RiWI Act amendments (2002) no apparent inconsistencies
Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002
Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006
Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010
Iron ore (Hamersley Range) Agreement Act 1963 (WA)

Mining Act 1904 (repealed)
Rights in Water and Irrigation Act 1914 (WA)
Sch 1 Mount Tom Price (1963)
Sch 2 Paraburdoo (1968)
Environmental Protection Act 1971 (repealed)
Mining Act 1978 (WA)
Environmental Protection Act 1986 (WA) exempts pre-1972 SA’s
Sch 10 Nammuldi (2000) EP Act applies as a contract term
RiWI Act amendments (2002) no apparent inconsistencies
Western Turner Syncline (2012) (additional proposal) EP Act applies
SA’s and legislation regulating groundwater management

RiWI Act limitations

- Some State agreements have express terms granting rights to groundwater and RiWI licenses
- No State agreements have express terms relating to the quantity of groundwater abstraction for mine dewatering
- Grant of an abstraction license (RiWI Act s 5C) and the quantity of groundwater allowed by the license is a discretionary executive action
SA’s and legislation regulating groundwater management

Implied terms and groundwater abstraction

• Limits on Mining clauses
  ▫ Prescribes the annual ore extraction amount
  ▫ Early agreements do not have an LOM clause

• Mining below the water table requires groundwater abstraction to allow safe mining

• The contract term providing for ore extraction is an express and essential term of the contract
  ▫ Groundwater abstraction to the extent necessary to allow safe extraction of the prescribed amount of ore may be implied into the contract by law or fact
Collie Coal Mining

Collie Coal (Griffin) Agreement Act 1979 (WA)

• Express rights to mine dewater for third parties
  ▫ Bluewater 1 power station

• Implied rights for mine dewatering (groundwater abstraction)
  ▫ No LoM clause in agreement
  ▫ Groundwater abstraction allows safe mining of Coal
    • Sustainable abstraction 2 gigalitres per annum
    • Current abstraction 49 gigalitres per annum (2000% over allocation)
Questions arising from implied terms:

1. Can implied terms limit discretionary executive actions?
2. Can SA’s using the ‘as if enacted’ ratification formula have terms implied by the law of contract?
3. If the SA does not have a limits on mining clause is the implied term is too broad and vague?
4. In older agreements can groundwater abstraction implied terms have been within the contemplation of the parties (intent)?
SA’s and legislation regulating groundwater management

EP Act 86 is the predominant Act regulating groundwater management

• Prevails over RiWI Act and Mining Act 78
• Applies to all new developments under SA’s by prevailing over SA or by contract term in SA
• Applies conditions under Part IV
• Conditions reflected on RiWI Act 5C and 26D licenses and EP Act Part V licenses
SA’s and legislation regulating groundwater management

EP Act Limits:

- Can only operate within its own objects
  - Unlikely to allow management of mine dewater (provision to third parties) unless an environmental objective
- Does not apply wholly to all developments
- Does not rebut the presumption to common law and statutory rights
  - Preserves existing rights under s 128
New legislation regulating groundwater management

Unilateral amendment of SA’s terms by legislation
• Will not breach SA contract terms
  ▫ Political constraints
• WA has never unilaterally amended SA terms
  ▫ Amendments are by negotiation

Groundwater abstraction limits
• Legislation allowing the Department of Water to prescribe groundwater abstraction limits likely to be inconsistent with implied terms of SA’s

Mine dewater management
• Legislation allowing the DoW to manage excess groundwater abstraction from mine dewatering unlikely to be inconsistent with SA agreement terms
Questions