THE NEGOTIATION AND ENFORCEMENT OF AGREEMENTS WITH STATE GOVERNMENTS RELATING TO THE DEVELOPMENT OF MINERAL VENTURES

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Most industrial and commercial enterprises from time to time negotiate agreements with various arms of government. Less often do they find themselves entering an agreement with the State itself, embracing more than one limb of the executive government. This practice is, however, quite common in the petroleum and mining Industry. Such agreements form a charter of rights on which many large mining developments depend for their viability and I have been asked to deal in this paper with the negotiation of such agreements, and with their enforcement.

I have restricted myself to agreements with a State government itself rather than attempting to give some coverage of the many individual agreements with government departments, local authorities, power authorities, water authorities etc., which often arise where infrastructure makes a franchise agreement unnecessary. Whilst some of the more general comments made in this paper will be apposite to such agreements each is really a separate subject and the nature of the agreements will depend upon the authority being dealt with and will differ substantially from State to State.

The paper has been divided into the following segments:

1. Rationale
2. Form
3. Scope
4. Enforcement
5. Entrenchment

1. RATIONALE

There are two main reasons which give rise to the use by the petroleum and mining industries of large-scale agreements with State governments. Mining ventures are often established in remote areas which have little or no existing facilities to rely upon so that it becomes important to ensure that all the necessary facilities become available. As these facilities are usually provided by State governments who indeed insist on their control the necessary assurances covering the full spectrum of operations can only be obtained from the State government.

Further, mining ventures have become a major part of the economy to the extent that it has become generally accepted that government legislative

assistance is proper. There are signs that this general acceptance is being broken down and one wonders how fast that process would occur in a situation where the economy and employment were running more satisfactorily. In Queensland there is a clear pattern of increasing toughness from one agreement to the next during the sixties and seventies, most clearly exhibited in areas like rail freights (especially their escalation provisions), environmental strictures, and stamp duty exemptions. While commonly dominated by a series of obligations which the company or companies concerned undertake to meet, it should be remembered that in substance these agreements have the object of affording privileges to the mining companies which would otherwise not be available. That is why the agreements are commonly referred to as franchise agreements.

Most large mining developments cannot rely very much on existing infrastructure and face the need to make large capital expenditure on transportation, accommodation, water and power facilities and the like. In their establishment and their continued operation a large number of government departments, commissions, instrumentalities, and authorities must co-operate in a co-ordinated way. The guarantee of such co-operation as is necessary to ensure the viability of the project is an essential requirement.

It is vital to secure not only appropriate mining titles but other lands for processing, transportation facilities, residential accommodation, and the other ancillary operations. Where there may be otherwise no ready means of securing all these, one must ensure that the State government will use its powers to make them available. This requires special treatment in a franchise agreement as resumption powers under existing legislation are usually limited to particular purposes and for use by particular authorities.

Further, except where title is acquired to land in fee simple, terms for various mining and other tenures frequently differ. In addition they are often a lot shorter than required for a long term mining development. One important objective therefore is to secure identical terms in respect of all leasehold properties required for the project to ensure the security of the project as a whole for a fixed minimum period.

A large number of agreements with government departments and instrumentalities would in the absence of a franchise agreement be required in any event to permit the establishment of a new venture. The enforcability, term, and default provisions ought to give sufficient protection from arbitrary action and as far as possible should be uniform to ensure the integrity of the whole project.

It is generally true to say that the legislative framework in which the mining company must otherwise operate is often inappropriate to the needs and practicalities associated with a new mining venture. Certainly much mining legislation still exhibits all too transparently the historical circumstances of the gold rush days.

It has been conceded as a result that the establishment of new large scale operations justify amendment of State legislation in many respects to permit mining ventures to operate with some security.

The answer to the question "when ought one to commence negotiations for a franchise agreement" ought to be "as soon as possible after prospecting and feasibility studies indicate the likelihood of the establishment of a new development". Again I think that one ought to strive for consummation of those negotiations at the earliest possible date, notwithstanding there may be many matters unresolved. In such cases, it will often be that the two most important considerations apart from location of a commercial mineral body (i.e. the arrangement of finance for the development, and the securing of suitable sales contracts) remain to be completed and any agreements would have to be conditional upon those matters being satisfactorily resolved. Further, many questions as to design and location of facilities to be constructed under the umbrella of an agreement will remain to be finally defined, but I do not think that the negotiation of satisfactory terms is likely to get any easier, as time passes, and the result of those negotiations, especially on financial matters, will often be relevant in terms of financing and selling negotiations. There is one problem though, with early negotiations. The State can be expected to insist on evidence that development will proceed before any final commitments are made. The first franchise agreement in Queensland was entered into in 1947 on the authority of The Electricity Supply Corporation (Overseas) Agreement Act and related to coal deposits near Blair Athol. The contemplated development never proceeded. The Queensland Government has ever since been somewhat chary of repeating the experience. I mention this attitude as a difficulty to be faced in negotiation rather than one to retreat from.

2. FORM

There are problems associated with the securing of an enforcable agreement with a State to operate over a long period of time. It is clear law that "no valid contract can be entered into (by a State) with an individual respecting the future use of discretionary powers."[1] But of course this is exactly what a franchise agreement seeks to achieve, for example by obliging a government to exercise powers of resumption, to grant mining tenements and subsequently renewals, or to levy harbour dues at particular rates.

The exception where a government is acting in a commercial context,[2] (the scope of which is in any event ill-defined) would not be applicable as the government is dealing with the mining company almost always in its public capacity.

The result of the application of this principle was dramatically illustrated in the case of *Cudgen Rutile (No. 2) Pty. Ltd. v. Chalk* (1975) 49 A.L.J.R. 22, which dealt with the enforcability of a standard clause in Queensland Authorities to Prospect to the effect that subject to certain conditions "the Holder shall be entitled at any time and from time to time during the said period to apply for and have granted to him in priority to any other person or company a mining lease".

An Authority to Prospect under the Queensland Mining Act is in the

form of an agreement between the holder and the Minister for Mines, on behalf of the State. It was held by the Queensland Full Court and confirmed by the Privy Council that as the Mining Act in laying down the manner in which a Mining Lease was to be granted contained a "chain of necessary steps to be taken, of satisfaction to be achieved, of decisions to be made or discretions to be exercised" (at p.25) it was not competent for the Minister to enter into a binding contract to grant a lease. Accordingly the refusal of the Queensland Government to grant a lease in the Cooloola Sands area for the mining companies concerned was upheld notwithstanding the provisions of the Authority to Prospect under which considerable sums of money had been spent.

The decision of the Privy Council in the Cooloola case seemed a complete if unsatisfactory answer to arguments that had been advanced that even though the Crown cannot fetter its future executive action in the sense that no one can prevent it from exercising a subsequent discretion inconsistent with the contract it has made, this should not prevent the government from answering in damages or compensation for the loss that has been suffered by the other party to the contract by reason of the decision of the government to walk away from its promise.[3] Accordingly it is necessary to resort to the authority of the legislature to support the creation of a binding contract in these circumstances. Needless to say where it is desired to amend the provisions of existing legislation this can only legally be done by Parliament enacting a statute to that effect, even where what is proposed is simply an exemption of dispensation. There are a number of ways that have been adopted to accomplish the desired result. The most acceptable is for an act to be passed authorising the execution of the agreement on behalf of the State and providing that upon execution, the terms of the agreement have the force of law as though enacted in the statute. To stop at ratification or approval will not give the agreement the necessary force of law.[4]

An even more satisfactory way of achieving the result would be to do away altogether with the concept of a contract, and to set out the terms of a franchise agreement in the form of a statute itself, so that, instead of authorising signature of an agreement set out in a schedule, which provides that the State agrees to do certain things and the mining company agrees to do others, a statute is enacted providing that the State *shall* perform its agreed obligations and the companies *shall* perform theirs. This technique would require careful attention to be given to provisions as to the manner of enforcement of the terms of the statute and as to the consequences of breach, but would remove consideration of the legal consequences of a franchise agreement from the realm of contract law altogether and would lessen the scope available to a court for protection of governments from the consequences of breach or unilateral inconsistent action. While the particular result may have been the same in that case, the majority decision of the Queensland Full Court in *Commonwealth Aluminium Corporation Limited v. Attorney-General* [1976] Qd. R. 231, would have had to fall back on a much closer consideration of the constitutional basis of entrenchment were that format adopted.

The desire to set aside the operation of inappropriate conflicting or discretionary legislation creates a problem for the draftsmen. Were one negotiating an agreement between two private corporations where it was desired to enter into a single contract governing their relationship to supplant a series of earlier agreements between the parties dealing with specific situations, the prudent course would be to advise that the new agreement itself set out all the provisions which are to remain current rather than to deal with the new arrangements in a broad way and to provide that earlier contracts were confirmed except in sofar as they were inconsistent with the new agreement. An alternative course would be to provide a new agreement containing express reference to those provisions of the old agreement which were modified and in what respects. When dealing with the whole statute law of the State neither of the preferred courses is practicable leaving open many avenues for argument as to whether earlier provisions of State law have been rendered inapplicable by implication. In some more simple situations this can be avoided. Hence for example it could be provided in the 1967 Petroleum (Barracouta and Marlin Fields) Agreement (Victoria) that except for the terms and conditions of the Petroleum Licence which were set out as a schedule and for two specified sections of the Victorian Petroleum Act 1958 which were not to be applicable, all the provisions of the Mines Act and Petroleum Act applied. Clearly this sort of practice is to be recommended although it is often impracticable to attempt to be exhaustive, and it is usually resisted by the State government.

A Queensland illustration of the potential dangers of failing specifically to exclude legislation is given in the context of the various coal franchise agreements. The Queensland Coal Industry Control Act is quite an extraordinary piece of legislation in its potential effect. It gives the Coal Board power *inter alia* to regulate profits and prices, to take control of a coal mine while the owner remains liable for outgoings, and to acquire coal mines. Compensation provisions (where they apply at all) are limited. The relevant canon of construction has been expressed to be "unless and to the extent that it is express or made absolutely clear by necessary implications a private statute does not extend to abrogate the provisions of a public general Act."[5] It is likely therefore that Queensland coal projects which have been developed under the auspices of franchise agreements remain subject to the provisions of that Act. In the particular example given, the State had rejected requests to exclude the provisions of that Act. Nevertheless, the principle is clear that, where existing law would be prejudicial, it ought wherever possible to be specifically excluded or modified.

3. SCOPE

The most important feature of a franchise agreement is the securing of an appropriate mining title. It is common that the term of the relevant tenement or tenements granted pursuant to the agreement, the area and the shape of the tenement are expanded from the usual restrictions contained in existing mining

legislation. An important objective is to avoid the vagaries associated with special discretions in the exercise of renewal rights under the terms of the then existing law. The franchise agreement also gives occasion for the drafting of the conditions to which the tenement would be subject along lines expressly designed for the particular situation. Sometimes special provisions regarding rent and the payment of royalties can be fixed. On the converse side it is sometimes the case that the right to mine is limited in quantity to a percentage of recoverable reserves, in which case attention ought to be paid to the effect of technological and economic changes in the future which will result in a changed definition of recoverable reserves.

Provisions for the construction of transportation facilities occupy a large part of most franchise agreements. These require agreement on who shall construct those facilities, who shall own and maintain them, how they are to be paid for and (in cases where government ownership is insisted upon) what freight rates are payable. Although examples can be found in earlier Queensland franchise agreements of private construction and private ownership of transportation facilities, the practice has been for some time for the Government to insist upon public responsibility for construction and public ownership and operation of railway and port facilities. The recent amendments to the Income Tax Assessment Act may in appropriate cases require this trend to be reconsidered.[6]

Where governments insist upon public ownership they nevertheless insist upon private finance. This creates a problem with the Loan Council as the extent of these "borrowings" greatly exceed the authorities individual States succeed in obtaining for annual public borrowings from the Loan Council and would seriously distort the ratios allocated between the States from year to year. Accordingly, the concept of "security deposits" has been evolved to avoid the advances being construed as borrowings. The scheme has been developed that although the State pays for the construction of the facilities the companies agree to lodge with the State by way of security deposit for the due performance by the companies of their obligations under the franchise agreement such sums of money at such times as the State requires to defray the actual costs of the capital expenditure incurred in carrying out construction of the facilities. The State agrees to pay interest on security deposits which is capitalised in the earlier stages before freight becomes payable. Security deposit moneys are refundable by instalments after the commencement of operation of the transport facilities. Rights to refunds are carefully dovetailed with the use of facilities to ensure that repayment of the security deposit is matched by receipts of freight, in effect amortising the cost of construction over an agreed period of time. These security deposits carry with them a liability for forfeiture for breach of the obligations of the companies.

Although transportation facilities are publicly owned, rights to ensure that the facilities are available for company use in priority to others are invariably built in to the agreement. These may or may not include protection against concessional freight rates for other users, limitation or prohibition of

other users, or the requirements of capital contributions to be made by newcomers.

As mentioned above it is usual to include detailed provisions regarding the acquisition of lands necessary for the conduct of the mining and related operations.

The provision of water is often an essential part of the viability of a mining project. The effective construction of necessary dams and pumping facilities and the provision of a guaranteed supply to mining companies normally require substantial alterations to existing legislation which has been drafted to ensure the availability of water supply for domestic, agricultural and pastoral purposes, usually on a broad and discretionary basis. To take some examples from the Queensland context, section 4 of the Queensland Water Act provides that the right to the use and flow and to the control of the water at any time in all watercourses which flow through or past the land of two or more occupiers and all lakes and springs which are situated within the land of two or more occupiers together with any artesian well, any sub-artesian well and any other sub-terranean sources of supply shall, subject to certain restrictions set out in the Act, or until appropriated under the sanction of the Act or some other Act, be vested in the Crown. Section 6 of the Act provides in general terms that a person will not divert or appropriate any water from any watercourse, lake or spring except in the exercise of the general right of all persons to use water for domestic purposes and ordinary use and for watering stock from any watercourse,lake or spring vested in the Crown and to which there is access by a public road or reserve. Otherwise special licences are required. A Water Board constituted under the Act has power to levy rates and charges and make assessments on a wide and potentially discriminating basis and section 36 provides that the owners and occupiers of the lands within a Water Area so declared shall alone be entitled to the supply of water unless surplus water exists. Section 21 entitles the Commissioner to agree with an owner or occupier of land to supply water to be used by him on that land provided that any agreement shall be for a term not exceeding fourteen years. Section 22 gives the Commissioner an unrestricted power to lessen the quantity of water supplied and to make orders regulating the order of priority in which and the quantities with which the various consumers shall be entitled to be supplied. This catalogue of provisions makes it clear that it is necesssary to set out in considerable detail what rights to take water mining companies have.

Existing local government arrangements are often inappropriate, especially in a case where a new town or towns are required to service the mining operation. It may be necessary for a new local authority to be constituted. At one time it was common for the companies to be given control of the authority for a considerable period of time. Although that concession is unlikely to be granted anymore it is still common for the government to agree that a separate division of an existing or newly constituted local authority be set up with a separate account so that on the one hand it is clear that the mining company's operations must pay their way insofar as the provision of local government

services are concerned, but on the other it is not necessary to subsidize unrelated parts of the local government area.

I thought it might be appropriate to make some specific mention of the need now to try and anticipate environmental attacks to the extent that is possible. It is submitted that these matters should be carefully attended to as part of any government agreement. State environmental legislation will no doubt be applicable. It may be the case that the Commonwealth will take an interest under the Commonwealth Environment Protection (Impact of Proposals) Act which, in the recent case of *Murphyores Inc. Pty. Ltd. v. Commonwealth* (1976) 9 A.L.R. 199, 50 A.L.J.R. 570, has been held to be valid to entitle the Commonwealth to make environmental considerations relevant in any decision it has to make in the exercise of any legislative power which the Commonwealth has, irrespective of whether that power is directed towards environmental matters at all. If an impact study would be required it is clearly desirable to have it done and to have it agreed as far as possible with the State itself so that the franchise agreement can provide for compliance with the recommendations of any impact study but that no additional requirement will be imposed by a State government beyond those specifically agreed to. Of course this will not always be possible at the time a franchise agreement is entered into.

The Aurukun Associates Agreement Act 1975 which relates to a proposed bauxite mining development near Weipa is an example of how this may be dealt with in such circumstances. In passing it is noted that the environmental provisions of that agreement appear for the first time in a separate part of a Queensland franchise agreement and rank in order as the first of the substantive parts of the agreement. Formerly the granting of the mining tenement and the right to mine held that place of honour!

The part provides that the companies are to make environmental studies in accordance with guidelines set out in a schedule to the agreement and provides for those studies to be furnished to the relevant Minister. The companies are prohibited from commencing any mining or development work until the Minister and the relevant statutory authorities have approved in writing the proposals of the companies in relation to those works for the proper care of the environment. If any dispute arises in relation to the proposals it may be referred to the tribunal constituted under the agreement and the agreement provides that where appropriate the conditions applied in connection with any approval may be imported into the terms of the mining tenements and other licences, leases, permits or rights granted under the franchise agreement.

It can be seen that many different departments of government will be involved in negotiations. This creates its own problems. One is the inevitable inconsistency of styles, of proposed methods of treatment of non-substantive matters. Hopefully the State legal officers will assist in the endeavour to achieve conformity of treatment, but this is a problem that only persistence can hope to overcome. More serious problems arise where there are differences of policy. For example the Forestry Department's concern for environmental factors can often conflict with the attitudes of the Mines Department. Treasury will quite

properly view matters from a standpoint different from that of other departments. The resolution of these oftentimes quite difficult internecine arguments which sometimes extend to ministerial level require the creation of an overall policy committee, which in Queensland is usually chaired by the Co-ordinator-General. Really such a policy committee should be involved as often as possible to keep everything on the rails.

A point worth mentioning in negotiating franchise agreements is the need to keep aware of parliamentary sittings. It is no use finishing negotiations just at the commencement of a long parliamentary recess, especially where time constraints are imposed in other areas such as joint venture agreements, development contract commitments etc. Election years (or the possibility of early elections) can magnify this problem. It is wise to keep this timing factor in mind at an early stage, to avoid last minute rushes.

4. ENFORCEMENT

I have mentioned earlier the importance of ensuring that an agreement has the force of law. Nevertheless it is clear that there are a number of legal remedies that are not available. It has been suggested that a Crown contract involving the provisions of public funds will be unenforcable until parliament has appropriated funds to satisfy it. In Australia it seems clear that a court will adjudicate on the merits even though the Treasury will not be able to satisfy judgement without general or specific appropriation.[7] The position as to general appropriation differs from State to State. The position in Queensland is that a specific appropriation is required, but that, in the absence of one, execution may be levied against State property if a judgment is not satisfied within a specified period of time.[8]

The preregative writs of certiorari (where a decision is quashed) and prohibition (where a body is prevented from proceeding further) are not available against the Crown, although there is authority that they may issue against departments and individual Ministers. Likewise a writ of mandamus will not issue against the Crown or against Crown servants acting directly as agents of the Crown.[9] Unlike the position in England however, it is clear that injunctive relief against the Crown will be available for breach of a contractual obligation.[10]

It has been argued that an action for breach of an agreement given the force of law has its character changed from an action for breach of contract to a tortious action for breach of statutory duty.[11] This would not be the case if the agreement were merely confirmed or authorised by statute without expressly being given the force of law.

See for example the distinction drawn by Farwell J in *Manchester Ship Canal Company v. Manchester Raceway Company*, [1900] 2 Ch. 352 at 362: "Of course, if the Legislature says to the parties, "Not only do we declare the agreement valid between you, but you shall perform it," then there is a statutory enactment over and above the agreement validated between the parties. . . "

In any event I have put forward above the concept of drafting an agreement within the statute, so that, clause by clause the parliament says "you shall perform it" expressly. Consistent with that, the parliament ought to say what consequences flow if the legislative mandate is ignored by either party involved, in the realm of damages, injunctive relief (including mandatory orders), the right of the other party to remedy the default and claim the cost of so doing, the right to terminate or suspend correlative obligations, and so on. Of course the mining companies will be more interested in examining the questions where it is the State that defaults, and there can be reluctance to attempt to spell out the consequences of State default (a reluctance often spawned by government unwillingness to concede its likelihood or its own accountability) but I believe these matters ought normally to be brought into the open and agreed upon: the courts will otherwise continue their reluctance to treat the government in the same manner as an individual or corporation when confronted with agreements of the breadth and scope that franchise agreements encompass.

An aid to enforcement which has been widely used in Queensland is the establishment of a special tribunal to hear and determine disputes arising out of franchise agreements. Hence in the *Central Queensland Coal Associates Agreement,* to take an example, a tribunal is set up which is to consist of a Supreme Court Judge or a Barrister of seven years standing appointed by the Governor in Council (in the later case on the recommendation of the Chief Justice). The tribunal is given power

(a) to decide and determine all matters which are required to be so determined under specific provisions; and

(b) to determine any dispute arising between the State and the companies concerning any casue or anything contained in the agreement or the meaning or construction of anything in it or the rights, duties or liabilities of either the State or the companies except those which are expressly stated to be in the discretion of the Governor in Council or are required to be agreed upon between the State and the companies or are expressed to be determined by any nominated person, for example the Commissioner for Railways; and

(c) to determine disputes similar to those mentioned in paragraph (b) above between the companies and various Crown and public instrumentalities.

The tribunal has inquisitorial powers under the Commissions of Inquiry Acts. Its orders are to be published in the Queensland Government Gazette, are binding and have the force of law. The use of the tribunal enables a summary determination of disputes without publicity. It is noted that the most recent Queensland franchise agreement, the Aurukun Agreement, goes two steps further by providing that an order of the tribunal is deemed to be an order of the Supreme Court and is enforcable as such, and also by including the equivalent of a *Scott v. Avery* clause.

The use of such a tribunal has the advantage of giving some opportunity for the building in of protection in the substantive provisions of agreements where very often especially in relation to location and construction of facilities

and standards absolute and detailed provision at the time the agreement is negotiated is impossible, objective criteria are difficult to find and the tendency is for the relevant government to want the final say.

Another advantage that I think the use of this procedure has is that if later disputes do get serious and a mining company really believes that the State government is not honouring its commitments, there is some sort of threshold of pain which a company has to experience before it is prepared to take the extreme step of going to court against the State government, because in the context of the franchise agreements, no matter how many things they cover there are other matters in which one is still in the hands of the government. I believe there is a lower threshold of pain in making a decision to have a matter referred to arbitration by a tribunal than to have to go through the public experience of making the decision to issue a writ.

A further problem of considerable significance in enforcement was raised by Dunn J. in the case of *The Commonwealth Aluminium Corporation Limited v. Attorney-General* [1976] Qd. R. 231. He raised the question whether the enforcement of a franchise agreement may not be justiciable at all by the Court: "It is by no means clear to me having regard to the scope of the Agreement and the many "political" promises which it contains. . . that the damage alleged is cognisable by the Courts" (at 262).

In expressing this misgiving he relies on certain statements in the judgment of Dixon C.J. in *South Australia v. The Commonwealth* (1962) 108 C.L.R. 130 at 140, suggesting that agreements between governments relating to broad matters of policy and extending over a period of time, in the particular instance an agreement between the State of South Australia and the Commonwealth as part of a Commonwealth-wide scheme to bring about a uniform railway track gauge throughout Australia, may in appropriate cases cross the line between "the exercise of jurisdiction reposed in the Court" and "a domain that does not belong to it namely the consideration of undertakings and obligations depending entirely on political sanctions." Similar observations can be found in other judgments in that case.

However, in my submission the two cases are fundamentally different: In the *Railway Agreement Case* the Court was dealing with a situation where two governments had entered into an agreement to operate over a long period of time which left many important things on the express basis that they remained to be agreed upon, and involved large expenditure of public money over many years, not an agreement between a government and a company which in material respects did not leave those matters open in such manner. Furthermore even in the *Railways Case* it was admitted that many of the rights that would arise could be legally enforced in cases where the definition of those rights was sufficiently expressed in the agreement.

The following passages from a paper by Sir Harrison Moore were quoted with approval by both Dixon C.J. and Dunn J: "The High Court of Australia has more than once affirmed the rights and obligations subsisting between individuals as the guide to the ascertainment of the legal rights of which the

Court has cognizance. That principle includes agreement as a category of right, but it would not include agreement of which the subject of the mutual undertaking is the exercise of political power. The agreements are not such as are capable of existing between individuals, their subject matter is the peculiar and exclusive characteristic of governments. Even an agreement of the Crown with an individual respecting the exercise of future discretionary powers – that they will or will not be exercised in a particular way – probably cannot be valid contract. . . The task of distinguishing the classes of agreement may not in all cases be easy, particularly in "mixed" agreements some of whose terms present one feature and some another. It is even possible that it may extend to exclude agreements in which every item could be conceived of as an agreement between individuals but which were so comprehensive and far reaching that on the whole they must be treated or removed from the category of individual or corporate agreements".

It is submitted that these passages do not deal with the case of an agreement between an individual and a government which itself is given the force of law by an enactment of Parliament. Nevertheless, the observations made by Dunn J. give cause for concern. Putting the agreement into the statute itself must, I believe, lessen this opportunity for the courts to refuse to give relief. It may further be desirable to include express reference to the fact that its terms are justiciable (to the extent this is not inconsistent with the use of a tribunal of similar arbitral body to determine disputes). Further, for this reason as well as others, the greater the precision that can be arrived at in defining each party's obligations the safer the agreement will be from attack. In the final analysis, however, I think we should look more and more to defining the remedies that are intended to be available rather than leave it to the court to adopt remedies that have been fashioned in vastly different circumstances.

5. ENTRENCHMENT

The above discussions on enforcement deals with a situation where the state breaches an agreement without trying to protect itself. It is unfortunately necessary to consider provision for a situation where the state wishes to repudiate one or more of the terms of a franchise agreement and seeks parliamentary authority to do so, relying on the fundamental British constitutional principle that parliaments cannot bind their successors. Of course, mining companies entering into commitments under franchise agreements want the Parliament to do just that.

A discussion of the extent to which they can succeed in that desire must begin at section 5 of the Colonial Laws Validity Act 1865 which reads in part "every representative legislature shall in respect to the colony under its jurisdiction have and be deemed at all times to have had full power to make Laws respecting the constitution powers and procedure of such legislature: Provided that such Laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament letters patent Order in

Council or colonial Law for the time being in force in the colony".

The effects of Section 5 were considered by the High Court in the case of *Taylor v. The Attorney General for Queensland* (1916) 23 C.L.R. 457. The Court was asked to investigate the validity of the Parliamentary Bills Referendum Act of 1908 which provided that where a Bill passed by the Legislative Assembly in two successive sessions has in the same two sessions been rejected by the Legislative Council it may be submitted by referendum to the electors and if affirmed by them shall be presented to the Governor for assent. The Court upheld the validity of this provision on the basis of Section 5 of the Colonial Laws Validity Act and hence decided that a colonial legislature could reduce itself to one house.

The same section was also considered in the case of the *Attorney General of New South Wales v. Trethowan* [1932] A.C. 526, (1931) 44 C.L.R. 394. The case dealt with an attempt by the New South Wales Parliament of 1929 to preserve by the insertion of Section 7A in the Constitution Act the existence of the Legislative Council by providing for a referendum before it could be abolished. The Privy Council upheld a majority decision of the High Court to the effect that Section 7A was validly enacted since it laid down a manner and form requirement for legislation pertaining to the constitution of the legislature.

The following passage from the judgment of the Privy Council throws light upon the operation of the 1865 Act in enabling the colonial Parliament to require a referendum for certain purposes:–

> "Reading the section as a whole, it gives to the legislature of New South Wales certain powers subject to this, that in respect of certain laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the Statute Book. . . The enactment of the Act of 1929 was simply an exercise by the legislature of New South Wales of its power (adopting the words in s.5 of the Act of 1985) to make laws respecting the constitution, powers and procedure of the authority competent to make the laws for New South Wales."[12]

On the basis of these decisions it would seem to be open for a State parliament properly to provide in an Act giving a franchise agreement the force of law that any subsequent inconsistent legislation including an Act modifying or repealing the franchise agreement Act itself could only pass provided a certain manner and form was observed, and it would then be a matter for ensuring that the appropriate manner and form required the consent of the contracting company.

The problem with this is that the term "powers of the colonial legislature" as contained in section 5 have been somewhat narrowly construed. In *South East Drainage Board v. Savings Bank of Australia* (1939) 62 C.L.R. 603, the High Court had to deal with the inconsistency between the South Australian Real Property Act of 1886 and the subsequent South Eastern Drainage Acts. The earlier Act purported to bind future legislatures in that for the repeal of any of its provisions to be effective, the words "notwithstanding the provisions of the Real Property Act 1886" must appear. It was held that that provision was not a law respecting the constitution, powers or procedure of the legislature.

Further support for this narrow view is contained in the decision of *Clayton v. Heffron* (1960) 105 C.L.R. 214. The Legislative Assembly in New South Wales attempted to use the deadlock procedure of section 5B of the Constitution Act of 1902 to abolish the Legislative Council. Section 5B provided for a free conference of managers, a joint sitting of both houses for discussion and a referendum. The High Court upheld the validity of section 5B but preferred to look for the source of authority to enact that legislation not in section 5 of the Colonial Laws Validity Act but in section 5 of the New South Wales Constitution Act which gave to the New South Wales Parliament the power "to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever." The majority judgment expressed some doubt as to the inference to be drawn from *Taylor's Case* as to whether in this case the substance of section 5B fell within the words "respecting the constitution, powers and procedure of such legislature". *Clayton v. Heffron* is, however, authority for the proposition that the power of the State legislature to make laws for the peace, welfare and good government of the State included constituent as well as ordinary legislative power.

In the English case of *Vauxhall Estates v. Liverpool Corporation* [1932] 1 K.B. 733, the Court had to decide between inconsistent sections of the Acquisitions of Land Act 1919 and Housing Act 1925 when the former Act had attempted to render void any inconsistencies with its own provisions. The Court denied any suggestion that such a provision demanded an express repeal and voiced the principle that no Act can seek to render inoperative subsequent legislation. The case of *Ellen Street Estates v. Minister for Health* [1934] 1 K.B. 590, also dealt with the same provisions of the 1919 Act. Maugham J. said, "The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal" (at 597). In *British Coal Corporation v. The King* [1935] A.C. 691, the Privy Council upheld this principle in relation to the Statute of Westminster. What these cases do not decide however is the ability of Parliament to reconstitute itself in a different form. It is submitted that a State legislature does have the power to modify itself for certain purposes and hence has the power to entrench a franchise agreement. That this conclusion is a valid one finds support from the judgment of Clark J. in the Tasmanian case *Re Sculley* (1937) 32 Tas. L.R. 3 at 37: "Parliament can so mould its own constitution as to make Parliament consist of different elements for the purposes of legislation upon different subjects." It is to be noted that this power of the legislature to alter the law affecting itself would not extend to provisions which would make it practically impossible or at least very difficult to change the law on a given subject as this would amount to an attempt by Parliament to bind itself as to substance. Likewise it seems generally accepted that the power does not extend to authorise the elimination of the representative character of the legislature nor it is argued can the Crown be removed from its role in the legislative system. In this context reference can be made to the judgments of the Supreme Court of

South Africa in *Harris v. The Minister of the Interior* [1952] 1 T.L.R. 1245. The Court held that the Statute of Westminster 1931 and the Status of the Union Act 1934 which embodied its provisions made the Union Parliament a sovereign legislature so that a requirement of the South African Act of 1909 that in certain cases a bill for amendment or repeal of the Act must be passed by both Houses sitting together by a two thirds majority was held to be operative, and the validity of the bill to alter the rights of coloured voters was successfully challenged on the grounds that the procedures which entrenched these rights had not been followed. This view of the power of the legislature to alter its structure to add and subtract elements for different purposes is given sanction in a dictum of Dixon J. in *Trethowan's* case where he spoke of the possibility of the U.K. Parliament incorporating a referendum in its legislative procedure for various purposes: (1931) 44 C.L.R. 394 at 426.

The issues were raised recently in the *Commonwealth Aluminium Corporation Case.* Section 4 of the Act which authorised the making of the agreement provided that the agreement may be varied pursuant to an agreement between the Minister for the time being administering the Act and the company with the approval of the Governor in Council by Order in Council, and that no provision of the agreement shall be varied nor the powers and rights of the company under the agreement be derogated from except in such manner. It further provided that a purported alteration of the agreement not made and approved in such manner should be void and of no legal effect whatsoever. Mirror provisions were made in the agreement itself. However in 1974 the Queensland Parliament enacted the Mining Royalties Act under which regulations were made having the effect of increasing royalties payable by the company beyond those which were provided for in the 1957 agreement. The 1974 Act introduced a new s70A into the Mining Act. It provided that, where there was an inconsistency between the royalty regulations and the provisions of an agreement made with the State of Queensland, the regulations should prevail. It was further provided in the amending Act that no action was to be brought by reason of its enactment or anything done under its authority, or under the authority of the regulations authorised to be made.

It is of interest to note that the 1957 agreement had been amended previously by agreement in accordance with the provisions of section 4 of the Act to alter the royalties. In 1974 no such agreement had been made.

The Queensland Full Court by a two to one majority held that the Mining Royalties Act of 1974 was valid to effect the amendment to the royalty provisions of the 1957 agreement. Wanstall S.P.J. based his conclusions to this effect on two grounds, viz:

(a) Section 4 of the 1957 Act was not doubly entrenched; that is it did not expressly say that the Act itself could only be varied except in the prescribed manner and accordingly could be repealed by implication to the extent necessary to give the 1974 enactment force.

(b) The provisions of the 1957 Act did not purport to lay down a manner or a form to be observed by Parliament but purported only to restrict the executive arm of government from amending the agreement other than in compliance with its provisions.

Dunn J., who agreed in the conclusions of Wanstall S.P.J., based his decision primarily on the second of those grounds: "When the structure of this agreement and the scope and purpose of the Act are understood the provisions of section 4 enabling variation of the agreement and prohibiting variation except as provided for by the section are to be understood as a legislative demand directed to the executive and the plaintiff and not as a restraint upon the legislative power self imposed by the legislature. Just as it may by repealing the Act deprive of force the promises from which the "powers and rights of the company under the agreement" are derived so it may deprive them of force by enacting legislation which is inconsistent with or conflicts with those promises": [1976] Qd. R. 231 at 260. Hoare J. dissented. He held that insofar as the 1957 Act purported to restrict the power to amend the agreement which had the force of law it was necessarily a law respecting the constitution, powers and procedure of the Legislature of Queensland within the meaning of section 5 of the Colonial Laws Validity Act, and accordingly because the 1974 Act enacts provisions which conflict with the 1957 Act in that respect it necessarily follows that it likewise is a law respecting the powers and procedures of the Legislature of Queensland. Likewise he held that section 4 by setting out precisely in what manner the agreement which had the force of law is to be varied it necessarily lays down the manner and form in which an amendment may be made. He held that the law was effective pursuant to section 5 of the Colonial Laws Validity Act.

The reasoning of the majority does not preclude the argument put above that provided one is careful to doubly entrench a provision and to draft it as varying the constituent body having the law making power over the State in respect of certain matters the company can enforce a franchise agreement against the State even in the face of an attempt by the "traditional" Parliament to alter the obligations of the State or company.

There are however several other hurdles to be considered. One peculiar to Queensland is provided by Section 3 of the Queensland Constitution Act Amendment Act 1934, which prevents the establishment of any legislative body in addition to the Legislative Assembly. Its purpose was to prevent the re-establishment of an Upper House. That Act which is clearly one with respect to the constitution, powers and procedure of the State Legislature is in itself doubly entrenched in the manner held valid in *Trethowan's Case*. Accordingly, at least in Queensland, it is necessary to provide an entrenchment clause that does not infringe the provisions of section 3 of the Constitution Act Amendment Act of 1934, that is, it is necessary to re-constitute the legislature for the purpose of enacting laws affecting a franchise agreement in a manner that does not create another legislative body in addition to the Legislative Assembly. It is thought that an appropriate certificate or consent by a person representing the relevant company can achieve that result although the question is hardly free

from doubt.

A further problem arises in that if a double entrenchment provision is to be effective, it must be able to be enforced in the courts and various cases give different indications as to the types of courses available and the locus standi of individuals to take action to restrain a government from acting contrary to the entrenchment requirements.

In *Trethowan's Case* the courts were persuaded to order that the proposed Act of 1930 aiming to repeal the entrenchment section (Section 7A) of the New South Wales Constitution and to abolish the Legislative Council could not be presented to the Governor for assent. In *McDonald v. Caine* [1953] A.L.R. 965, the Supreme Court of Victoria declared that a Bill for electoral redistribution which had not satisfied the constitutional requirement of an absolute majority could be prevented by that Court from being presented to the Governor, though in that case the Court held that such a declaration was unwarranted. Furthermore, in *Tonkin v. Brand* [1962] W.A.R. 1, the Supreme Court made a declaration that the defendants were under a duty to advise the Governor to issue a proclamation under the provisions of the Electoral Districts Act, 1947 to 1955.

However, the High Court in *Clayton v. Heffron* took a different line. The majority judgment suggested that the Court "can have nothing to do with an attempt to secure the intervention of a court of equity in a legislative process on the ground that the procedure is misconceived or alternatively has not been correctly pursued. . . The process of law-making is one thing: the power to make the law as it emerged from the process is another. It is the latter which the Court must always have jurisdiction to examine and pronounce upon": (1960) 105 C.L.R. 214 at 234-5. That Court distinguished *Trethowan's Case* on the grounds that it dealt with a specific statutory prohibition on presentation of such a Bill to the Governor without the required referendum. The question therefore revolves around the particular manner in which the statute is drafted.[13] The willingness of the Court to accept such matters as justiciable at this earlier stage is variable: see for example *Comack v. Cope* (1974) 3 A.L.R. 419, 38 AL.J.R. 319, *Western Australia v. The Commonwealth* (1975) 7 A.L.R. 159, 50 A.L.J.R. 69, and *Victoria v. The Commonwealth* (1975) 7 A.L.R. 1, 50 A.L.J.R. 7. Clearly if it is desired to have a court intervene one should say so in the Act and define the circumstances.

The question of the locus standi of a plaintiff has also received inconsistent treatment in Australian Courts. In *McDonald v. Caine* the plaintiffs were members of the Legislative Assembly and the Supreme Court of Victoria held that each had sufficient interest to take proceedings. In *Tonkin v. Brand,* Wolfe C.J. expressed no opinion on the locus standi of the plaintiffs as members of Parliament, arguing that their position as voters gave them sufficient interest to take this action. In *Trethowan's Case* the locus standi of the plaintiffs was excluded from the issues before the High Court and the Privy Council. In *Clayton v. Heffron,* however, the High Court doubted that such an action could be brought by plaintiffs "whose only interest is either as holders of offices of

which the Bill if validly enacted might deprive them or as a taxpayers that is members of the public or in two cases members of other legislative bodies" (1960) 105 C.L.R. 214 at 233. Again the remedy is in the hands of the draftsman who seeks to achieve an effective and workable double entrenchment provision.

In an area where unilateral action by governments in breach of undertakings made by them or their precedessors and the possibility of retrospective legislation are no longer unthinkable, there is good cause for giving careful consideration to the protection which a company can achieve if so minded. On the other hand, the liability of a project can be so affected by broader government decisions, both domestically and internationally, that the question of double entrenchment or not may not be a life or death issue. It has been suggested that perhaps the question of double entrenchment in the form that now seems necessary following on the *Comalco Case* is something that is a little academic in that no government is likely to agree to the inclusion of a clause of the detail and in particular of the substance which would be necessary. That may or may not be so but in my view for a government to have to acknowledge that it is not prepared to commit itself in the future to avoid a change in all the ground rules of the franchise government is a serious matter and if it does nothing more, the admission by a government of that fact, when refusing to include a double entrenchment clause, may well give one some negotiating power in some other directions.

Franchise agreements are not simple documents to settle; they are drafted to meet the requirements of a number of government departments and instrumentalities and (often) a number of company divisions and officers. They seek to deal with a maze of existing laws and to operate over long time spans. The fact that a single agreement can be successfully forged in such circumstances is in some measure a tribute to the fortitude of the parties who enter them on both sides. It also highlights the great value inherent in an agreement which has survived these difficulties to attain the status and effect of an Act of Parliament. That intrinsic value ought to command detailed and comprehensive persistence in the drafting of its individual provisions, and in the maintenance of its substance in fact free from the vicissitudes that affect economic, fiscal, revenue and other environments in which petroleum and mining industry operate.

It is interesting to note that in the *Comalco Case,* Hoare J. referred quite expressly in his judgment as a relevant matter influencing his opinion to the fact that the mining company concerned in good faith had entered into long forward commitments and expended large sums of capital in reliance upon the promises set out in the franchise agreement.

In another case, *Placer Development Limited v. The Commonwealth* (1969) 43 A.L.J.R. 265, which concerned an agreement between the Commonwealth Government and a Papua New Guinea timber company, Windeyer J. said, "A basic assumption of our law is that bargains are to be kept. This applies today to the contracts which the Crown makes with its subject as forcefully as it does to contracts between subject and subject" (at p.273). It is

perhaps a little disappointing to note that both the judges to whom I have referred were in the minority in the cases where they made those statements. The job in drafting and negotiating franchise agreements is to give as much ammunition as possible to judges of like mind to persuade their brothers to the same way of thinking.

Footnotes

1. Per Dixon C.J., *South Australia v. The Commonwealth,* (1962) 108 C.L.R. 130 at 141.
2. *Amphrite* [1921] 3 K.B. 500, *Cory (William) & Sons Ltd v. London Corporation* [1951] 2 K.B. 676.
3. See for example the discussion by P.W. Hogg "The Doctrine of Executive Necessity and the Law of Contract" (1970) 44 A.L.J. 154 and Mitchell, *The Contracts of Public Authorities* (1953).
4. *Gatineau Power Co. v. Fraser Companies Ltd* [1941] 2 D.L.R. 487; *R. v. Midland Railway (1887)* 19 QBD 540; *Davis v. Taffnale Railway* [1895] A.C. 542; *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260.
5. *In re Verral* [1916] 1 Ch. 100 at 111.
6. Income Tax Assessment Act Amendment Act, No. 205 of 1976.
7. *New South Wales v. Bardolph (1934)* 52 C.L.R. 455.
8. The Claims Against the Government Act, 1866.
9. *R. v. Scherger (1957)* 99 C.L.R. 496.
10. *McLean v. Rowe (1925)* 25 S.R. (N.S.W.) 330.
11. Enid Campbell, "Legislative Approval of Government Contracts" *(1972)* 46 A.L.J. 217.
12. [1932] A.C. 526 at 539-540.
13. See G. Sawyer, "Injunction Parliamentary Process and the restriction of Parliamentary Competence" 60 L.Q.R. 83.