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## **An Overview of the Australian Legal Framework for Mining Projects in Australia**

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## 1 Introduction

The mining industry in Australia is enjoying a period of boom with conditions unparalleled in Australian history. Much of this is being driven by the demand from China to secure supplies of raw materials for the Chinese industrial expansion.

A key factor of the Australian mining industry has been the systematic development of a legal framework which aims to protect miners and secure their interests; especially when moving from exploration to development and operational stages. In this regard, it is noted Australia was named as the world's most secure location for mining investment in the Behre Dolbear 2005 survey<sup>1</sup>. Amongst other matters, compelling reasons for investing in Australia include the availability of vast natural resources, its stable social and political system and its proximity to Asia Pacific markets. However, also important is the transparency of Australia's legal mining framework, which underpins investment in the sector.

This paper provides an overview of key legal features of Australia's mining system and aims to demonstrate the advantages of Australia's open mining regime. In this regard, the paper considers:

- (a) the Australian legal system and foreign investment regime;
- (b) the framework of laws which secure a miner's interest to extract minerals; and
- (c) some other areas of specific interest – environmental considerations and native title issues.

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<sup>1</sup> Behre Dolbear & Company, Inc, *2005 Ranking of Countries for Mining Investment Where "Not to Invest"* found at [http://www.dolbear.com/Publications/CountryRankings\\_os.pdf](http://www.dolbear.com/Publications/CountryRankings_os.pdf)

## **2 Background - sources of law in Australia**

### **2.1 Government investment policy**

Before considering Australia's legal mining framework, it is important to understand the overall policy parameters which govern investment (including large scale offshore funding for mining projects).

In this regard, it is noted that all tiers of Government actively encourage foreign investment in Australia. A proactive foreign investment regime, coupled with a well defined system of laws and procedures, is seen as fundamental in encouraging large scale investment in major mining projects. In part, this is achieved through a regime which does not prohibit foreign investors from acquiring interests in mining tenements in Australia.

Having said that, it is important to note that certain investments in Australia require notification to the Foreign Investment Review Board (FIRB). In particular, proposals to establish new businesses involving a total investment of AUD\$10 million or more, investments into existing businesses worth at least AUD\$50 million and certain acquisitions of land (including interests in land) will need to be notified to FIRB. However, consistent with Australian Government's foreign investment guidelines, in practice, it is rare for objections to be raised in relation to proposals for offshore investment mining ventures (as the policy objective of FIRB is to protect Australian national interests – which are usually well served by increased foreign investment in the sector).

In broad terms, Government policy is aimed at providing an open inward investment structure in Australia (which is not otherwise restricted by layers of regulation). A favourable foreign investment culture is important in providing the impetus required to fund large scale mining projects (which often need significant financial support

from offshore lenders). It is a culture which is endorsed by all levels of Government; irrespective of political persuasion.

## **2.2 The Australian federal system and its impact on mining laws**

Any analysis of Australia's mining laws also requires a brief overview of the nations' system of Government. In this regard, Australia's constitution provides for a federal system of Government. This results in a division of jurisdiction over mineral resources between two levels: Commonwealth and State (and there are 7 States and 2 Territories). Onshore mining is primarily a State Government matter, although the development of a mining project will require consideration of certain Commonwealth laws.

It should be noted that the scope of a State's powers are ultimately subject to Australia's written Constitution (which sets out the division of powers between States and the Commonwealth). While most mining related legislation is made by the States, some ancillary issues (such as indigenous affairs) are regulated by the Commonwealth, which also oversees general matters such as finance and trade.

In practice, the divisions of powers between the two levels of Government are generally clear and unambiguous. It is noted that Commonwealth powers are concurrent, not exclusive to, the powers of the States (but Commonwealth powers prevail where the States and Commonwealth legislate on the same matter).

It is also important to note that all laws of the Commonwealth and States are interpreted subject to the common law i.e. a well established yet evolving system of precedents which are generally applied with consistency across all tiers of Government.

### **3 The legal framework supporting mining in Australia**

#### **3.1 State mining laws and legislation**

With authority to regulate their own mining regime (as discussed above), each State has enacted specific legislation to provide the legal and administrative framework to support the sector. Whilst State legislation is not uniform in this area, it is noted that similar regulatory approaches are adopted in each jurisdiction. In this context, we focus specifically on Western Australia for the purposes of this paper (but note similar systems of control are adopted in other States).

In broad terms, entitlements to mine in each State, and systems of control to secure a miner's interest in a mineral deposit, are regulated by:

- (a) the Mining Acts<sup>2</sup>, which enable the States to grant licences and/or mining leases over a defined area (see section 3.2); or
- (b) a State Agreement, developed for a particular large mining project (see section 3.3).

#### **3.2 Licences and mining leases acquired under the Mining Acts**

The respective State Mining Acts primarily deal with entitlements to mine on State owned land, in addition to private land. Generally, such laws prescribe the conditions for acquiring particular mining interests (and will thereafter protect such interests once acquired), with Governments adopting a common licensing system for the administration of mineral deposits.

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<sup>2</sup> New South Wales: *Mining Act 1992 and the Petroleum (Onshore) Act 1991*; Victoria: *Mineral Resources Development Act 1990*; South Australia: *Mining Act 1971*; Queensland: *Mineral Resources Act 1989*; Western Australia: *Mining Act 1978*; Tasmania: *Mineral Resources Development Act 1995*.

When analysing the licensing system, it is necessary to consider the three essential stages for the development of mines in Australia: the initial exploration stage, the further detailed exploration and assessment stage, and the mining stage. The type of licence issued by the State will generally depend, in large part, on the stage of development of the particular project. In this context, it is also important to note Australian law regards prospecting and exploration for minerals as part of the overall mining process. This concept of an overall and interconnected mining process then underpins protections afforded to miners moving from exploration to development phases, i.e.: a priority right to move between classes of licences gives an investor an ability to protect an investment in exploration activities by providing some certainty that rights to mine will follow (see further discussion below at section 3.2.2).

To support the analysis contained in this paper, we attach at Annexure 1 a flow chart summary of the mining leases and licensing regime applicable in Western Australia.

### **3.2.1 Types of mining licences and leases**

In broad terms, the types of mining licences which are granted will include the:

- (a) Prospecting Licence, allowing the holder to prospect for minerals and gives priority for a grant of a mining or general purpose lease;
- (b) Exploration Licence, which, as with the Prospecting Licence, allows the holder to explore for minerals and thereafter gives the miner priority for a grant of a mining or general purpose lease ;

- (c) Retention Licence, allowing the holder to further explore for minerals and gives priority for a grant of a mining or general purpose lease;
- (d) Mining Lease, providing a miner with a right to work and extract minerals from the land;
- (e) General Purpose Lease, usually granted for the purpose of erecting, placing and operating machinery related to mining operations, depositing or treating minerals, or other specified purposes directly connected with mining operations; and
- (f) Miscellaneous Licences, generally granted for the purposes of providing infrastructure in support of mining operations.

Types (a) to (d) are discussed below in further detail.

### Prospecting Licence

A Prospecting Licence will usually be granted by the State where an applicant seeks to commence initial exploration activities.

This type of licence will confer on the holder the following rights<sup>3</sup>:

- (a) a right to enter a specified area for the purpose of prospecting for minerals in, on or under the land;
- (b) a right to prospect for minerals and to carry on such operations and such works as are necessary for that purpose, including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for to further investigate mining options;

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<sup>3</sup> Ss48 & 49(1) of Mining Act 1978 (WA)



- (c) a right to excavate, extract or remove from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, as does not exceed a prescribed limit; and
- (d) upon completion of investigations, a right to apply for, and to have granted, one or more mining leases (or a general purpose lease in respect of any part of the land the subject of the prospecting licence).

Application for a Prospecting Licence is a simple and straight forward process. An applicant need not prepare a detailed working program, except for a written description of the area of land over which the licence is sought (accompanied by a map which clearly delineates the boundaries of that area<sup>4</sup>).

The term of a Prospecting Licence is relatively short, and the holder is not allowed to apply for another prospecting or exploration licence over the same area of land within 3 months from the expiration of an earlier licence.

### Exploration Licence

As with a Prospecting Licence, the Exploration Licence will be granted by the State in support of a miner wishing to conduct preliminary studies on the feasibility of an area for mining of mineral deposits.

The rights granted under such Exploration Licences are substantially the same as provide for in respect of the Prospecting Licence<sup>5</sup> (including the important right of granting the holder a priority to apply for a grant of a mining lease or general purpose lease over the specified area if exploration activities prove up a viable reserve).

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<sup>4</sup> S41(1) Mining Act 1978 (WA)

<sup>5</sup> Ss66 & 67(1) Mining Act 1978 (WA)

The application process is more complicated in comparison to that applying to Prospecting Licences. Specifically, the applicant must include in the application a working program setting out details of proposed exploration activities to be carried out in the area, the estimated amount of money proposed to be expended on the exploration and the technical and financial resources available to the applicant<sup>6</sup>.

Public notification of the application is required by, for instance, advertisement in a local newspaper. Any objections are to be lodged with a relevant Minister within a prescribed number of days after publication, and dealt with in public hearings in Court (with the Court then required to make recommendations to the Minister on whether to grant the Exploration Licence).

If relevant in a particular case, the applicant of an Exploration Licence may be required to pay compensation to the land owner/occupier where activities:

- (a) damage the land surface;
- (b) place restrictions on an existing right of way;
- (c) cause damage to improvements; or
- (d) otherwise cause deprivation of use of the land, loss of earnings or social disruption.

The amount of compensation payable is calculated independently from the value of minerals located on the land.

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<sup>6</sup> S51(b) Mining Act 1978 (WA)

Exploration Licences are generally granted for a period of five years, with an initial renewal thereafter of one or two years and then one further and final renewal of one or two years. In exceptional circumstances, the Minister may exercise a discretion to grant a further period of extension. These time periods are generally regarded as sufficient for the purposes of conducting the necessary tests and investigations. However, all Exploration Licences are subject to reductions in area (“relinquishments”) from the third year onwards<sup>7</sup> where no progress is made in moving to develop an area for mining.

### Retention Licence

A Retention Licence will generally be sought where the licence holder has discovered minerals during initial exploration, but wishes to postpone further development until mining in the specified area becomes economically viable. This stage may be eliminated altogether where a miner is financially capable of moving directly from an Exploration Licence to a Mining Lease.

Application for a Retention Licence is similar to an application for Exploration Licence. In this regard, the applicant must submit detailed working programs and notify relevant third parties. In addition, the application must be accompanied by a statutory declaration confirming that:

- (a) there is an identified mineral resource in the area in respect of which the licence is sought; and
- (b) mining of that identified mineral resource is for the time being impracticable for any of the following reasons:

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<sup>7</sup> S65 Mining Act 1978 (WA)

- (i) the identified mineral resource is uneconomic or subject to marketing problems, although that resource may reasonably be expected to become economic or marketable in the future;
- (ii) the identified mineral resource is required to sustain the future operations of an existing or proposed mining operation; or
- (iii) there are existing political, environmental or other difficulties in obtaining requisite approvals.

A Retention Licence confers on the holder similar rights and obligations as are contained in an Exploration Licence (including priority rights to move to a Mining Lease provided the miner maintains the Retention Licence).

In practice and despite their availability, Retention Licences are not commonly sought by miners, who are usually able to secure finance during the initial exploration stage.

### Mining Leases

If drilling proves successful and generally where a miner has secured sufficient funds to develop a project, application will be made for a formal Mining Lease. If already holding a Prospecting Licence or Exploration Licence, the miner will be able to convert this interest in priority to any other third party who may also be interested in mining a particular area.

Mining Leases are regarded as the most valuable mining interests (often being granted for substantial periods with extensive rights of renewal; usually over a much larger area than is initially claimed).

Unlike Prospecting Licences or Exploration Licences, Mining Leases give the miner a real interest in land and a right to extract minerals.

An applicant for a Mining Lease must provide outlines or particulars of the mining development proposals. Public notification is also necessary, providing a degree of transparency as to the awarding of mining rights.

There is generally a limitation on the effective area of any Mining Lease; to be not more than 10 square kilometres in total<sup>8</sup>.

Once an application is granted, a State appointed authority will generally issue a formal lease (setting out the miner's specific rights and obligations). The mining lease will usually specify a term, rent, expenditure requirement and royalty payable (with the later component being particularly important for State Governments as a source of revenue).

Importantly, the Mining Lease will give the miner an absolute right to extract minerals from the land for profit, i.e.: on the grant of the Mining Lease, the miner will be entitled to sell minerals extracted or take production in kind. The miner is then obliged to maintain the Mining Lease by complying with the prescribed expenditure and reporting obligations applicable to the land. The expenditure requirement ensures that sufficient funds are spent to justify the concessions granted to the miner, and generally specifies that a certain amount of money must be spent on a mining tenement.

Compensation generally is payable for mining activity conducted under a Mining Lease (on a similar basis as is discussed above in respect of Exploration Licences). In this regard and where open cut or surface

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<sup>8</sup> S73 Mining Act 1978 (WA)

mining is planned, it is common practice for the miner to purchase the property on which the mine is to be located.

The term of any leases or licenses granted in this mining stage are generally very long compared to an Exploration Licence or Prospecting Licence. Further extensions of a Mining Lease are also possible (unless the holder fails to comply with the conditions imposed, rendering the grant liable to forfeiture by the State).

### **3.2.2 Security when moving from exploration to mining**

As noted above, exploration and then mineral extraction are regarded as part of the overall mining process, with exploration licence holders given priority to move to formal mining leases on proving up a reserve. State laws prescribe the manner in which miners are able to protect an interest in land from the exploration to operational phases (with miners effectively guaranteed further rights in land). For instance, in Western Australia, regulation provides that holders of prospecting, exploration and retention licences have the right to apply for and to have granted to them mining leases over the lands covered by their initial licences (such that there is a seamless transfer of miner's interest in the land) – this right sits in priority to those of third parties.

### **3.2.3 Registration of mining licences and leases**

In general terms, States maintain a registrar of mining licences and leases granted over land. For instance, in Western Australia a dealing in rights under a licence or lease will not be effectual until formally registered. A dealing in a mining licence or lease which is not registered may be postponed to the interest of a party that has acquired a subsequent registered interest. Nevertheless, an unregistered dealing may be valid and enforceable as between parties to the dealing.

The system of registration provides control and transparency in support of the overall mining licence and lease system.

#### **3.2.4 Benefits of the Australian mining licence and leasing regime**

The licensing system provides a clear means through which ownership of the minerals is transferred from the State as the owner to the private miners who are then able to engage in mining operations. This system is an important cornerstone of Australia's open mining system. Provided that licence conditions are complied with, a miner is given a degree of certainty as to its rights over a deposit. Such certainty is important to enable investment in a project (with funding often being provided by third parties).

The Australian mining sector has developed and grown in the context of an open and transparent licensing system. Of significant importance is the ability for participants to move from exploration to mining phases with certainty in the manner discussed above at section 3.2.2; i.e. having spent considerable monies on exploration activities, a miner then has certainty that it will be able to extract deposits to enable a return on its investment.

### **3.3 State Agreements**

In addition to the licensing and mining lease regime and as noted above, State Governments in Australia also use "State Agreements" as a legal foundation to facilitate development of major mineral and energy resource projects.

State Agreements are agreements that negotiated between the applicable State Government and a developer. The State Agreement will set out the rights and obligations of both parties throughout the life of a significant development project.

They are contingent on a prospective developer demonstrating in respect of a known area of mineral deposits, an ability to finance a project and provide a logical and coherent development proposal. In this context, it is essential that a miner show to the Government commitment to a project by clearly demonstrating:

- (a) preparation of a feasibility study to define the project (and a detailed indication of issues to cover in a development proposal);
- (b) the addressing of environmental and indigenous issues; and
- (c) clear identification of the developer and equity participants.

Once negotiated and settled, the State Agreement will be ratified by Parliament. This ratification ensures that the terms of the State Agreement override any inconsistent provisions in any other law. In addition to providing a clear right to mine, a State Agreement allows all requirements of a major development project to be managed under a single enactment, including the orderly development of towns, ports and other infrastructure.

Whereas mining leases and licences deal separately with the phases of a development, a State Agreement may cover all aspects of a project from exploration to mining operation (but, in practice, will usually only be negotiated after extensive preliminary exploration activities). A State Agreement will also contemplate the granting of a mining lease or licence as one of its terms.

A flow chart setting out the processes to follow in negotiating a State Agreement and development proposal is set out in Annexure 2.



### 3.3.1 Indicative terms of a State Agreement

Once executed, indicative terms of a State Agreement may include the following:

- (a) mining area – specified by attachment of a geographical map;
- (b) ratification and operation – confirmation that the State Agreement will operate to take effect on signing, despite any enactment or other law;
- (c) obligations of the miner – to include a requirement to undertake continued studies on all aspects of a mine project; the submission of detailed development proposals; commitments to comply with applicable native title and environmental laws; and provision to the State of evidence of the availability of finance and opportunities to commercialise the extraction of minerals;
- (d) obligations of the State – to include on approval of the miner’s proposals, the grant of a mining lease in agreed form; where required, the granting of other leases and licences to support mining operations; and a commitment to make available land for infrastructure support facilities;
- (e) a regime of royalty payments– the methodology for calculation and payment of royalties is usually specified in some detail;
- (f) termination rights and obligations on the occurrence of certain events;
- (g) dispute resolution procedures;

- (h) term – e.g.: the State Agreement operates for 50 years from the commencement date; and
- (i) any State benefits granted in conjunction with the project e.g.: the State Agreement may exempt the project from stamp duty or other applicable State taxes.

### **3.3.2 State Agreement and development proposals**

The requirement to prepare and submit a development proposal is a key component of a State Agreement.

In this regard, modern State Agreements have two broad phases of approval:

- (a) registration and execution of the State Agreement and its ratification by Parliament (described above); and then
- (b) the approval of development proposals around which State Agreements are written.

Development proposals provide the mechanism by which commitments are entered into between parties during negotiations; and thereafter applied in the actual implementation of a project.

Once settled after negotiations between the prospective miner and Government representations, a development proposal will be submitted to the relevant Minister for final approval (but with the Minister unable to approve a proposal until other primary issues have been finalised, including any environmental approval, finalisation of any native title agreements and the granting of any heritage clearances). Once approved, the development proposal will be binding on all parties to the State Agreement.

In broad terms, a development proposal submitted to the Minister for undertaking a project will include details of implementation arrangements for:

- (a) the mining and recovery of minerals;
- (b) any beneficiation or further processing of minerals;
- (c) mineral transportation (usually by rail and/or shipping);
- (d) accommodation and ancillary facilities for the mine workforce;
- (e) utilities supply;
- (f) use of local labour, professional services, manufacturers and suppliers;
- (g) residue disposal;
- (h) the basis upon which the miner will finance a project; and
- (i) such applications for further mining leases as are required to be granted to it for the purposes of its proposed operations.

### **3.3.3 Reporting Requirements**

Once executed, a miner will be obliged to comply with the terms of the State Agreement (including applicable reporting obligations). In this regard, a miner will generally be subject to three types of reporting obligations:

- (a) annual reports in relation to exploration activities in defined mining areas;

- (b) quarterly investigation reports on mining, in addition to infrastructure; and
- (c) specific disclosures as to financial and marketing arrangements.

Reporting requirements are generally viewed as important in monitoring the participant's progress in advancing a mining project. In this regard, failure to meet reporting requirements can provide the State with the basis to determine a State Agreement.

### **3.3.4 Royalty regime**

As noted above, a State Agreement will specify royalties payable by the miner to the State once a project reaches an operational phase. In this regard, a State Agreement will usually contain extensive provisions dealing with the:

- (a) calculation and payment of royalties;
- (b) lodgement of production reports; and
- (c) royalty returns (usually required within 14 days of the end of each calendar quarter, showing product shipped).

Royalties are usually payable on an ad valorem basis and charged as a percentage of "f.o.b. revenues" (meaning the actual or deed price for a mineral product payable by a purchaser less export taxes and specified costs incurred between loading and delivery to the purchaser).

### **3.3.5 Benefits of the State Agreement system**

A State Agreement allows an investor to create a unique legal regime for each resource project to overcome deficiencies, if any, in the general law of the State. They also establish an integrated regime and

facilitate approval, management and monitoring of the projects by co-ordinating the different regulatory controls otherwise applicable to the project. In this regard, all project phases are regulated under the umbrella of one framework arrangement.

A key benefit is also the certainty provided to developers who are likely to incur significant capital expenditure commitments in driving a major project. Specifically, once in place, State Agreements can only be changed by mutual agreement in writing by both the State and the developer. Accordingly, settlement of a State Agreement expressly provides for co-operation between all participants in a development and sets out the ground rules (current and prospective) on how a project will be advanced over time; meaning there is agreement on key issues from the earliest development stages.

In summary, entering a State Agreement demonstrates clear Government support for a project and provides the prospective miner with a powerful “message of support” when procuring financial support.

Specific benefits for a miner also include:

- (a) a formalised allocation of the responsibilities between a developer and the State in advance of implementation, ensuring no major impediments to a project in due course;
- (b) unlike other Acts of Parliament, a State Agreement cannot be unilaterally changed by a Government as amendments require the mutual agreement of all parties;
- (c) certainty and security of tenure, with the State obliged to grant tenure and mining rights under relevant legislation once a State Agreement is in place (and is being complied with);

- (d) potentially, specific benefits in relation to the zoning and taxing of land which is the subject of the State Agreement; and
- (e) restrictions on the ability of the State to resume any of the lands which are subject to title issued under State Agreements (without at least obtaining the consent of the miner).

In addition, such agreements also provide benefits to the State. State Agreements are generally regarded as useful in the overall:

- (a) economic enhancement of the State through shortening the timeframe to gain development approvals (avoiding length and uncoordinated efforts in seeking approvals to explore for deposits and operate mines); and
- (b) increasing of the value add component of minerals extracted from land by providing a framework to encourage further processing in a State. For instance, it is common for the State to include a “secondary processing clause” in a State Agreement (committing developers to the establishment of secondary processing facilities).

In addition to encouraging economic development, State Agreements will also facilitate expenditure on socially beneficial infrastructure in support of a project (e.g.: schools, hospitals, public roads, water management resources, etc).

### **3.4 Enforcement of Mining Interests – the Warden’s Courts**

In Australia, each State maintains its own court system, comprising the Supreme Court and a number of other subordinate courts. In addition to the jurisdiction of civil courts, each State had also established the Warden’s Courts to manage specific issues relevant to mining law.

Taken together, these courts are the ultimate arbitrators for disputes in relation to mining interests.

The historical and present importance of mining in Australia can be seen in the fact that the sector has its own separate court – the Warden’s Court. The functions of each Warden’s Court vary from judicial to administrative in nature. For instance, as noted above, the Warden’s Courts will be primarily responsible for hearing applications for mining tenements and any objections raised against the grant of such tenements. In this regard, the Warden’s Courts are required to make appropriate recommendation to a Minister who is responsible for granting an interest to mine.

It should be noted that extensive powers are conferred on the Warden’s Courts such that they are an important part of legal framework which supports the mining industry. In this regard, the Australian court system has developed to provide a balanced and open system to resolve mining disputes. The transparency of the dispute resolution system provides further certainty to industry participants (in terms of both processes and outcomes); and is an important component in a framework designed to encourage growth and investment.

## **4 Specific Issues of Interest**

### **4.1 Environmental management**

Australian mining laws must also inter-relate with the developing body of environmental laws. In this regard, protection and conservation of the natural environment of mining operations are among the most important responsibilities of each State Government.

Accordingly, each State has formulated its own specific mining management process under the relevant environment legislation. The aim of these procedures is to ensure the any mining project complies with minimum environmental standards.

Common features of these processes generally include three stages:

- (a) the Proposal, Notice of Intention or Environment Plan or Initial Advice Statement stage - during this stage, the developer must submit a formal proposal describing the expected duration of the project; the infrastructure it will need during the life of the project and potential environmental impacts;
- (b) Government Assessment stage - upon receipt of the proposal, the relevant Government authority will decide whether an environmental assessment is necessary (i.e. whether a project is environmentally significant) and, if so, the environmental issues to be addressed; and
- (c) Government Approvals stage - at this stage, the Government authority, or its Minister, will decide whether to issue an environmental approval for the project. The approval is often tied to a continuous environmental management system.

The benefit of this system is that it encourages the developer to address environmental requirements at an early stage of a project. Consequently, it enables developers to respond to concerns raised by the public and make adjustments to their development proposals during the planning and design phase. This avoids cost blow outs should environmental objections be raised at a later stage of the project. Consistent with the theme of this paper, it is also noted that the public review process further reinforces the open and transparent nature of regulation of Australia's mining industry.



## 4.2 Native title interest

Native title has become increasingly important in Australia in recent years and no review of mining law is complete without considering this issue. In this area, the key law is the Commonwealth Native Title Act 1993 (“NTA”), which commenced operation from 1 January 1994. This legislation specifically recognises and protects native title rights against any future dealing on the land, including all mining operations. Native title rights and interests are held to exist in accordance with the laws and customs of indigenous population, where those people have maintained their traditional connection with the land and their title has not been removed by a law or other action of Government (such as a grant of freehold title).

Native title rights have become a significant issue for many miners, because the NTA gives registered native title claimants or native title holders a right to negotiate with project developers in relation to certain acts, including the grant of an exploration, mining or petroleum permit or title.

In this regard, there is scope for some uncertainty where miners are required to regulate arrangements with traditional land holders. However, where no agreement can be reached between the native title parties and the miner after six months, a party may apply to the National Native Title Tribunal for a determination.

A determination will consider whether to allow mining over a particular site. If granted, a determination will normally place conditions on the miner. In some circumstances, the native title claimants may apply to the applicable Court for a determination and seek compensation from the miners where their native title rights have been lost or impaired as a result of Government action in granting a leasehold interest over land where native title exists.

Aboriginal cultural heritage may also exist on land independent of any existence of native title interests. In this regard, all States have legislation which provides blanket protection to indigenous archaeological sites by way of Ministerial consent. Further, a miner will usually be required to obtain an Aboriginal heritage clearance before commencing any mining operation on land.

The requirements of native title and aboriginal heritage are matters which many miners will need to face, particularly as mineral deposits often tend to be in areas which have value to indigenous populations. Native title legislation requires both miners and indigenous claimants or title holders to take into account the interests of each other. Negotiations can often be lengthy, and where miners are unfamiliar with the cultural norms of indigenous communities, may require the assistance of appropriately qualified/experienced experts.

Interested indigenous parties may, in return for allowing miners access to traditional sites or lands, require compensation, which may include training and employment incentives, royalties, or cash payments. These are matters which miners need to factor into their investments.

Whilst indigenous claims are regarded by some as an impediment to investment, it is noted that the NTA (and associated laws) provide a comprehensive system for resolving uncertainty over native title issues in Australia.

## **5 Conclusion**

Australia is regarded as one of the world's leading mining nations. In large part, this is due to the openness and transparency of its mining investment regime and legal framework. In this context, a well defined and coherent system of control provides certainty to industry participants. It is important to stress the relationship between

transparency and certainty; and therefore the positive impact this has on overall investment and development of the Australian mining sector.

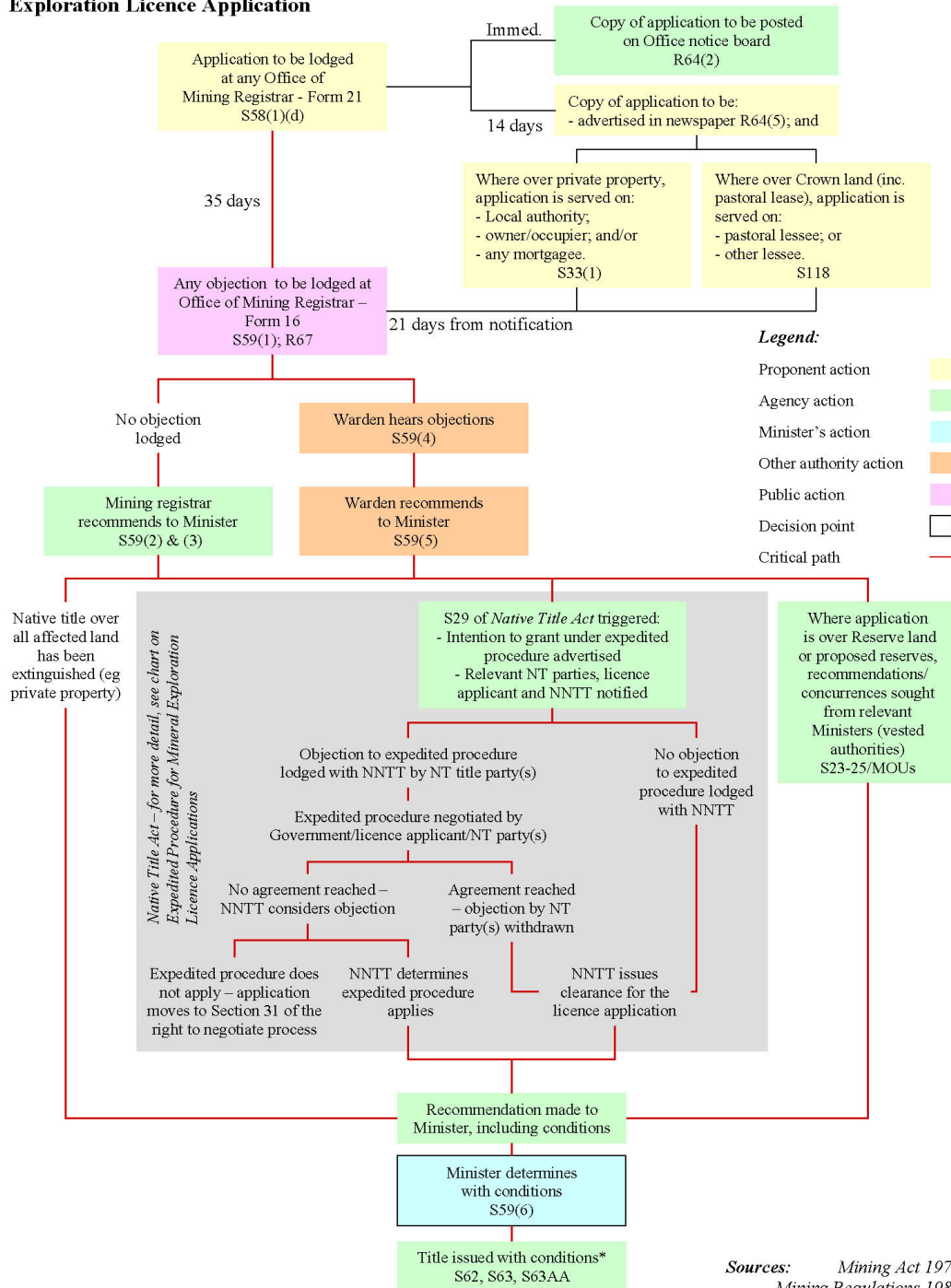
***Robin H. Chambers***

***Chambers & Company***

[A professional profile of Mr Chambers is attached to this paper at Annexure 3].

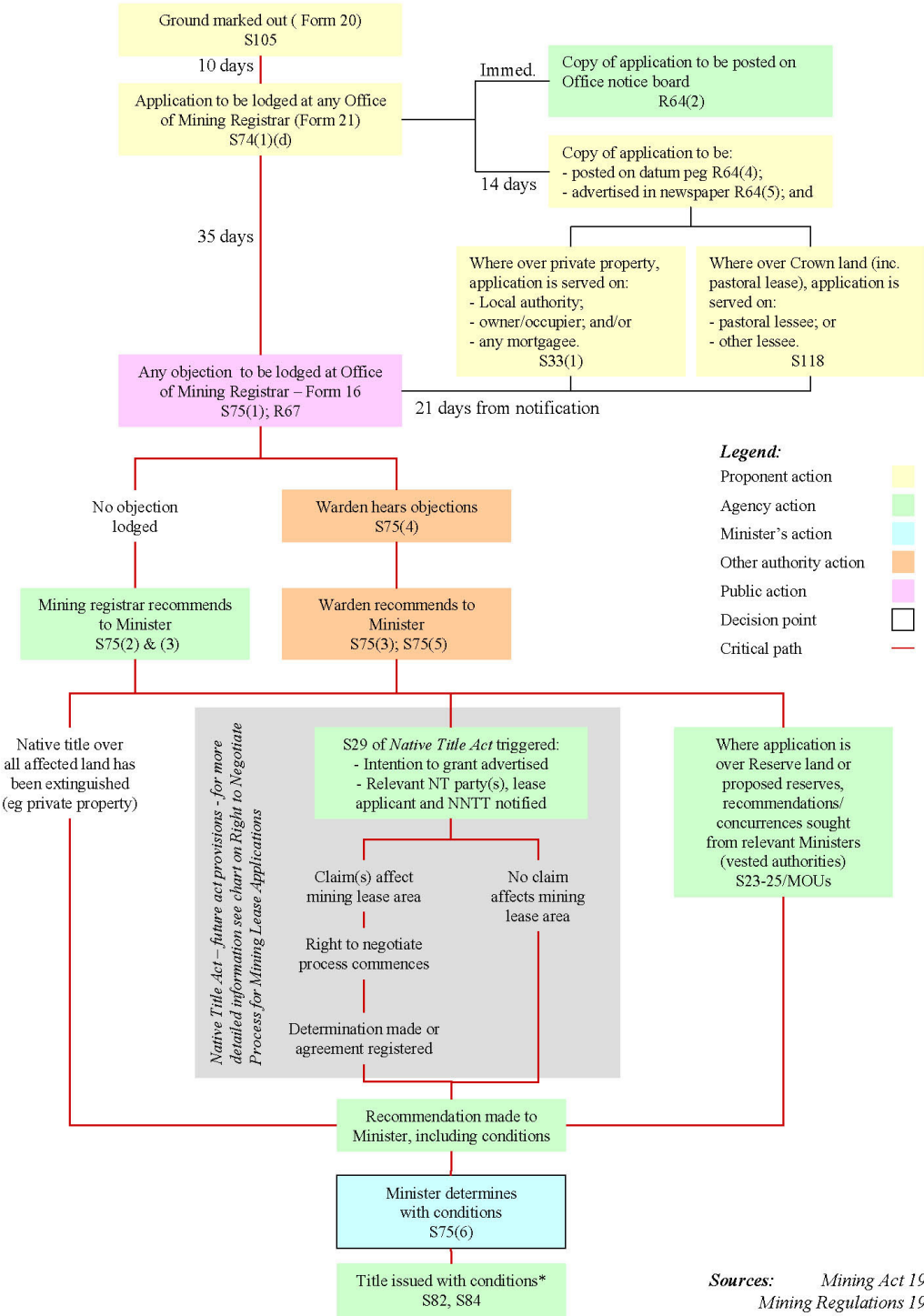
## Annexure 1: Process for granting a mining licence or lease<sup>9</sup>

### Exploration Licence Application



<sup>9</sup> Taken from Department of Industry and Resources of Western Australia's website at <http://www.doir.wa.gov.au/documents/investment/ExplorationLicenceMining.pdf> and <http://www.doir.wa.gov.au/documents/investment/MiningLeaseApplication.pdf>

**Mining Lease Application**

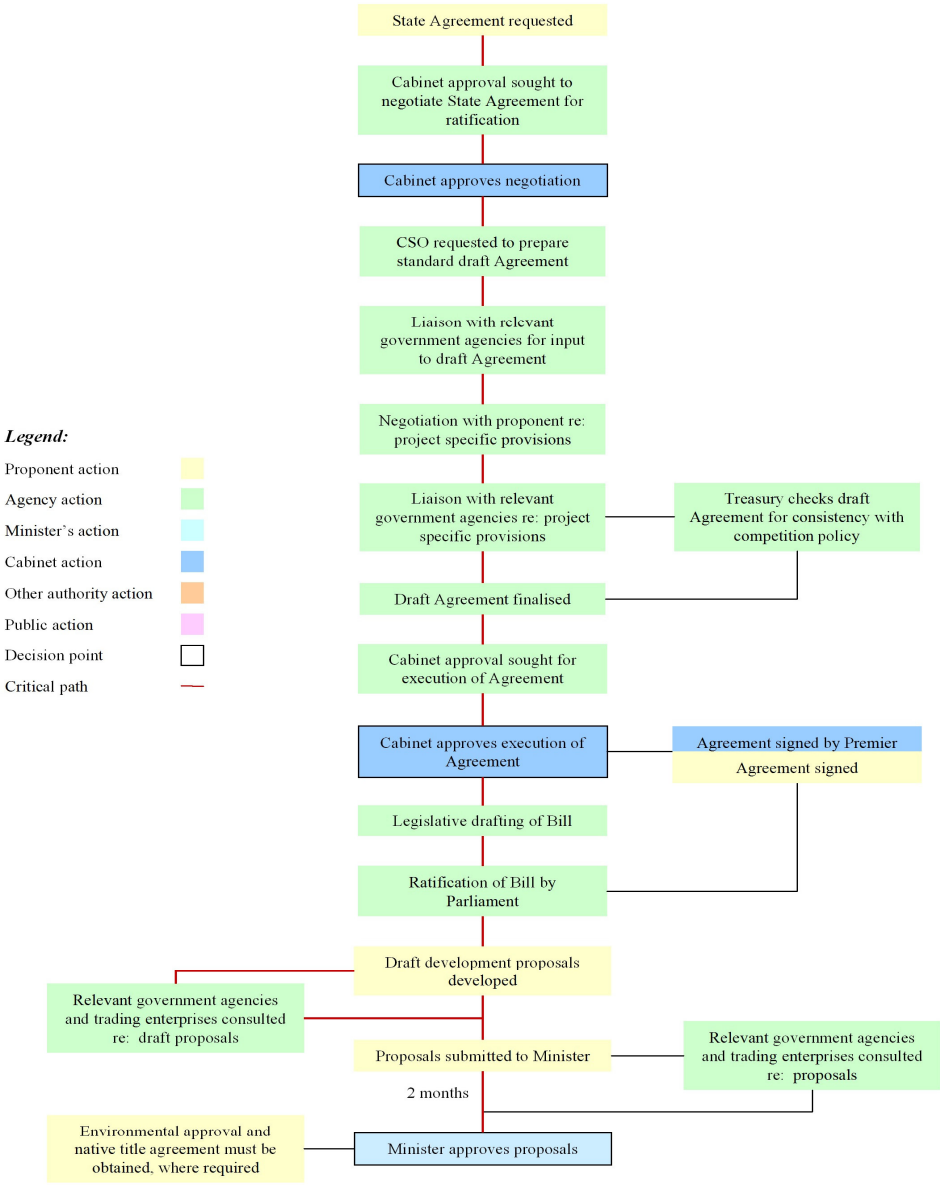


\* Schedule of endorsements and conditions draw lessee's attention to provisions of the *Aboriginal Heritage Act 1972*

Sources: *Mining Act 1978*  
*Mining Regulations 1981*  
*Native Title Act 1993*  
*Administrative MOUs*

Annexure 2: State Agreement Process<sup>10</sup>

State Agreement and Development Proposals Process



<sup>10</sup> Taken from Department of Industry and Resources of Western Australia's website at <http://www.doir.wa.gov.au/documents/investment/StateAgreementsKeatingFChart.pdf>

## Robin H. Chambers Personal Profile



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### Practice Description

Robin Chambers practice involves acting as lead lawyer on international project negotiations, primarily in the Oceania and Asia region. Mr. Chambers is experienced in structuring, negotiating and implementing international infrastructure projects and has particular expertise in resource projects. Prior to becoming the senior partner at Chambers & Company, he was appointed General Counsel of CRA Limited (now Rio Tinto Limited), where he remained for 14 years. Mr. Chambers has acted for the Chinese Government entities on a number of major mining projects in Australia.

### Representative Matters

- Acted for Sinosteel as lead Counsel in the development of the Channar joint venture.
- Acted as lead Counsel for Sinosteel Corporation in negotiating a studies joint venture agreement with Midwest Corporation Limited.
- Acted as senior lead Counsel in advising four major Chinese steel mills (Wuhan Iron & Steel, Tangshan Iron & Steel, Anshan Iron & Steel and Jiangsu Shagang) in their participation in the \$11.6 billion Wheelarra joint venture with BHP Billiton.
- Acted as General Counsel to Australian United Steel Industry Ltd (AUSI Project) on all aspects of its proposed AUD 2 billion DRI/Steel project in Western Australia. This involved the corporate structuring and documentation, engineering/construction contracts, supply contracts, sales contracts and the initial project financing arrangements (in conjunction with Chadbourne & Parke).
- Advised Wugang on a joint venture with the International Minerals in Western Australia.

- Advising a major Australian company on the acquisition of a private port in China linked to an Australian iron ore project.
- Advised Gindalbie Metals Ltd on its studies joint venture with Angens.
- Advised Arcelor, one of the two largest steel producers in the world on a \$2 billion iron ore project in Australia.
- Advised Enron International on its Maputo HBI/steel project in Mozambique on its steel slabs off-take sales contracts with China, Indonesia and South Korea.
- Advised Paget Mining Limited, an Australian company, on its Sabodala gold project in Senegal, West Africa. This involved negotiations with the Senegalese and French governments over the mining concessions, advising on and negotiating option arrangements, and establishing an International Chamber of Commerce arbitration process in Paris.
- Advised Federation Resources N.L., an Australian company, on the negotiation and documentation of a concession agreement with the Republic of Azerbaijan in preparation for its proposed public floatation on the Australian Stock Exchange.
- Advised a major US mining interest on privatization bid to the Philippines Asset Privatization Trust.
- Advised on a Shell Billiton Bogusu project in Ghana, West Africa.
- Advised a World Bank consortium on the Morak gold project in Mauritania.
- In conjunction with Macquarie Bank, participated in negotiations with BHP Power, Sithe, and other power companies for the development of a 200 megawatt power station in China.
- In conjunction with our U.S affiliate, Chadbourne & Parke, advised the Victorian Department of Treasury on certain regulatory aspects of the Victorian Gas Privatization Program.



### **Education**

Graduated with Arts degree and an honours Law degree from Melbourne University and with a Master of Laws degree from Duke University in the United States.

### **Professional Background**

- Admitted to practice in Victoria, Australia.
- General Counsel of CRA Limited (now Rio Tinto Limited)
- Associate with Baker & McKenzie and Chadbourne & Parke LLP in the United States.

### **Practice Areas**

- Projects
- Project and trade finance