

Requirement: The Department of State Development is undertaking a review of the *Mines and Works Inspection Act 1920*, the *Mining Act 1971* and *Opal Mining Act 1995*, and has released 3 discussion papers identifying issues under the Acts. Please prepare a submission to the Department addressing one or more questions in any of the discussion papers.

Submission: How can the PEPR development and assessment process, and transparency after approval, be made better for the community, the environment, landowners, explorers and operators?¹

PEPR is the acronym for Program for Environment Protection and Rehabilitation.² The PEPR is a requirement for operational approval at both the explorational and operational stages for a new mine. The PEPR sets out environmental outcomes that are expected to occur because of the exploration or mining operations, including criteria to measure and achieve set environmental outcomes.³ PEPR is identified as a program under Part 10A of the Mining Act 1971.⁴ This submission will consider strategies that already may exist, or may need to be given greater priority aiming to make the PEPR development and assessment process better for all stakeholders, including the community, the environment, landowners, explorers and operators. It will also achieve greater transparency after approval.

This submission will primarily focus on community input during the PEPR development and assessment process. Environmental issues, along with the roles and rights of landowners will be considered. The involvement of explorers and operators through this process is quite exhaustive at present suggesting a need for streamlining. Greater opportunities to create improved accessibility for the community to be involved need to be generated.

BETTER for the Community

Ensuring community involvement through the PEPR development and transparency afterwards will encourage positive perceptions of the mining industry and hold them to

¹Government of South Australia, Leading Practice Mining Acts Review Mining Act 1971 and Regulations (Discussion Paper Department of State Development, December 2016) p.46

² Ibid 12

³ Ibid 102

⁴ *Mining Act 1971* (South Australia) Pt 10A, s 114 (1) (5) Replacing the EWA, DEF and MARP

account. It may also establish a mining company's credentials that they are worthwhile and can be trusted to fulfil their commitments. The case of the Kanmantoo mine is a good example to illustrate this. Transparency of the behaviour and processes in dealing with the government and the community foster goodwill with mining companies.

Community Engagement

For any prospective mining project, consultation through community engagement is fundamental to success. A paramount concern is to ensure that PEPR development and assessment process is not conducted in undue haste. This would result in reduced meaningful community engagement, as well as likely generating community suspicion. A community, whether it be the local or regional community may be directly affected by a new mining project. Sometimes the visual, physical, health and economic repercussions of a mining venture could include unwanted pollution, reduction in property values or reduced amenable living public spaces. These represent valid community concerns and would be reflected in antipathy toward a prospective mining project. These concerns need to be adequately and thoroughly addressed. While it has been said in that past that 'the [Mining Bill] goes to great lengths to ensure that the current climate in the community is fully accommodated in respect of mining'⁵ there is a great deal to still transpire to ensure that community involvement is meaningful and productive throughout PEPR planning.

Consequently, how is a 'common low impact'⁶ mining operation defined and assessed? In terms of the community, environment and landowners, one would think that realistically, there is no 'common low impact.' All could potentially experience an adverse impact from a 'common low impact' mining operation. Is a low impact mining operation realistic?

Furthermore, if a standard generic PEPR is approved, how have the unique conditions which do exist in each local community, been adequately assessed to ensure there will be no short, medium or long term consequences for the surrounding community. What are the measures implemented to achieve mitigation? How is the monitoring of mitigation activity

⁵ *Southern Titanium NL v Heidrich and Others* [2004] SAWC1 6 quoting Hon AF Kneebone Parliamentary Debates South Australia 1971-72 Vol, 1-3, 40th Parliament, 2nd session.

⁶ Government of south Australia, above n 1, 45

to be robustly undertaken? 'Common low impact' needs to be clearly defined in both legal and common parlance to ensure the PEPR development and assessment process would have adequate consideration for the community, environment and landowners. If this is not achieved the mining explorer or operator representatives could argue anything was 'common low impact' to reduce their workload to receive a standard generic PEPR. A standard generic PEPR does not comprehend the unique aspects of each community in South Australia including the commercial, tourism, agricultural, environmental potential local industry.

The non-economic aspects of the local community, such as heritage, cultural and overarching historical aspects of a community can also be corrupted through mining exploration and operation. These aspects need to be considered for every PEPR. The potential for the destruction of landforms or the fabric of communities may be overlooked because of intense support towards mining which dominates the South Australian political and economic agenda.

To a considerable extent, Government policy and political interests in South Australia and Australia strongly support mining as a key driver of the economy.⁷ Use of indenture acts for mining enterprises are of major significance to the south Australian economy. A good illustration of this is the Olympic dam project.⁸ Jay Weatherill describes this venture as being 'obviously critically important to the State.'⁹ Weatherill had also described the role of DSD 'to ensure the Government better responds to the needs of business and drive trade and investment.'¹⁰ (sic). He also employed a new Chief Executive Officer, previously employed as a 'spin-doctor for BHP.' to coordinate the enterprise.¹¹ One might struggle to assess the

⁷ Documented throughout document in Government of South Australia, above n 1 and also on the DSD and other government websites.

⁸ Paul Leadbeter and Alexandra Wawryk, 'Is the Fox Still Guarding the Henhouse? Mining and Environmental Protection in South Australia' (2013) Vol 30 (1) *Environment and Planning Law Journal*, 3, 12

⁹ 'Weatherill to discuss Olympic Dam expansion with BHP next week' *The Advertiser* 26/10/2011, Premier Jay Weatherill <<http://www.adelaidenow.com.au/business/weatherill-to-discuss-olympic-dam-expansion-with-bhp-next-week/news-story/c6c93a8e7a8d838648a76e97c620df7e>>

¹⁰ 'State Development Chief Executive Don Russell lives in Sydney, Flies in to Work in Adelaide' *The Advertiser*, 24/10/2016 when announcing Dr Don Russell's as the CEO of Department of State Development that DSD <<http://www.adelaidenow.com.au/news/south-australia/state-development-chief-executive-don-russell-lives-in-sydney-flies-in-to-work-in-adelaide/news-story/b286c5bd2e35eb4cf5c54a1b4f2ac63f>>

¹¹ Cameron England 'Former BHP Billiton chief spin doctor Kim Winter-Dewhirst appointed Department of Premier and Cabinet chief executive' *The Advertiser* 5/9/2014 <<http://www.adelaidenow.com.au/news/south->

level of impartiality and objectivity the viewpoint of non-BHP viewpoints could be.

Governmental support is consistently supporting mining where, in the Warden's Court, it is said the 'purpose of the Mining Act 1971 (SA) is to encourage mining while the Warden's Court should allow mining to occur where it can be done so.'¹²

It is imperative that there is an objective element to government decision making where the non-mining interests of the community are also considered. Potentially the dominance of the South Australian economy by the mining industry could lead to adverse effects on other potential components of the South Australian economic landscape because of the all-encompassing nature of mining. For example, in the case of *Southern Titanium*¹³ there was significant interference in agricultural farming contribution, while duly compensated, is still representing a significant interference.

With a strong bias towards mining and mining companies there is also the legacy issue of limited transparency. Furthermore, the mining companies' tendency to lobby governments for support and to 'pick me' also resulted, for example, in regulatory capture in NSW. ICAC wrote that 'It is undesirable to have unregulated lobbying to the NSW government.'¹⁴ In this case there was no opportunity for the community to have meaningful input prior to the granting of an EL (exploration Licence) with the public only being notified following an EL being granted. A community consultative committee was only established once the EL was granted.¹⁵ Transparency and community consultation needs to be a priority.

A fundamental challenge to be determined when a mining activity is being considered is whether mining a resource is the best outcome for the community. Community engagement by prospective mining companies needs to be genuine rather than tokenistic. It demands forthright advertising in many forms of media including notices in libraries, leaflet drops and information on local community websites to ensure that the community has a genuine

australia/former-bhp-billiton-chief-spin-doctor-kim-winterdewhirst-appointed-department-of-premier-and-cabinet-chief-executive/news-story/189f7276fd99b03f23b20b9cd5ed0b4e

¹² Southern Titanium, above n 5 14

¹³ Ibid

¹⁴ ICAC Report: Reducing the opportunities and Incentives for corruption in the states management of coal resources. 27

¹⁵ ICAC Report October 2013, 17

opportunity to engage with the impacts of the proposed exploration or operation activity. Use of objective independent organisations also contribute to authenticity.

Involving the community to contribute to the PEPR, as well as ensuring transparency following the PEPR approval, results in a less regulatory environment. A government organisation, such as DSD [Department of State Development] should be obliged to plan beyond the interests of mining explorers and operators to those of the wider community, including the environment down to concerns of affected landowners. The public viewpoint might then be responsibly accounted for.

Another way to ensure an objective voice in the PEPR would be to allow community submissions, as well as the mining company submission for the PEPR, especially from locally affected communities. In current practice, mining companies are encouraged to engage with the community to gain social licence. This needs to be a more open and inclusive conversation. The mining company, local community, and relevant DSD officers document specific concerns about the future potential mining site and some of these concerns should be included in the PEPR. It would then contribute to an authentic community voice.

The PEPR for each mining project at both exploration and operational stages should adequately address the unique aspects of the community potentially affected. 'Engaging with the community in the early stages can also add value to the exploration or development project because landowners and local residents often have unique expertise and knowledge about the history of an area, the community, and future developments, etc.'¹⁶

A mining company cannot just attend a trade fair, or erect a stall at the local country market, to illustrate a substantive community engagement exercise. More needs to happen! Community engagement means that community meetings are well advertised, including invitations, with all community members being encouraged to participate. Encouraging

¹⁶ Government of South Australia above n 1, 15

positive interactions leads to better guidelines for mining explorers and operators to be informed, have a healthy basis for relationships and rely on improved reconnaissance which can be encapsulated in the PEPR to add significant value to a venture. Often the local community has a wealth of knowledge about the mining sites and will be able to contribute significantly to the PEPR process. Ideally the PEPR should be a unique document, rather than generic for 'common low impact' projects. Each mining company is unique, each community is unique and each environmental site is unique. There is no 'one size fits all'.

There is also the wider South Australian community. This community owns the minerals that are to be exploited. The wider community of South Australia should be the recipient and beneficiary of the government stewardship. While a mining company may fear that involving the wider community could generate a lengthy court case, being empowered to contribute to conditions in the PEPR process should instead realise empowerment for the wider community. This will ensure a transparent process, which will also ensure a lack of regulatory capture. Decisions should not be made 'behind closed doors'. This is of course when the process is entirely transparent. One may be concerned that DSD will merely reflect the perspective from a mining industry viewpoint, while ignoring the interests and view of the wider community. The latter are concerned about the process and methods used to extract minerals, which they collectively own. They are also very involved and concerned how the land will be rehabilitated following a mining venture.

BETTER for the Environment

From an environmental perspective, improvement has been deriving from changes in 2010 to the Mining Act (1971). These changes ensured protection of certain features such as flora and fauna and also defined the term 'environment.'¹⁷ It is widely recognised that mining can affect ecology¹⁸ and site contamination occurring as a consequence of mining activities' as in the case of Brukunga¹⁹ can have long term repercussions. While the mining licence holder can appeal decisions, there are no rights given to third parties to 'bring enforcement

¹⁷ Leadbeter et al, above n 8, 6

¹⁸ Martin et al, 'Environmental Property Rights in Australia: constructing a new Tower of Babel (2013) 30 (6) *Environmental and Planning Law Journal* 531, 536

¹⁹ Leadbeter et al, above n 8, 18

proceedings²⁰ The PEPR process must involve a thorough assessment, even if the environment does not involve 'world heritage' classified areas of significance.

Environmental conservation provides financial benefits which are not always recognised by mining interests. There needs to be a market-based approach to environmental conservation.²¹ Unfortunately, courts can be 'loath to recognise environmental public goods as private property interests,²² instead focusing on the acquisition of mining rights rather than the property itself. The lofty aspiration should be to live 'sustainably' aiming to 'leave our environment in no worse, and preferably in better condition, for future generations.' A well managed conciliation process is an ideal way to 'ensure that the respective interests of miners and landowners are enabled and protected in a balanced manner.'²³

BETTER for Landowners

Landowners, including those holding native title, and leaseholders, should be encouraged to be involved in the PEPR process as soon as the mining company has signalled its interest to come on to specified land. The mining is a disruption to the life²⁴ of current inhabitants and stakeholders. Consultation is key, and needs to be open to the community, who may resist as freehold title owners, the mining interests, but they do not own the minerals.²⁵

BETTER for Explorers and Operators

Committing to an improved PEPR development and assessment process advantages explorers and operators while also advantaging the affected community. Making transparency after venture approval benefits mining explorers and operators. So, South Australia seems to have created 'a nanny state' for mining companies, both explorers and operators. This is why the community, environment and landowners need to be involved as much as possible in preparation of the PEPR. As part of this review, there needs to be

²⁰ Ibid 12

²¹ Martin above n 18, 531

²² Ibid 546, quotes *ICM Agriculture v Cth of Australia* (2009) 240 CLR 140; 170 LGERA 373; *Buzzacott v Minister for Sustainability, Water, Population and Communities (No.2)* [2012] FCA403.

²³ *Borthwick & Ors v Australian Graphite P/L* [2015] SAWC 1 40, 10

²⁴ Government of South Australia above n 1, 32

²⁵ *Southern Titanium* above n 5 46,47

change to the operations process to include substantive consultation to give landowners and the community the right to have their say on any proposed changes.²⁶ The policy towards a mining company seems to be inconsistent with policy towards other private property transactions such as in domestic homes where there is a dominant user pays system in place.

Conclusion

If the South Australian community is going to benefit from mining, despite some of the legacy issues which still plague it, then ensuring compliance from the respective mining companies, coupled with close monitoring of this compliance, is essential to ensure that the social licence of the mining company to continue and eventually rehabilitate their operations is realised. In conclusion, ensuring the involvement of interests of the community, the environment and relevant landowners in a political climate that could unequivocally support a mining exploration or operation venture is fundamental and should be sought through an objective viewpoint pursued both during and after the PEPR process.

²⁶ Government of South Australia above n 1, 41, 2.