Development Consents and Mining in New South Wales

Gabrielle Kibble (A commentary on the paper by David S White)*

COMMENTARY

I will preface my comments by emphasising that the significance of the mining industry in the State's economy is well recognised by the New South Wales government. More specifically, this applies to the Department of Urban Affairs and Planning, which I represent as the Director-General. The government now has an extensive background in considering mining projects and facilitating appropriate projects to go ahead. This is subject to there being adequate safeguards to protect the environment and to take account of community interests.

In order to place the planning and environment requirements into context it is useful to have an appreciation of the nature and extent of mining in this State. For example, in the year ended 30 June 1993, the turnover from the mining of coal and metallic minerals in New South Wales was $3,816 million. The major contributor was the coal industry with $3,351 million while the metallic minerals industry made up the remaining $465 million.

My Department is currently dealing with 12 major development applications for mining proposals throughout New South Wales—the total capital cost of these projects exceeds $1.1 billion and would directly employ more than 1,600 people.

The total area of land disturbed by mining in Australia is relatively small, being some 150 hectares or .02 per cent of the total area. The value of production per unit area from mining is very high compared with most other forms of land use. However, in some areas, the local and regional environmental and social effects of mining can be significant necessitating comprehensive assessment and community consultation.

In order to explore for minerals the mining industry needs to have access to rural lands. An agreement was recently made between

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representatives of the industry and New South Wales farmers on terms for land access for exploration.

David White perceives the development approval process in New South Wales for mining projects as complex, uncertain, lengthy and unsuitable. Whilst this may not be the universal view it is appropriate to challenge continuously the appropriateness of the process and test its value-adding. Suggestions are welcomed. Ultimately it must be recognised that planning, development assessment and approval processes, regulatory regimes are a reflection of, and response to, community expectations and political forces. The community in New South Wales is sophisticated, complex and demanding of participatory, environmental and quality of life standards unique to New South Wales. Whilst benchmarking development approval processes in New South Wales against national or international practices, is useful to test efficiency, it may be misleading unless variations in community attitudes, characteristics, expectations are accounted for. The government is continually faced with calls for increased efficiency, faster decision-making and deregulation to reduce existing controls. However, these requests must be tempered by recognising the range of external factors which influence the development approvals process. Regulation and procedural requirements in the planning system are a response to legitimate community concerns about preserving our environment and heritage while maintaining fairness and integrity for the developer and the wider community interests.

In considering possible structural and regulatory changes, a key issue is that those who operate within the system should be able to perceive it as being effective, fair and reasonable. Any proposed change to avoid possible duplication and delay, or to provide greater certainty or assurance as to outcomes, should not compromise these fundamental objectives and features of the New South Wales planning system. Part of the department's function is making sure that potential developers and administrators have an adequate understanding of the system and how it works without being put off by unfounded fears arising from perceptions about the problems they think they might encounter.

The development approval process for mining (and other major development proposals) relates to, and interfaces with, four broader aspects:

- the planning system including its legislative and procedural provisions;
- the regulatory and licencing requirements of various government agencies—issues usually referred to as sequential approval processes;
- the Commonwealth government requirements; and the culture of specific proponents and communities;
- the culture of specific proponents and communities.

Many of David White's points relate to these interfaces.

I agree with Mr White as to the need to provide all concerned with certainty, consistency and efficiency. Various studies and reviews of the

development approval process indicate what can be perceived as conflicting requirements by the users of the system, the need for certainty and at the same time, as implied by David White, a requirement for flexibility to suit various situations.

There is now within the planning administration a positive attitude towards problem solving and challenging the system to improve efficiency. Recent initiatives include:

The ongoing review of the NSW planning system. This has resulted in a number of legislative and operational changes being made to improve the efficiency and effectiveness of the planning and development approvals processes. Recent legislative changes include amendments to the *Environmental Planning and Assessment Act* 1979 which mirror the approvals provisions in the new *Local Government Act* 1993 and hence provide greater consistency between the two Acts. For example, this has created an opportunity to lodge with councils joint applications for building and development proposals. The legislative changes now enable "in principle" and "staged" consents to be given to development proposals. Also, a change which might be of particular benefit to the mining industry is the extension of the time allowed before a consent lapses, if a development has not been substantially commenced, from two to five years or longer if considered appropriate. This recognises the reality that large and complex projects often take some time to get started. The department is increasing its delegation to local councils in the local environmental planning process and has significantly reduced concurrence requirements provisions to streamline and reduce the layers of bureaucratic processes. Another amendment clarified that the introduction of a later planning instrument does not affect the operation of a valid development consent. This will remove uncertainty as to the possibility of zoning changes which could affect the operations of an approved development.

State Environmental Planning Policy (SEPP) No 34—Major Employment Generating Industrial Development. SEPP 34 applies to major industrial employment generating development, including mines, which have at least a hundred full time post construction jobs or a capital investment of $20 million or more, excluding land. The Minister for Urban Affairs and Planning is the consent authority for these developments coming under SEPP 34. The policy provides the consistent and uniform approach and has been successfully implemented to date with input and partnership of local government, as it recognises upfront the State significance of the development projects under the policy. As at end of July 1995, 37 development applications have qualified under the policy with a total capital value of $2,800 billion and potential to create 4,600 jobs. Approximately 25 per cent of these development applications are for mining development projects.

Explicit power to express conditions of consent for a development as clear and explicit standards for the performance of a development proposal. This allows for more flexibility by the applicant and more efficient assessment. It provides more certainty that

outcomes will achieve set objectives yet allows the applicant to determine how those objectives will be achieved.

Section 94 Contributions Plans. These plans have been introduced to improve accountability of consent authorities in the levying of contributions payable by applicants, under s 94 of the *Environmental Planning and Assessment Act* 1979, towards the provision or improvement of amenities or services when consent is granted to a development application. As some mining developments may be required to pay substantial s 94 contributions, this improved accountability should assist the industry in understanding and meeting its obligations in this area.

Section 117 Direction. The direction relates to coal, other minerals, petroleum and extractive resources. It has effect if a local council proposes to prepare a local environmental plan which would prohibit or restrict mining or extractive industry where these land uses are presently permitted and the Director-General of the Department of Mineral Resources has objected to the proposed change in the permissible use. The local council preparing the plan must refer it to the Director of Planning if the council wishes to go ahead with the plan. The Director of Planning will consider the circumstances and, if considered appropriate, can act to ensure that the mining or extractive industry is not prohibited or restricted by a change in the plan. The s 117 direction provides a response to industry concerns that mining or extractive industry could be adversely affected by changes in planning controls. At the same time the procedures to be followed in applying the direction provide for the interests of the local council and other parties to be properly considered.

State Environmental Planning Policy (SEPP) No 37—Continued Mines and Extractive Industries. This policy was made to allow the continuing operation for a period of two years and three months of any mines or extractive industries relying on continuing use rights until planning approvals are obtained for the affected operations. Our legal advice is consistent with David White's observation that this policy affects extractive industry operations in the main as mining is already covered under model provisions which protect continuing use rights. The Minister for Urban Affairs and Planning has recently decided not to extend the moratorium period under the policy as such an action could not be justified.

I agree with the proposition that one of the key contributors to inefficiencies in the development approval process relates to the sequential nature of planning, licencing and other regulatory requirements. We should strive to articulate, both legislatively (where possible) and certainly administratively, integrated provisions and practices that reflect a whole of government requirement and prevent duplication. This is particularly important for the mining industry.

A major initiative is underway in this regard. A working party convened by my department and comprising senior representatives of the New South Wales Minerals Council (representing the mining industry) and relevant government agencies (Environment Protection

Authority, National Parks and Wildlife Service, Land and Water Conservation, Mineral Resources, State Development and Cabinet Office) is developing for the first time an integrated development approval system for the mining industry. By the end of 1995, I expect that this group, for example, will have developed and agreed on a single set of requirements, procedures and particularly conditions of consent so that the industry and the community can obtain the clarity and certainty they have been seeking. I also expect this group to develop an overall strategic environment and development plan for the mining industry. This plan will, for example, clarify the requirements for various categories of developments at various locations and hence enable us to focus on the issues that matter. Significant streamlining opportunities can eventuate from such a plan without affecting environmental requirements or public participatory processes. This approach is also consistent with the cumulative land use study we are undertaking in the Upper Hunter Region of New South Wales. The study will establish a framework for the assessment and decision-making of future development proposals, including mining, in the region. I particularly expect the study to provide an environment and/or land use strategy that will clarify future resources development and avoid lengthy debate at the project-specific level.

An issue considered by the government-industry working party is how the procedure for planning focus meetings conducted by the Department of Mineral Resources might provide more benefits. Mr White has questioned the effectiveness of the planning focus process and suggested that one-to-one communication between the mining company and each separate government department would be better. I do not subscribe to this view. The planning focus meetings have proven essential to identify and bring the main players together and quickly highlight key issues. There is nothing to prevent an applicant having more detailed discussions with individual authorities and in most cases it would be advisable for development proponents to take this action. What is needed is a strengthening of the undertakings of such meetings to ensure they are effectively implemented. A number of guidelines and memorandum of agreement are being finalised in this regard.

The Working Party is also looking at concerns raised about how commissions of inquiry are conducted. Any recommended action will of course have regard to the views of the commissioners of inquiry. The forum of commissions of inquiry is an integral part of our public participation and independent evaluation and advice to the Minister in particular as the decision-maker. It is a matter of concern that increasingly development proposals, and particularly in the case of mining projects, attract high level and unnecessary legal debate and intervention. I note that there are no legal or administrative provisions or obligations for the commission of inquiry process to make decisions. They are advisory to the decision-makers in relation to, and specifically concerning, "the environmental effects" of development projects. Recent cases further highlighted that commissions of inquiry may not necessarily have to make recommendations as to whether development should or not proceed, but focus on the environmental implications of

development. Notwithstanding, I am of the view that the process and outcome would benefit from a legislative amendment to enable flexibility in the setting of terms of reference. This would, where applicable, focus the review on the key issues of most concern.

I also believe that it was not the legislator's intention to subject the commission of inquiry findings to "merit" review by the court. This is not to say that such reports and findings cannot be the subject of judicial review as to their veracity, analytical processes and content in reaching a particular finding. I suggest that the latter argument is the one applicable to David White's propositions.

David White has also offered a number of comments about what constitutes an adequate content for an Environmental Impact Statement (EIS). Subject to meeting the legislative content requirements, the proponent of a development proposal has some discretion in presenting the EIS in a format and at a level of detail which appears most appropriate for that particular project. Naturally care is needed to ensure the EIS is not misleading by its failing to identify and address, in a reasonable way, the key issues for the project concerned.

There is a misconception that the EIS should be "independent" per se and hence independently prepared. This is not necessarily true. The EIS accompanying a development application is one input to the assessment process. In a sense, it is the proponent's submission. It is a tool for use in the process rather than being the end of the process in itself. Further action will involve public comment and assessment, and when a development application is approved, conditions being set and ongoing reporting by the proponent to relevant authorities on the performance of the development. It should of course be accurate and scientifically correct.

The view that the Impact Assessment process can be costly and with the potential to delay projects unless made relevant to the projects is accepted. The concept of EIA is sound in that it enables integrating locational, environmental, social considerations in development projects. It is critical for that process to add value to both projects and decision-making, that is, to contribute to the improvement of projects environmentally and economically.

In response to concerns that EISs are often bulky, complex to the general public and do not focus on key issues, it is appropriate to note some of the recent initiatives which include:

1. The Director's requirements for EISs have been examined and there is now a greater focus on State and regional planning issues rather than local issues.
2. Amendments to Sch 3 of the *Environmental Planning and Assessment Regulation.* This is the key planning mechanism which sets the level of environmental impact assessment for development projects in the State. The focus for deciding when an EIS is required has now changed. Designated developments are those considered to be significant enough to warrant the preparation of an EIS which must accompany a development application. Some development

categories have been redefined, some catgories were removed and others added. Thresholds based on scale and size to determine whether a proposal needs an EIS have been, in general, increased. More importantly, though, location criteria have been introduced as a trigger for an EIS being required. Many developments will only need an EIS if they are in or near environmentally sensitive locations and are likely to affect the environment significantly because of the sensitivity of that location. By focusing on the most environmentally significant projects, these amendments will simplify the development of industry without compromising the environment or the public consultation process. Additionally, the resources of councils, government agencies, industry and the community will be used more efficiently.

3. The department has published a series of Best Practice Notes including for Mining to assist the preparation of relevant EISs.

I am mindful of the increasing complexities of the development approval processes not only in New South Wales, but elsewhere, and accept the challenge of the need to respond continuously to our legislative and administrative practice. I conclude however by observing that, irrespective of the form of legislation or the culture of its administration, a narrow legalistic interpretation can only have a detrimental effect on the sound objectives of our planning system. There are many examples of complex mining and other major projects who have efficiently gained approval with appropriate time scale and highly acclaimed outcomes. It may be useful for us all to reflect on some key components of such successful experiences as they are more relevant now:

It has to be a good project. The broad social, environmental and economic benefits must outweigh adverse impacts.

Consultation. Early consultation is required widely and continuously. Consultation with the community is not the mere provision of information but serious attempts to involve all concerned.

Adequate lead time. As companies take substantial time in feasibility and financial planning, they should also take time for the environmental planning considerations. There are no short cuts in any development approval process.

A good and competent EIS. This will cover the upfront issues and focus on those of most concern.

Flexibility and preparedness to negotiate. This should be carried out by all affected parties and throughout the process.

The New South Wales planning system has serviced and continues to service the community well. I trust we can all continue to achieve its objectives positively.

ATTACHMENT

Broken Hill has traditionally been a significant producer of metallic minerals such as zinc, lead and silver. Elsewhere in New South Wales at the mines at Cobar and Woodlawn near Goulburn are major producers

of copper, along with other materials such as lead, zinc, silver and gold. Coal production has increased substantially since the mid 1960s in response to overseas demand and to meet the requirements of local power stations and steelworks. The industry employs some 15,000 people. Part of the change since the 1960s has been the substantial increase in open cut coal mines which now account for about half the total saleable coal production in New South Wales. Major coal producing centres in the State are Gunnedah, the Hunter Valley areas of Cessnock, Lake Macquarie and Singleton-Muswellbrook (in the northern district), the Bulli-Wollongong and Burragong Valley area (in the southern districts), and the Lithgow, Portland and Ulan areas (in the western districts).

A further component of mining involves the production of industrial minerals, including the mineral sands such as rutile and zircon. Most of the mineral sand production in New South Wales has come from sands along the mid-north and the far north coast of the State. There are also deposits of various other minerals at a variety of locations which are mined for particular purposes.

This brief consideration of the scope of mining will show that mining operations will vary widely in their size, nature and location. Therefore, planning issues and environmental impact will also vary widely. For example, the effect of a large open cut coal mine employing a lot of staff will be very different from the effect of a small gold mine operated by possibly two people.

There are a variety of other materials such as sand used in cement, road base gravels and soils or loams which are not classed as minerals under the mining legislation. The winning and removal of these materials is normally defined as an extractive industry under the planning legislation rather than mining legislation.

Environmental planning instruments made under the *Environmental Planning and Assessment Act* 1979, and applying in various areas throughout New South Wales, will usually provide for mining (and also extractive industries) to be permitted in certain areas subject to development consent being obtained. Mining and extractive industries are frequently permitted with consent in rural areas, except for those zones where special provisions might apply to maintain a particular environment such as where small area hobby farms are permitted. In addition, mining and extractive industries may be prohibited in certain environmentally sensitive areas such as where environmental protection zones have been created.