

ECONOMIC DEVELOPMENT AND INFRASTRUCTURE COMMITTEE
Inquiry into greenfields mineral exploration and project development in Victoria

Adelaide — 18 November 2011

Members

Mr N. Burgess
Mr M. Foley
Mr W. Noonan

Mrs I. Peulich
Mr G. Shaw

Chair: Mr N. Burgess
Deputy Chair: Mr M. Foley

Staff

Executive Officer: Ms Y. Simmonds
Research Officer: Mr S. Martin

Witness

Ms M. Ballantyne, Solicitor, Environmental Defenders Office of South Australia.

The CHAIR — I am Neale Burgess, the Member for Hastings. I'm the Chair of the Committee. This is Martin Foley, the Member for Albert Park, and Wade Noonan, the Member for Williamstown. This is an all party parliamentary committee hearing evidence today for the Inquiry into greenfields mineral exploration and project development in Victoria. So welcome to our hearing. All evidence taken at this hearing today is protected by parliamentary privilege, however anything you say outside the room will not have the same protection. At some stage this will all become public information so you do need to probably bear that in mind when you are giving evidence.

Could you please state your full name and your business address?

Ms BALLANTYNE — Melissa Justine Ballantyne, 408 King William Street, Adelaide.

The CHAIR — You are appearing on behalf of the Environmental Defenders Office?

Ms BALLANTYNE — That's correct.

The CHAIR — Your position is solicitor?

Ms BALLANTYNE — Yes.

The CHAIR — Would you like to make an oral submission?

Ms BALLANTYNE — Thank you. I do appreciate the opportunity to address the Committee today. The Environmental Defenders Office is a community legal centre specialising in environmental planning law and we have a particular focus on looking at which industries do have environmental impacts and, of course, the mining industry is one of those which is in our spotlight. So I appreciate being able to give evidence today. Thank you.

The focus of my presentation, which I will try to keep as concise as possible, relates to the legal framework, the regulatory framework. This year, in South Australia, some improvements were made to the Mining Act and they came in effect from 1 July but, in our view, we think there could be more done to improve the regulatory framework to make it more sustainable, robust, equitable and transparent, and I will give some examples of where I think there should be further improvement. Essentially, as in other jurisdictions, mining is operated outside the normal regulatory framework for industry. We suggest that given the impacts that mining has on the environment, such as use of water, impacts on quality of water, clearance of native vegetation impacts biodiversity, site contamination, plus greenhouse gas emissions both in mining and also in the processing of fossil fuels, that it should actually be brought back into the regulatory framework which applies to all industry.

So my presentation will focus on the Mining Act. I understand, of course, there are other laws which impact on the regulation of the industry, including the Petroleum Act. Of course, the Roxby Downs (Indenture Ratification) legislation which I was here for just a couple of weeks ago, to observe the committee hearing on that, I won't go into those in any great detail. I will focus on the Mining Act.

My primary point at the outset is that the regulator in South Australia is the Mining Minister and through the Mining Minister and his department PIRSA, Primary Industries and Resources, they regulate and promote the industry at the same time and we say that there is a real risk of regulatory capture where there is that dual role. I would suggest that perhaps an example of that is back in 2008: Marathon Resources was suspended from mining for dumping waste up in the Arkaroola Sanctuary. It was with, we say, undue haste it was able to commence mining again within a fairly short amount of time.

The CHAIR — What was the time?

Ms BALLANTYNE — I think it was within 12 months, from memory, and whilst that is open to the Mining Minister to do that, we would say that there is a possibility that the Mining Minister might take a fairly relaxed approach to enforcing conditions and perhaps following up on transgressions by mining companies and perhaps his department may also take into account that public good is synonymous with promoting the mining industry. So we suggest that, in fact, mining should be regulated by our Environment Protection Authority, which is the independent authority, and it should be well resourced to carry out that role. That's an important point which is outside the framework but it is always there in the background about resources. Of course, the Environment Protection Authority does have some role. It regulates the processing of minerals and it also has

various guidelines and policies and it has a role where there is perhaps site contamination or environmental harm from spillage of waste outside a mining lease. So there is a certain role but we say the Environment Protection Authority should have a greater regulatory role, as it was set up to do.

It is interesting how much of the State is covered by licences, exploration licences and mineral licences. I have a little diagram which shows just how much that coverage has expanded over recent years.

The CHAIR — I would be really interested to see that.

Ms BALLANTYNE — Yes, sure. I don't have a number of copies, unfortunately. I think it gives an indication of just how much of South Australia is covered. In fact, 21 per cent of our State is national parks and conservation parks and reserves but three-quarters of that is open to mining, which I think is a very poor showing on the part of South Australia. A lot of it is historically based but we do have that situation now that only a very small amount of the State is exempt from mining, for example under the Wilderness Protection Act and other heritage agreements and the like.

So the experience that we have in South Australia, I think it is fairly safe to say that mining leases et cetera are granted routinely by the Mining Minister. We do have new provisions regarding what the Minister must consider in terms of the environment — we think that is an improvement — from 1 July, and there is also a definition of 'the environment' in the Mining Act now, which I think is better than what there was but it really could go further in terms of dealing with activity within the environment. My suggestions would be around talking about habitats, ecosystems and ecosystem processes and the Biological Diversity Act, the community species and the genetic level. So a more composition of the environment is needed in any regulation of mining.

There is provision in the Mining Act for exempt areas and we think that is a really important provision, to create no-go zones for mining where mining can't exist. I think that is there, though, for economic reasons to stagger mining not so much for environmental outcomes and perhaps there should be indeed a particular provision which allows declaration of no-go zones for environmental reasons. My point on that is backed up by the fact that in the Parliament at the moment there is a protection bill for Arkaroola, the sanctuary, which I'm sure you are aware of.

Mr FOLEY — Don't assume terribly much.

Ms BALLANTYNE — Okay, and there has been a lot of debate about how to protect that area from mining over many years, and the fact that the Government has brought into Parliament a bill to particularly protect that area suggests that perhaps those exempt area provisions in the Mining Act is not strong enough to protect the environment, particularly significant parts of the environment which needs protection from mining, and that bill specifically states that mining is to be prohibited from the date of passage. So we would suggest that there needs perhaps to be a stronger clause within the Mining Act with respect of no-go zones.

So assessment of mining leases and mining and exploration leases and the like, as I say, are fairly routinely done. I don't know of any major mining proposal that's ever been knocked back. Certainly smaller projects have been. I would suggest that there are different provisions relating to private mines which I won't go into but essentially there is a fairly standard procedure that is followed through the Mining Act for assessing and approving mining leases and the like.

There are provisions for referrals to be made to the Planning Minister, Environment Minister and the River Murray Minister. However, those referrals don't give those ministers the power of direction over mining applications. I would suggest for extremely important applications that there should be concurrence by Cabinet on certain mining applications of great importance to the community. At the moment, the Mining Minister has pretty much complete decision making and discretionary decision making around those issues. So I think there are real difficulties with that condensation of power within the Mining Minister's portfolio.

The other issue I wanted to talk about was native vegetation clearance as a result of mining. There is an exemption for mining activities essentially in respect of approval to clear native vegetation in this State. However, that exemption does allow for significant environmental benefits to be considered. I think there is another story around what we see is the difficulties with significant environmental benefits. We would suggest that they don't necessarily live up to expectations and perhaps we are not adding to our native vegetation resources in that way but simply creating the kind of lending bank which is taken from routinely and not added

to. Also, there is not legislation to cover the clearance of native vegetation; it is simply reduce the guidelines, and we would suggest that that is not a strong enough regulation.

The other important aspect of assessment which came through this year in terms of amendments to the Mining Act was improvement to environmental programs which the mining companies are required to carry out before they get approval. We think they are quite comprehensive now so we give the Government a tick on those but there are some issues. There is an auditing process that can be done with those programs but we don't think they go far enough, and also the Minister has a discretion as to whether they release the information from those audits. There is also no definition of 'environmental outcomes', which we find strange, within the legislation.

So I think there needs to be more clarification around that issue but generally the assessment process, I think, has some fundamental flaws. The legislation does not actually require companies to address ecologically sustainable development principles so there is no requirement to achieve ESD or to address the precautionary principle, nor what impacts the Minister has to consider. We think they should be required to consider all impacts; cumulative impacts, climate change impacts. They are not specifically addressed in the legislation and I think they should be.

Another issue which was taken to another level as a result of the amendments was the ability of the Minister to give an early 'no' on exploration licences, but we think that should actually go further and apply to all applications.

The other area outside of assessment that I want to cover is compliance and enforcement and then third party input. So compliance and enforcement: significantly, there are greater powers for authorised officers and the Minister as a result of the 1 July amendments and I think that is a good thing and they can direct mining companies, even suspend operations, direct on rehabilitation measures et cetera. However, again there should be sufficient funding to make sure that they can carry out their activities.

There has also been an increase in penalties for illegal mining and failure to follow directions. Now the penalty is \$250,000 for a breach, much better than it was when the Mining Act first came in.

Mr NOONAN — Sorry, what was it?

Ms BALLANTYNE — I think it was about five or something, so it has obviously eroded over time due to inflation. Still, I would say it is nowhere near high enough. You know, if you've got a mining company and it costs them \$5 million to make an improvement, if you take on the economic rationalist approach you would say 'Well, let's see if we can get away with not being caught. It is going to cost us five million to do that. If we get caught we are going to have to pay \$250,000'. It is not hard to figure out why you would perhaps take the risk if you were a mining company, and with the amount of money we are talking about involved these days, \$250,000 is nowhere near enough. I would suggest at least \$1 million, if not, \$1.5 million for those sorts of breaches, but I do commend the Government, though, on increasing it from the 1971 level.

So I think we need to go further with penalties. There is also a new compliance structure that has been introduced and that is to be commended. It is based on other up-to-date regulatory processes and other jurisdictions but when they do put their compliance and enforcement policy on paper, which I believe it's in the process of, that there need to be clear rules about how those are implemented.

So we need to also consider for the future perhaps a tiered approach to offences: high level, mid level and lower level, which I think is the best practice used in other jurisdictions. At the moment we just have a one-size-fits-all with maximum penalties, which is better, of course, but I think we could go further with a tiered approach, and also, to enable the courts to make a range of perhaps innovative orders where there are breaches, and those things can include paying the costs of investigation, perhaps some publication of offences and convictions, things that are likely to act as greater deterrence measures for the future.

We would also suggest that perhaps there be independent auditing of compliance measures over time in a comprehensive manner to see how well companies are doing with respect to environmental programs and compliance generally. So I think those are important things. Again it requires well resourced government departments to do that but overall I think those sorts of things will lead to a more sustainable process in the future. So that was the second area I wanted to cover.

Thirdly, an issue that is something that we focus on with respect to all environmental laws is third party input and participation in the decision making process around mining. At the moment, the Minister, in our view, makes a decision on mining before they even advertise the fact that a mining lease may be granted. We see that as certainly not best practice. With best practice, we would say that there needs to be a proposal that is generally put out for public consultation. There needs to be a reasonable time frame for public consultation. There needs to be full disclosure of what the proposal is on the web site. There need to be full disclosure of any submissions that are put in as a result of the proposal going for comment, and if there are submissions made, there needs to be public hearings to further glean information about the proposal and the issues that are arising. That is common practice both in South Australia and in other jurisdictions. Our Development Act, for example, does well in terms of public consultation on important and significant developments. So the idea of having this robust public consultation process is not new and I think the Government here in South Australia could well do more in terms of that within the Mining Act.

The other issue is there should be third party rights to challenge decisions around mining. Certainly mining companies can challenge decisions made by the Minister in terms of conditions and any response that they have on environmental programs they can challenge in the courts. However, there are no rights to challenge by community members, those who put in third party representations i.e. submissions on mining proposals, and we see that as a really inequitable state of affairs in South Australia.

In addition, generally the community should be able to enforce any breaches of mining conditions through the courts. If the Mining Minister won't or the Environment Protection Authority won't in respect of mineral processing, we think that there should be open standing, which is the ability of anyone to take that action in the courts. It should not be based on whether you have a financial interest in the project. It should be that there is a general right to take those sorts of actions in the court, and if there is action by such public interest litigants and they come to us generally, they should be protected from cost orders if they choose to take action as they are not taking action for their own personal benefit.

It is a new and developing area of law, protective costs orders, but I know our sister organisation in Victoria has written quite comprehensively about protective orders and I would recommend you read their publication on that issue. That is a general point in relation to public interest litigation but I think it has particular application to the mining industry and mining industry matters.

That's a snapshot of where I think the regulatory framework has real promise, but it also is open to real improvement as well.

One last point though and that is the vexed issue of coal seam gas extraction. Obviously an issue across Australia, it is becoming an issue here. We would suggest, as has been suggested elsewhere, that there be a moratorium on those sorts of applications until we are fully aware of some of the potential impacts on the environment, particularly water sustainability. So unless you have any questions, that is where I am finishing for the day.

Mr FOLEY — We do have a few questions. Thank you very much for that. One of the key terms of reference for us is the managing of the conflict between different uses of land and resources and competing arrangements there. We heard submissions from farming groups yesterday about their view on the relative merits of mineral exploration and development versus food security, right to farm, private land use. So in that context, does the Environmental Defenders Office have any general propositions but in terms of specific — I am trying to get my head around this exempt notion of land, which seems to be a purely South Australian concept, and how that applies in these circumstances. So that is one package of issues there. The other is how the 'notice of entry' system — which I understand is 21 days, almost compulsory, once you give the notice system — whereby farmers or private land holders, but generally farmers, are required to allow exploration activity to then occur. So has the Environmental Defenders Office had any dealings with those kind of issues from those competing land use claims? Particularly the South Australian Government has prioritised mineral exploration development, at least over the last 10 years we have heard, probably about the last 20 years. That is an economic driver for the State. Has the Environmental Defenders Office entered into that general public space with a specific focus on how the exempt land stuff works and the 'notice of entry' stuff? Has the office had any exposure to those issues?

Ms BALLANTYNE — We have. I must say, I debated whether to include information on that in my presentation but given the time I chose not to, but certainly we have been approached by farmers and other land owners around that very vexed issue. Certainly that process has changed recently with the amendments. I still think it is a vexed issue regardless of that. It does give land owners certainly more of an equitable playing field. However, I think we have tended not to advise and assist those land owners in any detailed way.

What I would say generally is I think there needs to be greater strategic planning across the State in terms of land use generally to identify both environmental hot spots to be protected as well as how we have those issues of our competing land use resolved. I don't think there is a resolution though but we could do probably a bit more planning to try and have a better idea of where we want to go with mining approvals rather than the ad hoc approach we take at the moment, but it is certainly difficult times for land owners in the face of mounting mining activity.

Mr FOLEY — I'm sure like all good community centres you run on less than the smell of an oily rag but would it be asking too much if just the general position that you perhaps bring to those debates could be provided to our secretary at a later day?

Ms BALLANTYNE — Yes, I can do that. I have a lot of information on that. I am happy to provide.

Mr FOLEY — Thank you very much.

Mr NOONAN — I was very interested in your presentation. You provided a lot of content so thank you for that. This issue about the Minister for Mining essentially being the 'Environment Minister for Mining Activities', it seems like an interesting concept to me. I can see why it would give rise in your eyes to potential conflicts that exist. Can you just explain for our benefit the level of quality that you have seen demonstrated along departmental representatives in relation to their understanding of matters to do broadly with the environment in terms of all of the sort of sensitivities that you would normally have raised, and you have raised some in your presentation? So my question I suppose goes to: do you have people who are able to assess in the same way they may be able to do it in the EPA, sitting in the Department with the same understanding or depth of knowledge about environmental matters?

Ms BALLANTYNE — Look, I'm certainly aware that there are memoranda of understanding around environmental issues and assessment of those matters between the Environment Protection Authority and PIRSA and I don't doubt that there is understanding in a detailed way of those matters within individual units in the Department. It is a perception that we have that whilst that is the case and we don't doubt the integrity of those workers, that the dual role that they have is potentially conflicting and I would have to say, a couple of months ago I went to a departmental briefing on the new structure and the new amendments. I was the only environmental person within the room. I certainly had the perception that that briefing was entirely about how you follow the rules. There was very little said about how we go forward in developing compliance structures. I had to press the issue around when is that policy going to be forthcoming. It is still not, as far as I know, out for public comment, and we are talking of at least six months down the track. I appreciate the workloads of others but I think that I cannot pinpoint that there are difficulties and identified specific instances but I think the general perception would be that there is a conflict of roles there.

Mr NOONAN — Just the other thing that you mentioned which I think was interesting, that the recent amendments have established environmental programs which you touched on?

Ms BALLANTYNE — Yes.

Mr NOONAN — You are critical of the fact that they are subject to audits but those audits may not be made publicly available. Can you just explain to the Committee what are the outcomes that you would expect from those new environmental programs as part of the Act?

Ms BALLANTYNE — Well it is interesting, I think the approach that's taken in South Australia is that companies set their own outcomes and there is no guidance, as I said, to what outcomes should at least aspire to.

Mr NOONAN — Because we don't understand anything about that. Are these sort of like offsetting programs where there is an acceptance that, let's say, open cut mining will have a significant impact on the environment so there is some other program to offset the impact? Because we don't understand that at all.

Ms BALLANTYNE — Okay. That could be one outcome. There could be other outcomes regarding emissions, pollution levels, biodiversity loss, rehabilitation outcomes, a whole variety of matters could be dealt with under ‘Environmental Outcomes’. I think it is a bit open slather as to what we will see because we are obviously still in the new stage of working out those programs. I mean certainly there have been other programs in the past but I think this is new territory and I would have to say that, yes, it remains to be seen.

Mr FOLEY — I would just like to explore a little bit more on that issue because the Inquiry’s terms of reference are very broad-ranging. It is really held out to us that the South Australian model is really Australian best practice and the notion of the one-stop regulatory approach is consistently held as the centrepiece for that. I don’t want to put words into your mouth but I get the impression from your submission that the Environmental Defenders Office’s experience is being the regulator and the proponent in the one beast for a regulatory one-stop-shop causes your organisation some concerns?

Ms BALLANTYNE — Yes.

Mr FOLEY — That is a fair assessment on my part. If you had your opportunity, whilst wanting the process to be efficient and timely and thorough and robust, have you given any thought to what an alternative might be?

Ms BALLANTYNE — I think the alternative is — and I believe that in Queensland their equivalent of our Environment Protection Authority is the regulator and I think there is a model there — I think we should have assessment under the Development Act, which is our planning tool, and then regulation to occur under the auspices of the Environment Protection Authority solely. They have some role, as I said, but I think they should have a complete regulatory role rather than a mining minister. It just seems to me an inherent conflict that the Minister has and the Department.

The CHAIR — Further to what Martin just said, it seems to be that South Australia is held up as certainly a good place to do business. We are told that the time from application to approval is down somewhere to around about six months, which would certainly be shorter than any other jurisdiction that I am aware of. With the things that you would like to put in place and the protections you would like to see, what would you anticipate would be a better period of time or a resulting period of time from those processes?

Ms BALLANTYNE — I think timing is so much of an issue as thoroughly assessing an application.

The CHAIR — Do you have an idea of what that might require, what sort of timing that might require?

Ms BALLANTYNE — That’s a difficult question. I think if you take into account a reasonable period of public consultation, I would suggest a couple of months. That also involves consultation with relevant ministers and other agencies. You are probably looking at upwards of 12 months. Now, that would be abhorrent probably to mining companies but I think if you were to do the job properly that you do need to take that time and give people the opportunity to really be heard at both the submission stage and perhaps via public hearings as I suggested.

So I think you need to look at all the up-to-date sites and take into account what is already happening in terms of any other mining activities, that cumulative impact issue and also just looking broadly at what are all the impacts, social, environmental and community impacts, and that can take some time. We are looking at obviously a plan for the Murray Darling Basin and there is a long period of time that that plan has taken to get together. I think six months as an application approval time, that is very hasty but I know that that is what is happening at the moment and it is routinely the case with various mining applications.

The CHAIR — On a slightly different matter, I am just very interested in your views. You are very clearly here to be the spokesperson for the Environmental Defenders Office. Do you feel that there is more given to the miners than returns to the community from mining because most of the benefit from mining goes to the mining companies?

Ms BALLANTYNE — I guess I am a little bit outside my brief but I would say generally that the State does not do well in terms of royalties. I imagine that’s what you are getting to.

The CHAIR — A little bit. What I am just really thinking about was the stress that it puts on the environment as opposed to what it is that returns to the community, the trade-off?

Ms BALLANTYNE — Yeah. Look, it is a difficult question.

The CHAIR — Feel free not to answer it. That's fine. It is just I was interested to see if you had a set view on that.

Ms BALLANTYNE — I don't. I mean, there are benefits to mining, I can't deny that, but I see that if we are to engage and promote that industry that it needs to be done sustainably, and I don't think that we do that well enough here at the moment and if we continue on the path that we are and have the regulatory framework that we do, ultimately we may have a situation where the down side does outweigh the benefits and I think particularly in terms of those impacts on our water supplies, the pollution aspects et cetera.

The CHAIR — It is viewed fairly strongly that this came about in South Australia, the sort of drive with mining, probably in the early 2000s. Is that when you felt that the deeper impact into the environment without the proper protections increased?

Ms BALLANTYNE — I think that's probably right. It really wasn't on anybody's radar in the conservation sector until that time. I think it was seen as the fairly isolated pockets of mining, but now, I think as you can see on that map, we are talking about a lot more business being done in South Australia and it is certainly now, I think, one of the key issues for the future of this State in many respects.

The CHAIR — Thank you Melissa. Thank you very much for being here today and for giving us the benefit of your knowledge. You will be sent a transcript of today's proceedings and feel free to change any mistakes that you think have been made; typographical errors but not in the substance. So thank you very much again for being here.

Ms BALLANTYNE — Thank you for your time.

Witness withdrew.