

ANNEXURE 13

PROTECTED CONTRACTUAL RIGHTS

BACKGROUND

1. Protected contractual rights must be considered and preserved in arbitration determinations by the ACCC under section 44W(1)(c) of the TPA.¹ In effect, the terms pursuant to which a Service is to be provided, if it is declared, cannot deprive a party of a "protected contractual right".
2. If the Service is declared, and negotiations between the Mt Newman Participants and a potential access seeker are unsuccessful, the access seeker may notify the ACCC of an access dispute. To resolve the dispute, the ACCC will make an access determination. However, the ACCC must not make an access determination that would deprive any person of a protected contractual right. Thus, where the nature of a "protected contractual right" is such that provision of the Service, once declared, is not possible without depriving the Mt Newman Participants of that right, then declaration is likely to be futile.
3. In the *Hamersley* decision, Kenny J stated that while "it would not ordinarily be until the Commission makes a determination that the question of protected contractual rights could arise . . . there may be circumstances where the question properly arises before that point."²
4. Section 44W(5) of the TPA defines a "protected contractual right" as "a right under *a contract that was in force* at the beginning of 30 March 1995" (emphasis added).³ The Explanatory Memorandum to the *Competition Policy Reform Act 1995* (Cth) indicates that the purpose of identifying protected contractual rights is to afford protection to "all contractual rights relating to access to a declared service, either of the provider or of a third party, that existed at the beginning of 30 March 1995".
5. In *Seven Cable Television Pty Ltd v Telstra Corporation Ltd*,⁴ Tamberlin J considered the meaning of "protected contractual right" under section 152AR(4)(d) of the TPA. That section is cast in similar terms to section 44W(1)(c) but deals with restrictions imposed upon an access provider in granting access to telecommunications services at the request of a service provider.

¹ Section 44W provides that:

"The Commission must not make a determination that would have any of the following effects: ...
(c) *depriving any person of a protected contractual right;"*

² *Hamersley Iron Pty Ltd v National Competition Council* (1999) 164 ALR 203, at 226, [80].

³ It should be noted that the definition of "protected contractual right" does not require the right to have been held by a particular person at the beginning of 30 March 1995, but rather that the **contract** was in force at that time.

⁴ [2000] FCA 350. This decision was upheld on appeal by the Full Court of the Federal Court in *Foxtel Management Pty Ltd & Ors v Seven Cable Television Pty Ltd* (2000) 175 ALR 433 (Beaumont, Moore and Gyles JJ).

6. Although Tamberlin J adopted a “strict” construction to the statutory term “protected contractual right”,⁵ his Honour concluded that a protected contractual right included a right of exclusivity or bundling (which were the relevant rights in issue). Tamberlin J emphasised that it is the right and not the contract which is to be protected.

PROTECTED CONTRACTUAL RIGHTS OF THE MT NEWMAN PARTICIPANTS

Summary

7. The Mt Newman State Agreement, the Rail Transport Agreement (**RTA**) and the Special Lease relating to the Mt Newman Line (**Special Lease**), set out the rights and obligations of the State of Western Australia and the Mt Newman Participants in relation to (amongst other things) the Mt Newman Line and surrounding land.
8. The following contractual rights arise, in favour of the Mt Newman Participants, under these agreements:
- (a) a right to exclusive possession of the land on which the Mt Newman Line has been constructed and the Mt Newman Line, subject to certain express reservations and obligations; and
 - (b) an exclusive right to use the rail facility and associated infrastructure, subject only to express obligations for third party carriage, on certain conditions.
9. These rights arise under contracts which were in force at the beginning of 30 March 1995 and are, accordingly, “protected contractual rights”.
10. The Mt Newman Participants would be deprived of these protected contractual rights if the Service was declared and was required to be provided by the Mt Newman Participants. In those circumstances, the Mt Newman Participants cannot be required to provide the Service, even if declared.

Mt Newman State Agreement

11. The Mt Newman State Agreement was entered into by the State Government of WA and the Mt Newman Company Limited (the **Company**) on 26 August 1964. It is the agreement under which, subject to further approvals and agreements, the Company began iron ore mining, and constructed the Mt Newman Line and port facilities.
12. The Mt Newman State Agreement was approved by and is scheduled to the *Iron Ore (Mount Newman) Agreement Act (WA) 1964*.⁶
13. The Mt Newman State Agreement provides that it will continue in operation subject to compliance by the Mt Newman Participants with their obligations under the Agreement.⁷

⁵ [2000] FCA 350 at [75].

⁶ Section 3, *Iron Ore (Mount Newman) Agreement Act (WA) 1964*.

⁷ Clause 11(4).

14. Clause 19 of the Mt Newman State Agreement provides that the Company can assign its rights and obligations under the Agreement.⁸
15. The current parties to the agreement are the Mt Newman Participants.⁹
16. The Mt Newman State Agreement required the Company to submit proposals for the mining of iron ore, and the transport and shipment of that ore.¹⁰ Once State approval was given, the Company was required, amongst other things, to construct a mine, railway and wharf and to commence export of iron ore.¹¹
17. Following approval of the proposals, the State Government of WA was required to grant a mineral lease to the Company, and to grant in fee simple (or otherwise) special leases of Crown lands including for the railway, townsites and other leases.¹²

Clause 8 provides:

(1) As soon as conveniently may be after the commencement date the State shall:

Mineral Lease

(a) ...

Under Company's Proposals

(b) in accordance with the Company's proposals as finally approved or determined under clause 6 hereof or under clause 6A hereof or as varied from time to time pursuant to subclause (3) of Clause 20 hereof and as require the State to accept obligations:

⁸ Clause 19 provides:

"(1) Subject to the provisions of this clause the Company may at any time –

(a) assign mortgage charge sublet or dispose of to an associated company as of right and to any other company or person with the consent of the Minister the whole or any part of the rights of the Company hereunder; and

(b) appoint as of right an associated company or with the consent in writing of the Minister any other company or person to exercise all or any of the powers functions and authorities which are or may be conferred on the Company hereunder,

subject however to the assignee or (as the case may be) the appointee executing in favour of the State a deed of covenant in a form to be approved by the Minister to comply with observe and perform the provisions hereof on the part of the company to be complied with observed or performed in regard to the matter or matters so assigned or (as the case may be) the subject of the appointment."

⁹ See the Sixth Schedule to the *Iron Ore (Mount Newman) Agreement Act 1964* which states that "the State and the Joint Venturers [defined as BHP Minerals Pty Ltd, Mitsui-Itochu Iron Pty Ltd and CI Minerals Australia Pty Ltd] (pursuant to certain assignments and Deeds of Covenant and the release of the Mt Newman Iron Ore Company Limited pursuant to clause 19(2) of the Principal Agreement...) are now the parties to the agreement dated the 26th day of August 1964 which agreement was approved and is scheduled to the *Iron Ore (Mount Newman) Agreement Act 1964* and as amended from time to time..."

¹⁰ Clause 5.

¹¹ Clause 9(1).

¹² Clause 8.

Lands

- (i) *grant to the Company in fee simple or for such terms or periods and on such terms and conditions (including renewal rights) as subject to the proposals (as finally approved or determined as aforesaid) shall be reasonable having regard to the overall development of the harbour and access to and use by others of lands the subject of any grant to the Company and of services and facilities provided by the Company:*

for nominal consideration – townsite lots;

at the peppercorn rental – special leases of Crown lands within the harbour area, the townsites and the railway; and;

at rentals as prescribed by law or are otherwise reasonable – leases rights mining tenements easements reserves and licences in or under Crown lands

under the Mining Act the Jetties Act, 1926 or under the provisions of the Land Act modified as in subclause (2) of this clause provided (as the case may require) as the Company reasonably requires for its works and operations hereunder including the construction or provision of the railway wharf roads airstrip water supplies and stone and soil for construction purposes...

(emphasis added)

18. Clause 8(4)(b) of the Mt Newman State Agreement provides:

"the State ... shall not ... without the consent of the Company resume nor suffer nor permit to be resumed ... any of the works installations plant equipment or other property for the time being belonging to the company and the subject of or used for the purposes of this Agreement nor any lands for the time being owned by the Company in fee simple hereunder or under any lease or licence issued pursuant to this Agreement ..."

19. A copy of the *Iron Ore (Mount Newman) Agreement Act (WA) 1964*, to which the Mt Newman State Agreement is scheduled (in the First Schedule), is included in the **Supporting Documents**.

Special Lease

Background

20. Pursuant to clause 8(1)(b)(i) of the Mt Newman State Agreement and under section 116 of the *Land Act WA 1933*, on 13 December 1967, the State Government of WA "demise[d] and lease[d]" the land on which the Mt Newman Line was subsequently built, including the land below the surface to a depth of 200ft, to:
- Pilbara Iron Limited (30%);
 - Dampier Mining Company Limited (30%);
 - Amax Iron Ore Corporation (25%);
 - Mitsui-C Itoh Iron Pty Ltd (10%); and
 - Seltrust Iron Ore Limited (5%);

collectively, the **Lessees**. "Lessees" is defined in the Special Lease to mean these companies and "each of their respective successors and assigns".¹³

21. The lease was stated to be for:

*"...the special purposes of enabling [the Lessees] to carry on mining operations and cognate operations on the said land for the purposes of or for purposes connected with the overall mining operations carried on by the Lessees under the [Mt Newman State Agreement] including the construction, development, maintenance use and operation of a railway and ancillary installations and facilities including a service road between the mine townsite and the port pursuant and subject to the proposals of the Lessees." (emphasis added)*¹⁴

22. Clause 2(1) of the Special Lease provides that the Lessees:

"...shall peaceably hold and enjoy the demised premises during the said term without any interruption by [the Crown] or any person rightfully claiming through under or in trust for [the Crown]".

23. In consideration for this grant, the Lessees agreed to pay rent to the State.

24. Clause 2(2) of the Special Lease provides that the Lessees have the option to extend the lease for a further 21 years, on the same terms.¹⁵ The Special Lease, which is registered, records that it has been extended, most recently for 21 years from 7 April 1988. Therefore, the Special Lease is "a contract that was in force at the beginning of 30 March 1995".

25. The Special Lease also records that the most recent assignment of the lease occurred on 20 December 1996. The Lessees registered at that time were:

- BHP Minerals Pty Ltd (85%);
- Mitsui-Itochu Iron Pty Ltd (10%); and
- CI Minerals Australia Pty Ltd (5%).

Further, on 28 December 2001, an "application" was registered which indicated that the "correct name of the first registered proprietor is now BHP Billiton Minerals Pty Ltd". CI Minerals Pty Ltd is now Itochu Minerals & Energy of Australia Pty Ltd.

26. Therefore, the current registered Lessees are the Mt Newman Participants.

¹³ Clause 3(12).

¹⁴ Special Lease recital (vi).

¹⁵ The Lessees are obliged in the initial term to construct a railway and ancillary infrastructure, however this obligation is not the subject of the option to extend.

Reservations

27. The Special Lease identifies a number of exceptions to the Lessees' right to "peaceably hold and enjoy" the demised premises. They are:
- (a) The State retains title in all mines for gold, silver, copper, tin and other metals, ore or minerals and petroleum.
 - (b) Members of the public can "go pass and repass" for all purposes (with or without stock, or vehicle) on certain roads built on the premises, subject to the proviso below.¹⁶
 - (c) The State, or anyone with its authority, can take timber, use stones and other materials, subject to the proviso below.
 - (d) The State retains the right to search and extract gold, silver, copper, tin and other metals, ore or minerals, subject to the proviso below.

In relation to each of (b), (c) and (d), the proviso is that the activity must not unduly prejudice or interfere with the operations of the Lessees under the Mt Newman State Agreement (or so long as the Lessees are not unduly prejudiced or their operations under the Agreement are not unduly interfered with).

28. Clause 3(1) of the Special Lease also provides that:

"..it shall be lawful at all times for [the State]¹⁷ (subject to the provisions of this lease and the [Mt Newman State Agreement] and in particular without limiting the generality of [clause 8(4)(b) of the Mt Newman State Agreement "No resumption"]:

(i) to require the Lessees to consent to the granting of such easements (including easements without dominant tenements as referred to in the Public Works Act, 1902), or rights in or over the demised premises; or

(ii) to use or permit the use of the demised premises, in each case as reasonably necessary (taking into consideration the present and future use or development of the demised premises by the Lessees) in connection with the overall development or use of lands adjacent to the demised premises

PROVIDED ALWAYS that no such grant use or permission to use (as the case may be) would:

(a) unduly prejudice the Lessees or prejudicially interfere with the operations of the Lessees under the Agreement; or

***(b) increase the Lessees' commitments or prejudicially interfere with the Lessees' control over the demised premises"* (emphasis added)**

¹⁶ See also, clause 9(2)(b) of the Mt Newman State Agreement permitting the public to use roads provided that "such use shall not unduly prejudice or interfere with the Company's operations hereunder".

¹⁷ The limited third party rights that are available under this clause are all subject to the State of WA either being the "third party" or requiring the consent of the Mt Newman Participants, or permitting the third party. In other words, this clause does not permit any third party use/easement without the consent of the State of WA.

29. The State may also build roads, water pipelines and telephone lines (etc) over the leasehold, so long as it would not "unduly prejudice the Lessees or prejudicially interfere with the operations of the Lessees under the [Mt Newman] Agreement".¹⁸
30. The Special Lease further provides certain arrangements whereby the State can monitor compliance with the lease, and require the Lessees to alter the location of any improvements, subject to the payment of damages.¹⁹

Rights of the Mt Newman Participants under the Special Lease

31. Under the Special Lease, the Mt Newman Participants have a right to *exclusive possession* to the demised premises, subject only to the express reservations and obligations referred to above.²⁰
32. Further, in the case of grants of easements or permissions under clause 3(1)(i) or (ii), the grant, use or permission must not:
 - (a) unduly prejudice the Lessees or prejudicially interfere with the operations of the Lessees under the Agreement; or
 - (b) increase the Lessees' commitments or prejudicially interfere with the Lessees' control over the demised premises.²¹
33. A copy of the Special Lease is included in the **Supporting Documents**.

¹⁸ Clause 3(1)(iii).

¹⁹ Clause 1(7).

²⁰ In *Goldsworthy Mining Ltd v The Commissioner of Taxation* (1973) 128 CLR 199 at 213, Mason J stated (in relation to a special lease granted by the State of WA under the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* and the *Land Act 1933*):

"Although these provisions restrict the use to which the joint venturers may put the premises and impose obligations of an important kind, in my view they are not inconsistent with existence of a right of exclusive possession in the joint venturers. Indeed the provisions assume the existence of that right." (emphasis added)

More recently in *Western Australia v Ward* (2002) 213 CLR 1 at [551], per McHugh J in relation to a reservation to prevent the lessee from excluding "the Aboriginal natives" confirmed this position and stated:

"Unless the lease had given the lessee the legal right to exclude all others, the reservation would be irrelevant. The same comment can be made in respect of reservations that allowed third parties to enter the demised premises for various purposes. Anyone at that time who thought that such reservations were inconsistent with the legal right to exclusive possession simply did not understand the law relating to leases."

And per Callinan J at [745]:

"It follows that special leases issued under s 116 of the Land Act 1933 conferred a right of exclusive possession."

²¹ This clause is to be distinguished from Kenny J's decision in *Hamersley* where no equivalent clause (b) was identified.

Rail Operations

34. Under the Mt Newman State Agreement, the Company was obliged to construct various facilities including a railway²² and eventually, to pay to the State royalties on the iron ore sold.²³
35. The obligations on Mt Newman Participants also include those set out in clause 9(2)(a) of the Mt Newman State Agreement, which provides:

"(2) Throughout the continuance of this Agreement the Company shall:

- (a) *operate its railway in a safe and proper manner and where and to the extent that it can do so without unduly prejudicing or interfering with its operations hereunder allow crossing places for roads stock and other railways and transport the passengers and carry the freight of the State and of third parties on the railway subject to and in accordance with by-laws (which shall include provision for reasonable charges) from time to time to be made altered and repealed as provided in sub-clause (3) of this clause and subject thereto or if no such by-laws are made or in force then upon reasonable terms and at reasonable charges (having regard to the cost of the railway to the Company) PROVIDED THAT in relation to its use of the said railway the Company shall not be deemed to be a common carrier at common law or otherwise;"* (emphasis added)

36. The operation by the Mt Newman Participants of the Mt Newman Line (and the obligation to do so "in a safe and proper manner") is subject to the express obligation to carry third party freight and passengers, but only to the extent that to do so would not unduly prejudice or interfere with their operations under the Agreement. Importantly, there is no obligation under this clause to permit a third party to operate rolling stock on the Mt Newman Line – only to carry freight and only where to do so would not unduly prejudice or interfere with the Mt Newman Participants' operations.

RTA

37. The operation of the Mt Newman State Agreement was modified by the RTA. The RTA was executed on 27 January 1987 by the State and the then Mt Newman Participants.
38. The RTA sets out more detailed terms on which third party iron ore is to be carried on the Mt Newman Line. The provisions of the RTA are examined further in **Annexure 14**.
39. Clause 1 of the Schedule to the RTA provides that the "Mt Newman Participants" for the purposes of the RTA are the parties for the time being comprising the Company under the Mt Newman State Agreement (in other words, the current Mt Newman Participants).
40. Clause 2 of the RTA provides:

"(a) Notwithstanding the provisions of clause 9(2)(a) of the Mount Newman Agreement the provisions of the Schedule hereto and the principles set forth therein shall apply to the carriage of iron ore products of third parties over the Mount Newman railway system. ..."

²² Clause 9(1)(c).

²³ Clause 9(2)(j).

41. Clause 3 of the RTA provides that:

"All freight goods or products of a third party other than iron ore products shall be carried over the Mount Newman railway system pursuant to the provisions of clause 9(2)(a) of the Mount Newman Agreement." (emphasis added)

42. Clause 2 of the Schedule to the RTA provides that:

"The Mount Newman Participants shall as and when required carry the iron ore products of a third party over the third party railway system in accordance with detailed contractual arrangements, consistent with the provisions of this Schedule and with such additional provisions as the parties may agree, to be negotiated between the Mount Newman Participants and the third party..."

43. Clause 4 of the Schedule to the RTA provides that the arrangements for carriage of third party iron ore under clause 2 of the Schedule must be structured so that they "do not unduly prejudice or interfere with the operations of the Mt Newman Participants under the Mt Newman State Agreement".

44. A copy of the RTA is included in the **Supporting Documents**

The Mt Newman Participants' Protected Contractual Rights

45. The RTA imposes an obligation on the Mt Newman Participants to carry the iron ore of a "third party". They must only do so however, where the terms on which they will do so (consistently with the requirements of the Schedule to the RTA) will not unduly prejudice or interfere with their operations under the Mt Newman State Agreement.

46. More particularly:

- (a) The Mt Newman Participants have a right of exclusive possession under the Special Lease which is a contract which predates 30 March 1995.
- (b) The right of exclusive possession under the Special Lease is subject to exceptions which do not extend so far as permitting a third party to use railway track constructed, by the Mt Newman Participants, pursuant to the terms of the Mt Newman State Agreement and the Special Lease.
- (c) The Mt Newman State Agreement and the RTA require that the Mt Newman Participants carry the iron ore (and other freight and passengers) of third parties. In the case of the iron ore of a third party, they must do so pursuant to an arrangement with the third party which is consistent with the terms of the Schedule to the RTA, provided that that arrangement does not "unduly prejudice or interfere with the operations of the Mt Newman Participants"²⁴.
- (d) There is no obligation under the Mt Newman State Agreement or the RTA, nor any exception to the rights of quiet enjoyment of the demised premises on which the Mt Newman Line is built, to allow a third party (particularly one other than the State)

²⁴ It should be noted also that once such an arrangement is made however, the Mt Newman Participants may not revisit the issue of whether the arrangement so prejudices or interferes with their operations – see cl4(c) of the Schedule to the RTA.

the use of, or access to, the Mt Newman Line, or to allow the rolling stock of a third party to be operated on the Mt Newman Line.²⁵

- (e) The Mt Newman Participants have the right to refuse to carry the iron ore of a third party other than "in accordance with a detailed contractual arrangement consistent with the provisions" of the RTA; and may refuse to carry the other freight of third parties other than pursuant to the terms of paragraph 9(2)(a) of the Mt Newman State Agreement.

The Mt Newman Participants would be deprived of those rights

47. If:

- (a) the Service were declared;
- (b) the Mt Newman Participants refused to provide the Service; and
- (c) the ACCC determined that the Service was to be provided to a third party access seeker,

that determination would deprive the Mt Newman Participants of the right to "peaceably hold and enjoy the demised premises", and those that flow from it as set out above.

- 48. Particularly, any compulsory requirement to provide the Service, being the use of the railway track of the Mt Newman Line would be contrary to the Mt Newman Participants' rights set out above. Use by a third party of the Mt Newman Line (by putting the third party's locomotives and ore cars on the line) would necessarily deprive the Mt Newman Participants of their rights to quiet enjoyment and exclusive use.
- 49. The exceptions in the Special Lease as to limited third party use of the land on which the Mt Newman Line is constructed, clearly do not extend to the point of requiring provision of the Service. Even if they did so, such a use would clearly unduly prejudice and interfere with the operations of the Mt Newman Participants.
- 50. The Special Lease provides for easements or use of the demised premises by the State or third parties in certain circumstances, but these entitlements do not extend to the provision of the Service. Again, even if they did so, those rights are subject to the proviso that they must not either unduly prejudice or interfere with the operations of the Mt Newman Participants or increase the Lessees' commitments or prejudicially interfere with the Lessees' control over the demised premises.
- 51. For these reasons, any requirement to provide the Service, once declared, would necessarily deprive the Mt Newman Participants of these protected contractual rights. Therefore, the ACCC cannot make such an access determination.

²⁵ Clause 3(1) of the Special Lease does not extend so far as to permit even the State to do so. In any event, if it did, that entitlement would be subject to there being no prejudicial interference with the Mt Newman Participants operations, or control over the land, nor any increase in their commitments.

Declaration is futile without access determination

52. Where the Service cannot be required to be provided by the Mt Newman Participants, even if declared, then declaration is futile.
53. If the Service were declared, the Mt Newman Participants would not voluntarily supply the Service. This is because of the very substantial costs and inefficiencies that would be imposed on the Mt Newman Participants if they were to provide the Service (as has been explained elsewhere).