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# HUMAN RIGHTS AND ENVIRONMENTAL RIGHTS: IMPLICATIONS OF A "RIGHTS BASED" APPROACH FOR MINING IN AUSTRALIA

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## Introduction

Mining companies have been criticised for their human rights record in developing countries with allegations ranging from collusion with security forces, violation of labour rights and association with pariah regimes.<sup>1</sup> Persistent complaints and international scrutiny have led to a concerted global effort by some of the largest mining companies to address such criticisms by putting in place processes to avoid past failings. Whilst the mining industry has been the focus of sustained criticism for its environmental record, I am not aware of human rights allegations regarding mines located in Australia. What, then, can the relevance of the response to these criticisms be for mining companies operating in Australia?

Whilst the implications are becoming clearer for Australian companies operating internationally, little attention has been given to what, if any, are the likely implications for mining companies operating within Australia. In this paper, I consider possible implications for mining in Australia of a "rights-based" approach to the environment with respect to both policy and legislative developments and litigation.

## Forging the links – international legal and policy developments

Linking environmental and human rights is not an entirely novel concept. Some argue there has been an implicit or explicit recognition of the right of humanity to a healthy environment since the Universal Declaration of Human Rights in 1948.<sup>2</sup>

The link between health and environment is an obvious one. In 1980 the Human Rights Committee of the UN observed that a nuclear waste disposal site in Port Hope, Canada, jeopardised the lives of nearby residents and raised serious issues with regard to the obligation of states to protect human life.<sup>3</sup> The connection between health and the environment has also been recognised by human rights bodies nationally. For example, the Australian Human Rights and Equal Opportunity Commission (HREOC) explicitly draws the link in its background material regarding the right to health.<sup>4</sup> In discussing the meaning of the Universal Declaration of Human Rights (Article 25) and the International Covenant on Economic, Social And Cultural Rights (Article

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12(a) HREOC refers to Principle 1 of the Stockholm Declaration that “*man has the fundamental right to freedom, equality and adequate conditions of life in an environment of equality that permits a life of dignity and well being*”.<sup>5</sup>

Whilst there is no doubt that the foundation for environmental protection can be traced back to early instruments, the two fields of international law, human rights and the environment, have until recently developed distinctly from each other. I consider the international community has now embarked upon a new stage in the development of international environmental law which will have implications on the national stage.

In my view, the first substantial step on this path was taken by the UN Office of the High Commissioner on Human Rights (UNHCHR) when it appointed Ms Fatma Zohra Ksentini as Special Rapporteur on Human Rights and the Environment for the Sub-commission on Prevention of Discrimination and Protection of Minorities.<sup>6</sup> In her final report in July 1994, Ms Ksentini described the interconnectedness of human rights and the environment and annexed a draft Declaration of Principles of Human Rights and the Environment. The draft declaration was prepared in May 1994 by a Meeting of Experts on Human Rights and Environment held at the United Nations in Geneva. The declaration deals with both substantive and procedural components of a right to a secure, healthy and ecological sound environment and has been hailed by non-government organisations, such as the Earthjustice Legal Defence Fund, as the starting point for adopting a set of legal norms consolidating the right to a satisfactory environment.<sup>7</sup>

Whilst there was early activity by the UNHCHR, it appears that the impetus waned in the mid to late 1990s. As recently as 2001, the United Nations Environment Program (UNEP) had not specifically identified a connection between human rights and the environment. In its program for developing and reviewing environmental law, UNEP proposed to develop innovative approaches to environmental law by studying the contribution that other fields of law could make to environmental protection and sustainable development. Whilst the report made specific reference to the fields of trade, security

and military activities, there was no explicit reference to the emerging links between human rights and the environment.<sup>8</sup>

Within a year, however, activity exploring the connections could be described as feverish. In January 2002 UNEP hosted a joint seminar with the UNHCHR in which Australia participated and to which a committee of experts reported that “*environmental protection constitutes a precondition for the effective enjoyment of human rights protection and that human rights and the environment are interdependent and interrelated*.”<sup>9</sup> The Meeting of Experts, examined multilateral environmental agreements, activities of global and regional and human right bodies and international and national developments. That meeting concluded that there was a growing interrelationship between approaches to human rights and environmental protection and that synergies had developed between these previously distinct fields.<sup>10</sup>

Later that year, at the Johannesburg Summit, the link was made more explicit in the Johannesburg Declaration on Sustainable Development. The Declaration welcomed the focus of the Summit on the indivisibility of human dignity and resolved that, through decisions on targets, timetables and partnerships, they would speedily increase access to such basic requirements as clean water ... and the protection of biodiversity. The Declaration includes the following statement, “*We recognise the reality that global society has the means and is endowed with the resources to address the challenges of poverty eradication and sustainable development confronting all humanity. Together we will take extra steps to ensure that the available resources are used to the benefit of humanity*.”<sup>11</sup>

International business groups have also been active participants in the process of bringing the two fields together. The International Business Leaders Forum published a report on business and human rights in 2002.<sup>12</sup> The report took a snapshot of seven multinational companies (including BP, BHP Billiton, Rio Tinto and Shell), and their commitments, policies and procedures for dealing with human rights issues. The International Council on Mining and Minerals recently published Draft Principles for a Sustainable Development Framework. Those Principles draw a link between sustainable development and human rights. They propose that the signatories will seek continual improvement in their performance and

contribution to sustainable development and, in doing so, will “*uphold fundamental human rights and respect cultures, customs and values in dealing with employees and others that are affected by our activities.*”<sup>13</sup>

Some NGOs are agitating for explicit recognition of the human rights implications. Earthjustice argues that “*Put positively, a clean and healthy environment is essential to the realisation of fundamental human rights*”.<sup>14</sup> As well as advocating institutional and policy developments, some NGOs have taken an active role in providing practical assistance to communities under the human rights banner. For example, Oxfam Community Aid Abroad has appointed a Mining Ombudsman to assist communities dealing with human rights issues involving mining projects overseas. The Ombudsman has been instrumental in negotiating agreements between companies and communities. Many of the concerns raised by the Ombudsman in her most recent report deal with environmental degradation and the effects of such degradation on the health, livelihood and cultural survival of the affected communities.<sup>15</sup>

Whilst I do not consider a binding norm has yet emerged that recognises a right to a healthy environment as a fundamental human right, there is little doubt that this is the direction that developments are taking. It is also clear that the concept of sustainable development provides the framework for these developments.

## Implications for Legislative and Policy Developments in Australia

It is uncontroversial that international developments in environmental law have driven legislative and policy developments in Australia. Many of the Acts that we deal with on a daily basis contain statements of principle which are directly derivative of international instruments. In particular, definitions of and references to sustainable development appear in the *Environmental Protection Act 1994* and the *Integrated Planning Act 1997*. Those principles are now being interpreted and applied by applicants, interested parties, administrative decision-makers and courts. Given the international trend to intertwine human rights and environmental

rights, what are the potential implications in Australia?

### Commonwealth powers

An obvious implication is the potential to shore up the constitutional basis for Commonwealth action in the environmental field. There is a clear international consensus that human rights are matters which affect the friendly relations between nations. This has formed the basis for legislation such as the *Racial Discrimination Act 1975*. Thus, if there are gaps in the legislative power conferred upon the Parliament through the external affairs power of the Constitution based on environmental treaties, human rights treaties may well fill those gaps. I don't propose to spend any more time on this topic as it appears to me that the debate about Commonwealth powers in the environmental field is all but over. Commonwealth Governments of all political hues have consistently asserted a legitimate role for the Commonwealth in environmental matters. This has been accepted and is expected by the community. I note that the Prime Minister was recently quoted in the *Weekend Australian* as declaring the environment a mainstream issue when stating that his 3 environmental priorities for 2003 are salinity, water rights and land clearing.<sup>16</sup>

### Procedural environmental rights

An area in which I see significant scope for legislative and policy development is in relation to procedural environmental rights (sometimes called environmental governance), such as the rights to information and participation in decision making. A public involvement norm has arguably emerged through the application of Principle 10 of the Rio Declaration which declares that environmental issues are best handled with the participation of all concerned citizens at the relevant level.<sup>17</sup>

The Meeting of Experts noted the important role that this principle has played in forging links between human rights and environmental rights.<sup>18</sup> The experts asserted that, through the development of this principle, there had been an increasing recognition by states of the rights of access to information, public participation and access to justice.

In a recent paper for the Environmental Law Institute, Bruch and Czebiniak observed that environmental governance rights were “*necessary to protect human rights: to preserve the right to life and a clean and healthy environment in which to live that life and to ensure that all people have a voice in decisions that could affect their health, livelihoods and environment*”.<sup>19</sup>

### Access to information

The current high water mark internationally for information rights is the Aarhus Convention of the UN Economic Commission for Europe. Article 7 provides “*each party shall make practical and/or other provisions for the public to participate during the preparation of plans and programs relating to the environment, within a transparent and fair framework, having provided the necessary information to the public*”.

Procedural environmental rights were also considered recently by industry. Nine of the world’s largest mining companies initiated a program to examine the role of the mineral sector in contributing to sustainable development. In the project report prepared through the World Business Council for Sustainable Development and the International Institute for Environment and Development, the Mining Minerals and Sustainable Development Project (MMSD Project) issued a report entitled “*Breaking New Ground*”.<sup>20</sup> In that report, the information needs of communities were acknowledged and described as being, relative to other stakeholders, “*particularly acute*”.<sup>21</sup>

The report also noted a need existed at all stages of the mineral cycle “*because of the power imbalances between communities and other actors*”.<sup>22</sup> Those power imbalances may not seem as stark here in Australia when compared with developing countries where language and culture may present significant hurdles. Nevertheless I consider the Report’s observation does have application to Australia. Indigenous communities may have particular language and cultural needs. But so do communities that many companies would regard as affluent, educated and culturally disposed to development. It is a recurrent complaint in both mediations and hearings before the Tribunal that communities have not had access to the information they perceived they needed.

### Form of information

Some would argue that the information rights already provided in Queensland legislation are adequate. Parties interested in applications for mining leases and associated environmental authorities are able to obtain the application documents and the environmental assessments and proposals provided to the decision makers. This provides much more substantial access to information than earlier forms of information rights, such as those considered by the High Court in *Saurr & Ors v BCC*.<sup>23</sup> In that case the High Court adjudicated on the form of an advertisement which the Court accepted was a primary source of information for interested parties. That is not the case for mining in Queensland.

However, developments in other countries show that there is scope for further enhancement of information rights, particularly in the translation of information into a meaningful context. For example, in Chile the public notification, by newspaper and government gazette, must describe the principal adverse environmental effects of the project.<sup>24</sup> It is possible for interested parties in Queensland to infer from the draft environmental authority what the EPA considers are the major adverse effects of the activity. However, this is not the same as an explicit statement in the public notice as to what the potential effects could be.

### Timing of information

The reference in the MMSD Report to the need for information at all stages of the minerals cycle will be welcomed by many communities. Mine planning information is necessarily vague at the commencement of a project as it seeks to deal with a multiplicity of variables and uncertainties that prevent corporations from predicting impacts and fixing operating conditions with the same certainty as a static processing facility. The legislation recognises that mine planning evolves over time and requires regular submission of Plans of Operation which are available on the public register.<sup>25</sup>

### Verification of information

It is not just the nature and timing of the information provided to communities but also

the source of information that can present significant difficulties. The MMSD report stated that the lack of trust in corporations, and, in many countries, in governments as well, has moved people from “*the naivety of a “tell me” world to one in which they are not only to be told but to be shown and to have the evidence verified*”.<sup>26</sup>

The lack of trust, leading to calls for verification is driving a number of developments. Firstly, much work is being done on establishing harmonised guidelines for the mining sector on reporting information through the Global Reporting Initiative. The ICMM has picked up this concept of verification in its Draft Principles which propose that signatories will “*implement effective and transparent engagement, communication and verified reporting arrangements with stakeholders*.”<sup>27</sup>

### Community engagement

Information rights are evolving into a right to meaningful community engagement. This is made explicit in the ICCM Draft Principles which commit signatories to listening and responding to legitimate community expectations and concerns.<sup>28</sup>

Community engagement has arisen through what the MMSD report refers to as a “public participation explosion”<sup>29</sup>, which it attributed to a number of factors, including the development of human rights regimes.

In Queensland, for mining projects, participation can be as narrowly interpreted as access to specified information and involvement in decision making through the objection process. However, many companies are now interested in looking at models of engagement that are more co-operative.

It also has to be acknowledged that there is a gap between regulatory requirements and recommended or best practice procedures. For example, objectors appearing before me have referred to EPA guidelines regarding consultations with the public which exceed the legal requirements imposed on the applicant. This can lead to unmet expectations about how the community will be consulted.

Experimentation with consultation models and capacity building for corporations will be critical to their successful engagement with affected

communities. One practical suggestion promoted at an MMSD workshop was to scope a community’s need for information around any project by asking the community what it needed to know in considering the project proposals.<sup>30</sup>

### Community consent

Intertwining environment with human rights, with its emphasis on communities, will support the impetus for further enhancement of procedural rights. So where is the cutting edge now? I see it in the push for translating participation into consent. This is clearly on the agenda. Steve Esposito, the Executive Director of the Mineral Policy Institute (an NGO mining watchdog) is quoted on the cover of the MMSD Report as follows:

*“One hopes it can be a springboard to action on fundamental issues like establishing community consent as a precondition of mining”.*

Lest it be thought that this is the ranting of the lunatic fringe, Rio Tinto, one of the promoters of the MMSD Project has repeatedly publicly announced that it does not propose to develop the Jabiluka Mine without traditional owner consent.

### NGOs

Before leaving the topic of information, there is one further trend which I have seen emerging in the material I have reviewed. As industry has responded to NGO demands to engage meaningfully with communities, it has started to push back and demand from NGOs and watchdog bodies the same standards that are being demanded of corporations. That, is information is now being promoted as a shared responsibility of industry, government and community groups. In the MMSD Report there is a clear call for NGOs to be as transparent and accountable as they demand government and corporations to be and for them to use their information equitably and fairly.<sup>31</sup>

### Impact assessment

Supporting information rights and community engagement requires more sophisticated assessment tools. The focus on human rights, and therefore on communities, necessarily

elevates the consideration of social factors in a way which I believe has not yet been realised in Queensland.

At the Johannesburg World Summit signatories declared that *“we agree that in pursuit of its legitimate activities the private sector, including both large and small companies, has a duty to contribute to the evolution of equitable and sustainable communities.”*<sup>32</sup>

The Report of the International Business Leaders' Forum referred to above demonstrates that human rights are now being incorporated into broader statements of environmental policy commitment. For example, BHP Billiton has a Health, Safety, Environment and Community Policy which states *“wherever we operate we will: develop, implement and maintain management systems for health, safety, environment and the community that are consistent with internationally recognised standards and enable us to: ... support the fundamental human rights of employees, contractors and the communities in which we operate; respect the traditional rights of indigenous people; care for the environment and value cultural heritage...”*<sup>33</sup>

Corporate policies such as this one demonstrate that the social element of sustainable development is being recast to specifically address human rights in a way that has not been done in earlier formulations. This must inevitably affect the way in which impact assessments are conducted by corporations. For example, Premier Oil has a social impact policy that they *“will assess the social, economic, health, human rights and environmental impacts of any new activity or project.”*<sup>34</sup>

Whilst environmental concerns rate highly in objections brought to mining projects in Queensland, my experience is that many of the concerns raised are more properly characterised as social impacts. These include access to resources, effects on property values and impacts on livelihood. The focus on community at the international level, I believe, will also trickle down to the practice of impact assessment for mining projects here.

The legislative framework is already there under both the *Mineral Resources Act 1989* and the *Environmental Protection Act*. In recommending the grant of a mining lease, the Land and Resources Tribunal must take into account a number of matters that involve social issues.<sup>35</sup> Likewise, in hearing objections to a draft environmental

authority for a mine, the Tribunal must consider the principles of ecologically sustainable development.<sup>36</sup> Further the purposes of the EIS process under the *Environmental Protection Act* are to assess potential adverse and beneficial environmental, economic and social impacts.<sup>37</sup>

In summary, I consider linking human and environmental rights will further enhance expectations and requirements for engagement with the community and the nature, scope, timing and form of information provided to the community.

## Forging the links - the Judiciary

The Meeting of Experts recognised the important role of the judiciary (national and international) in enforcing environmental law and emphasised the need to sensitise and provide further training for judges, lawyers and public officials.<sup>38</sup>

This was also taken up by the UNEP sponsored Global Judges Symposium held in Johannesburg which adopted the Johannesburg Principles on the Role of Law and Sustainable Development. Those Principles emphasised the signatories' commitment to the Universal Declaration of Human Rights and UN human rights conventions and their recognition of the close connection between those conventions and sustainable development. They also affirmed the key role of the judiciary in integrating the human values set out in the United Nations Millennium Declaration, including respect for nature, and in translating those values into action nationally and internationally.<sup>39</sup>

The Meeting of Experts noted there is a growing body of case law in many national jurisdictions clarifying linkages between human rights and the environment by:

1. recognising the right to a healthy environment as a fundamental human right;
2. allowing litigation based on this right and facilitating its enforceability by liberalising provisions on standing;
3. acknowledging that other human rights recognised in domestic legal systems can be violated as a result of environmental degradation.<sup>40</sup>

It appears, then, that the judiciary is starting to fulfill the role envisaged by UNEP. The national case law has been facilitated by the number of countries that include constitutional guarantees of human rights and, in some cases, environmental rights. In its report to the UNCHCR Earthjustice included constitutional provisions relating to environmental protection from some 109 nations.<sup>41</sup>

### National case law

The following cases are offered as examples where national courts have enforced environmental rights either as explicitly recognised in the constitution or by reference to broader human rights so recognised. It is not intended to be a comprehensive survey of such cases, given the limitations imposed by language and access to legal information.

For example, there has been ongoing litigation and political action regarding to the TVX Olympias Mine with reports that the Council of State has been petitioned to suspend work, the petitioners arguing that the mine was contrary to the principles of sustainable development and, therefore contrary to the Greek Constitution.<sup>42</sup>

#### The Ovacik Gold Mine – Turkey<sup>43</sup>

In 1989, Eurogold was registered and found gold near the village of Ovacik, Bergama, Izmir. There was significant local and NGO opposition to the mine, in particular its proposal to use a cyanide heap leaching process. 794 villagers from Bergama applied to the Izmir Administrative Court to overturn a decision by the Ministry of Environment to allow the mine to proceed. The Administrative Court refused the application on the premise that Eurogold, a subsidiary of Newmont Mining, would honour commitments it made in a letter of undertaking to the Ministry of Environment about taking preventative measures and establishing a monitoring committee to oversee their implementation.

The Council of the State upheld an appeal by the objectors and remitted the matter back to the Administrative Court for rehearing. The Council of State referred to 2 clauses in the Constitution of Turkey: one guaranteeing the right to life and

the other providing “everyone has the right to live in a healthy and balanced environment”. It decided that the processing method presented a great risk to human health and the environment. It stated “*it is natural to evaluate the public interest primarily in favour of human life when the damage to human life and nature that will be caused upon a realisation of the risk factor is compared to economic returns that will be accomplished at the end of an activity and where safeguards rely upon the goodwill of the operator and meticulous auditing of the preventative measures*”.

After it was remitted, the Administrative Court accepted the Council of State ruling. The Ministry of Environment then appealed and the Council of State upheld the lower court decision. The judicial process took 4 years and had been proceeded by other cases that established that the mine was in an area with a rich variety of flora and fauna and that the mine would have detrimental effects on olive production. The mine was sealed in early 1999.

Subsequently, Eurogold was granted a permit for a 1 year test operation after a report was prepared by representatives of the Ministry of Energy and Natural Resources and the Ministry of Environment, which had concluded that the risk would be rendered negligible by the proposed preventative measures. In May 2001 production started using 657 kilograms of cyanide a day to obtain 10 kilograms of gold and silver.

The villagers did not give up. On the basis of the Council of State ruling, the Izmir ruled Administrative Court ruled that the trial permit was violating the public good and issued an injunction preventing the permit being extended. The plant was supposed to close in April 2002. It appears that the Turkish Parliament subsequently passed a parliamentary decision to enable the mine to continue in operation, although the villagers maintain their opposition.

#### Pakistan – Saltmines<sup>44</sup>

This case involves concerns about pollution of the water supply source to the residents and mine workers at Kehwra in the salt ranges north-west of Lahore in Pakistan. A number of mining leases were granted in or adjacent to the water catchment area of the Mitha Pattan Spring, the major source of drinking water in the area. The

West Pakistan Salt Miners' Labour Union applied to the Supreme Court of Pakistan to cancel certain leases alleging that waste water discharged from the mine polluted the reservoirs creating a health hazard.

The court held that, although framed in general terms, the petitioners claim was to enforce the constitutional right of the residents to clean and unpolluted water. It decided that persons exposed to danger are entitled to claim that their fundamental right to life guaranteed to them by the Constitution had been violated. It enforced that fundamental right by directing the mouth of one mine be relocated to a safe distance from the stream and reservoir and by directing all other mines operating adjacent to the catchment area to take measures to prevent pollution of the catchment, stream and reservoir. The court also appointed a Commission with powers of inspection to monitor enforcement of its orders. Finally, it directed the relevant government agency not to issue or renew further mining leases in the catchment area without the prior approval of the court.

#### Codelco Mine, Chanaral, Chile<sup>45</sup>

A 1983 Survey conducted by UNEP listed Chanaral as one of the Pacific Oceans most serious cases of marine pollution from industrial waste. Between 1939 and the late 1980s, millions of tons of copper tailings waste were dumped in Chanaral Bay and a nearby cove. Chanaral residents brought action, relying in part on the Chilean constitutional rights to live in an unpolluted environment and to protective action to ensure enforcement of that right. The Supreme Court of Chile restrained Codelco from further activities damaging the marine environment and gave it 1 year to end dumping of tailings into the ocean.

#### Grasberg Mine, West Papua, Indonesia

In May 2000, waste rock dumps used by Freeport Indonesia at the Grasberg Mine collapsed and a wave of water and waste flooded through Wanagon Valley. Four workers lost their lives in the incident. A village 12 kilometres downstream was threatened and Freeport warned residents to avoid the river.

The Indonesian forum for environment (WALHI) brought an action in the South Jakarta District Court against PT Freeport Indonesia over statements the company made in the media and to Indonesian Parliamentary Committee hearings into the incident. The company had stated that there was "no threat to human health and no long term environmental impacts." In late August 2001, Judge Rusmandani Ahmad ruled that the company had breached the law on environmental management which required it to provide accurate information about its environmental management activities.

The Judge was reported as having said, "*the Defendant did not reveal what actually occurred during the incident. In Parliament they gave information that was contradictory ... it was manipulative and misleading*"<sup>46</sup>

WALHI sought an order that the company publicly correct its statements. The Judge declined to make the order but did direct the company to reform its waste management systems, to minimise the risk of further rock slides and to reduce its production of toxic waste so it could meet water quality standards. The company appealed the ruling and WALHI appealed the Judge's rejection of the relief sought. It appears that the appeals have not yet been dealt with.

Nevertheless the decision was hailed by WALHI as a landmark decision that was a "*first step of public struggle for the right to information as one of the basic human rights that should be assured by law*."<sup>47</sup>

This case is of particular interest because of the link drawn by WALHI between rights to information and basic human rights.

#### Foreign torts

There has also been litigation in Canada and the United States claiming damages by foreign citizens affected by mining activities of companies headquartered in the US and Canada. Whilst in these cases the citizens have drawn a link between human rights and environmental rights, there has been no judicial determination on this issue because they have been determined by application of the legal principle of *forum non conveniens*. That is the principle that gives the courts discretion to decline jurisdiction when the convenience of the parties and justice would be

better achieved by resolving the dispute in another forum. The following cases are two recent examples.

#### Texaco Mine, Amazon Basin, Ecuador and Peru

There has been extensive litigation in the United States courts relating to operations at the Texaco Mine until 1990. Citizens of both Ecuador and Peru alleged that there had been large scale disposal of inadequately treated hazardous wastes and destruction of tropical rainforest habitats, causing harm to both the indigenous peoples of the rainforest and the habitat.

Action was brought in the United States courts relying on the Alien Tort Statute<sup>48</sup>, which confers jurisdiction on the court to deal with a civil claim by a foreign citizen for a tort committed in violation of the law of nations or a treaty of the United States. It has been used on a number of occasions to deal with allegations of torture against governments. However it is not confined in its terms to such breaches. The plaintiff here alleged that Texaco's actions were in breach of principles of international law. In particular, affidavits were filed which drew links between human rights and environmental rights.<sup>49</sup>

At first instance, Judge Broderick of the United States District Court (NY District) decided there was insufficient information before him to decide Texaco's application to dismiss the action and he ordered discovery of documents.<sup>50</sup> Ultimately, however, in a series of decisions in the District Court and the Court of Appeal, the courts declined jurisdiction on the grounds that Ecuador and Peru were more appropriate forums for the litigation.<sup>51</sup>

#### Omai Mine on Essiquibo River, Guyana

A Canadian judge described the background to this case thus "*one of the worst environmental catastrophes in gold mining history occurred in the tiny South American country of Guyana the night of August 18 and 19 1995. The dam of the effluent treatment plant of the gold mine ruptured. Some 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants spilled into two rivers, one of which is Guyana's main waterway, the Esquebo.*" Guyana's victims of the spill formed a company in Canada to instigate a class action against Canbior Inc., a substantial

shareholder in the Guyanese corporation which owns the mine. The judge referred to the shock, fear and anger of those affected and stated that the emotional responses were perhaps affected because "*etched in the memories of many Guyanese was no doubt the macabre tragedy of Jonestown, Guyana in 1978 when over 900 cult followers committed suicide by injecting lethal quantities of a cyanide laced brew.*"<sup>52</sup> The court rejected the application to initiate a class action because the appropriate forum was Guyana. Subsequently, the Supreme Court of Guyana rejected a class action due to the repeated failure of the applicants to lodge affidavit material. It appears the company had separately reached agreements with a large percentage of the claimants.<sup>53</sup>

#### Ubi jus ibi remedium – once there is a right, there must be a remedy

So what is the relevance of these international case examples for litigation in Australia? Australians have no constitutional guarantees to human rights or to a clean environment and no Bill of Rights. That, of course, is not the end of the matter. There is an increasing interest by the judiciary in the role of domestic courts in enforcing international human rights law. It is a topic frequently addressed at international judges' forums and, most recently, was the subject of an address by Cherie Booth QC to judges and lawyers in Melbourne. Ms Booth championed the role that the common law and common law courts could, would and were already playing in the enforcement of international human rights principles.<sup>54</sup>

#### Teoh's case

In Australia, the decision of the High Court in Teoh's case may well form the foundation for innovative assertions of substantive environmental rights based on international human and environmental rights conventions even where they have not been implemented through legislation. Before Teoh, administrative decision makers acted on the assumption that obligations in the treaty that had not been enshrined in national legislation were not enforceable.

In Teoh's case, a Malaysian citizen married to an Australian citizen with 7 Australian born children was denied a permanent residency permit and subject to a deportation order because of a conviction in Australia for heroin importation. Mr Teoh argued that the UN Convention on the Rights of the Child placed limitations on the right of the government to deport non-citizens. Article 3 of that convention requires the best interests of the child to be of primary consideration in all actions concerning children. The High Court accepted that article should influence the decision making process.

The substance of the majority's reasons may provide the platform for those advocating other human or environmental rights:

*"Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in accordance with the Convention and treat the best interests of the child as "a primary consideration".<sup>55</sup>*

Interestingly, article 24 of the UN Convention on the Rights of the Child makes explicit the link between the right of the child to the enjoyment of the highest attainable standard of health and the provision of clean drinking water taking into consideration the dangers and risks of environmental pollution.<sup>56</sup> I have already referred to HREOC's recognition of the same link between the right to health and sustainable development. It is conceivable that a future challenge against adverse environmental impacts will be based on health rights, as it was in the Canadian example referred to the UN Human Rights Committee.

### Indigenous rights

Another field in which we may see innovative actions with special relevance to the mining

industry is the field of indigenous rights. Indigenous groups have been disappointed by recent High Court decisions, the effect of which was well summarised recently by Greg Koppenol, the President of the Land and Resources Tribunal:

*"The High Court has been very active in the native title field. Having initially determined that Australian law recognises native title, subsequent decisions have in most cases limited the concept. The most recent decision has gone much further in refining the requirements, such that the prospects of success of most unresolved claims to settled areas appears now to be in serious doubt."<sup>57</sup>*

It seems now that, for many indigenous groups, there is a gap between the substantive rights that are likely to be established and the procedural rights that are provided for by the legislative framework.

One response by indigenous groups could be to use the procedural rights, such as the right to negotiate, to obtain substantive outcomes. The MMSD report noted that industry was increasingly creating new bilateral contract based arrangements with indigenous groups and referred, as an example, to agreements between Rio Tinto and aboriginal groups in Australia.<sup>58</sup> The benefits of this approach were recently promoted by Marcia Langton in a joint presentation to the Commonwealth Law Conference.<sup>59</sup>

Given the growing disquiet amongst indigenous groups about the potential for the *Native Title Act* to deliver real outcomes for indigenous people and the current debate about how to go forward with recognition of traditional rights, a more explicit recourse to international human rights instruments may well provide an alternative vehicle. Indigenous groups could use the human rights framework to assert a basis for establishing control over or involvement in decision-making regarding land use. This is consistent with the trend in the United States and Canada where Native Americans and First Nations people are becoming increasingly involved in environmental regulation that respects their cultural traditions.<sup>60</sup>

### Other human rights

If the intertwining of human rights and environmental issues leads to the formulation of

environmental rights this will personalise and individualise an area of law traditionally regarded as public or communitarian in nature. The potential for this is obvious in the link between an individual's rights to health and the environment. However, it is not so confined and could involve other human rights. For example, in *Hatton & Ors v United Kingdom* the European Court of Justice applied the right to privacy to environmental harm.

That case involved overnight air traffic at Heathrow Airport. Residents argued that this traffic violated their right to privacy and the inviolability of their home under article 8 of the European Convention. They argued that noise levels at and around the airport led to loss of sleep, depression and ear infections. They also complained that their right to access an effective legal remedy under article 13 of the Convention was violated because the review rights provided in the United Kingdom courts were insufficient to allow them to claim that the increase in the night flights unjustifiably interfered with their privacy. The court found that the UK had violated both articles and ordered it to pay the plaintiff's damages and court costs.<sup>61</sup>

### Law of standing

As well as substantive rights, the link with human rights may lead to developments in procedural rights, such as access to remedies. A rights based approach to environmental issues could further relax the law of standing. The law has been described by Steven Keim as "*the principle that asks the public interest litigant not what laws have been broken but, rather, who are you to complain about it – who are you to speak on behalf of the trees, the rocks and its streams and those who live within them.*"<sup>62</sup> He argued that public interest litigation to enforce environmental laws is frequently frustrated by restrictive rules requiring plaintiffs to establish an interest in the subject matter. He noted that "*even where significant harm has resulted (and may be continuing) to the environment, the principal issue for the court to decide is frequently not whether the law has been (or is being) broken but whether the plaintiff has the necessary standing to bring the action.*"<sup>63</sup>

If access to justice does become accepted as a procedural environmental right, Hatton's case suggests that challenges may be open to limitations imposed either on who can access the courts or what issues they can argue.

## Conclusion – what cost the tick?

The concept of sustainable development provides the framework requiring environmental, social and economic objectives to be treated in an integrated manner. The Meeting of Experts recognised human rights as a pre-condition for sustainable development, environmental protection as a pre-condition for the effective enjoyment of human rights protection and, therefore that human rights and the environment are interdependent and interrelated.<sup>64</sup> I read with interest a well researched and argued article by Paul Walker in a recent edition of the QEPR which considered the concept of ecologically sustainability under the *Integrated Planning Act* post the Johannesburg Summit.<sup>65</sup> I agree with his conclusions that the international community's treatment of the sustainable development concept has shifted from an envirocentric perspective to a more humanitarian approach. I also agree with his conclusion that sustainable development is not treated synonymously with environmental protection.<sup>66</sup>

Nevertheless, I consider the greater focus on human rights and, therefore, the social dimension of sustainable development, is likely to result in a closer examination of what are the benefits to the community of a mining project. In my view this will inevitably lead to a greater demand for broader economic and social impact information than is currently gathered. The application of the concept of sustainable development is evolutionary and, over time, will become ever more sophisticated as it is applied, translated and interpreted.

In a practical sense, I would summarise the potential implications for mining projects of these international developments in the following way:

- (a) Information – Information will become more accessible and more effort will be put into translating the substance of the information in a meaningful way for communities. It will be provided at various stages throughout the life cycle of a mine. It will be increasingly verified by external actors.

- (b) Participation – Engagement with the community will occur throughout the life of the mine not just prior to the approval process. Engagement implies a genuine two-way communication process, not merely the provision of information.
- (c) Litigation – Court actions involving mining projects may not be confined to objection processes provided for in legislation. Human rights or environmental rights may provide the foundation for innovative actions. Technical limitations, for example, those imposed by the law of standing, will be challenged.
- (d) Stakeholders – Increasing focus on social issues and human rights may draw in new stakeholders to the process such as national and international human rights organisations and NGOs.

Whilst the nature and extent of the implications for the mining companies in Australia have not yet been realised the direction the trends are moving in is clear. The impetus to explore the link between human rights and environmental rights has become institutionalised at the international level and those who advocate both types of rights see real benefits in their mutual development. For those advocating environmental rights, the human rights regime which has evolved over a longer period and has more significant institutional infrastructure and international commitment provides an attractive mechanism for increasing the enforceability of international environmental law. For proponents of human rights, the link to environmental rights will assist to broaden and enhance narrower concepts which are focussed more on direct impacts on individual life and liberty. Internationally, mining companies have acknowledged and embraced this. It is only a matter of time before the implications are realised in the national sphere.

## Endnotes

<sup>1</sup> “Breaking New Ground: Mining Minerals and Sustainable Development - Report of the MMSD Project”, International Institute for Environment and Development and World Business Council for Sustainable for Development 2002.

<sup>2</sup> Simpson T & Jackson V, “Human Rights and the Environment” (1997) August *Environmental and Planning Law Journal* 269.

<sup>3</sup> EHP v Canada No 67/1980.

<sup>4</sup> [http://www.hreoc.gov.au/human\\_rights/rural\\_health/right\\_to\\_health.html](http://www.hreoc.gov.au/human_rights/rural_health/right_to_health.html). (Last accessed 01/05/03).

<sup>5</sup> “In view of the fact that the environment is essential to all forms of life, and all human rights are indivisible and interdependent, it is to be expected that there should be a convergence between the right to a healthy environment and other fundamental human rights.” “Human Rights and the Law”, T Simpson and V Jackson (1997) August *Environmental and Planning Law Journal* page 268 at 269.

<sup>6</sup> Resolution of the Commission on Human Rights 1990/41.

<sup>7</sup> “Human Rights and the Environment - Developments” materials for the 58<sup>th</sup> session of the United Nations Commission on Human Rights Geneva, 18 March-26 April 2002, Earthjustice Legal Defence Fund p.2.

<sup>8</sup> “The Program for the Development and Periodic Review of Environmental Law for the First Decade of the 21<sup>st</sup> century” UNEP p9 (Decision 21/23 of the Governing Council of 9 February 2001).

<sup>9</sup> “Meeting of Experts on Human Rights and the Environment – Final Text” UNEP/UNHCHR 16 January 2002.

<sup>10</sup> Meeting of Experts para 3.

<sup>11</sup> Johannesburg Declaration on Sustainable Development, adopted at the 17<sup>th</sup> Plenary Meeting of the World Summit on Sustainable Development 4 September 2002.

<sup>12</sup> “Business and Human Rights: Policy Commitments and Disclosure in the Extractive Sector” the International Business Leaders Forum April 2002.

<sup>13</sup> ICMM Sustainable Development Framework. ICMM Draft Principles 18/03/03.

<sup>14</sup> Earthjustice Report page 1.

<sup>15</sup> See Mining Ombudsman Annual Report 2001-2002 at <http://www.caa.org.au/campaigns/>

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- 18 Final Text op cit para 14.
- 19 Bruch C and Czebiniak R, “*Globalising Environmental Governments: Making the Leap from Regional Initiatives on Transparency, Participation and Accountability in Environmental Matters*” 32 ELR 10428 at 10453.
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- 21 MMSD Report page 292.
- 22 MMSD Report page 292.
- 23 [1973] CLR 242.
- 24 Regulation 30 3/4/97.
- 25 *Environmental Protection Act 1994 (EP Act)* sections 234, 235 and 540.
- 26 MMSD Report page 293.
- 27 ICMM Principal 10.
- 28 ICMM Principal 10(g).
- 29 MMSD report page 302.
- 30 MMSD Report page 297.
- 31 MMSD Report page 298.
- 32 Johannesburg Declaration on Sustainable Development Principle 27.
- 33 Business & Human Rights Report Appendix.
- 34 Ibid.
- 35 *Mineral Resources Act 1989* s. 269 4 (b) (i) sound land use management, (j) adverse environmental impact, (k) public right and interest, (m) appropriate land use and schedule definition of environment.
- 36 *EP Act* section 223(a).
- 37 *EP Act* section 40.
- 38 Meeting of Experts para 15.
- 39 The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium, Johannesburg, 20 August 2002.
- 40 Meeting of Experts para 15.
- 41 Earthjustice Report Appendix.
- 42 See [http://www.antigoldgreece.tripod.com/en/id178\\_m.htm](http://www.antigoldgreece.tripod.com/en/id178_m.htm). (Last accessed 3/12/02).
- 43 I am indebted to Aykut Coban who has allowed me to rely on information contained in his unpublished PhD thesis “*Global v Local? International Capital, the State and Communities of Environmental Resistance*”, which he is undertaking at the University of Essex in the United Kingdom. Other information has been derived from translations of the Administrative Court and Council of State judgments generously provided to me by Newmont Mining.
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- 45 *Pedro Flores and others v Codelco* ROL.12.753.fs.641 (1988) (Supreme Court of Chile).
- 46 “*Jakarta Court says Freeport misled Parliament*” Reuters 28 August 2001.
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- 63 Ibid 169.
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- 66 Ibid 136.