



BETWEEN A ROCK AND A HARD PLACE

Mineral exploration expenditure in Australia has fallen by 40% since 1997. The House of Representatives Industry and Resources Committee is investigating the causes and consequences of this decline, as well as the situation for petroleum. *About the House* reviews some of the evidence presented to the committee so far.

For the first two-thirds of the 20th century agriculture and mining dominated the Australian economy. Phrases like 'riding on the sheep's back' and 'the lucky country' reflected the fact that we were blessed with natural resources to 'harvest', which we did (and still do) through world-class farmers and miners.

Since then, we have seen the diversification of the economy, with the rise of a manufacturing sector and now the rapid growth of the services sector. While the spectacular developments seen in resources extraction after World War 2 have slowed, and the resources sector has concentrated on becoming more efficient, innovative and, increasingly, focused on value-adding, it nevertheless remains vitally important to our economy. Minerals and petroleum still account for some 35 per cent of the value of Australia's exports.

There is concern in resources industry circles, however, that the future may not be so bright, with mineral exploration expenditure having declined by more than 40 per cent since 1997.

The Chamber of Minerals and Energy of Western Australia reflected the concerns and views of many in the industry in its presentation to the House Industry and Resources Committee's current inquiry into impediments to resources exploration. The chamber is the peak group representing the mining and energy industry in Western Australia. Collectively, the chamber's members account for around 90 per cent of all minerals production in Western Australia and conduct between 80 per cent and 90 per cent of all minerals exploration in that state.

Western Australia currently accounts for more than 48 per cent of the nation's mining and petroleum production (by value), and 60 per cent of mineral exploration investment. The resources exploration and production industry contributes 23 per cent of WA's Gross State Product, directly employing five per cent of the state's workforce and indirectly another 15 per cent. The issue is considered so important in WA the state government recently conducted its own inquiry into 'greenfields' exploration issues (the Bowler Inquiry, November 2002).

"Exploration is an expensive and high-risk activity," the chamber's Chief Executive, Tim Shanahan, told the committee in Perth. "It goes without saying that exploration activity is vitally important to the health of the minerals industry and without substantial exploration future production will be affected and the WA economy will suffer accordingly."

The chamber's view is that there is a need for government initiatives to stimulate

activity in exploration and assist in the finding of new mines and deposits. It identifies several areas where it considers the federal government can intervene and thereby influence the level of exploration activity.

In particular the chamber believes priority areas for federal government intervention include reducing impediments to capital raising, via the introduction of a flow-through share scheme and a 125 per cent taxation credit system for expenditure on exploration; provision of additional high-quality geoscience information; and improving access to land, including amendment of the Native Title Act to assist agreement making and eliminate the need for costly and damaging litigation.

Government can directly and indirectly assist companies within the industry to identify where to explore for that 'big one'.

Resources exploration has been suffering an investment 'drought' for the last few years, with venture capitalists first preferring the (failed) dotcom arena, and more recently the increasingly 'sexy' area of biotechnology. During this period, large institutional investors have increasingly pursued low-risk, dividend-paying equities.

This has left resources exploration with insufficient capital, argues the chamber, a situation which needs to be redressed.

A flow-through share scheme based on the Canadian model is a favoured option of many mining industry stakeholders. It is designed to benefit 'junior' exploration companies particularly. Under current arrangements exploration companies are allowed an immediate tax deduction for exploration expenditure. However many explorers, in particular smaller ones, are not generating taxable income and are therefore not in a position to benefit from the tax deduction. Under a flow-through scheme, the tax benefit from exploration outlays would flow straight to an entity that provides capital to the explorer, rather than to the explorer, thereby providing an incentive for entities to invest in exploration.

Concerns have been raised that such a scheme may be rorted, as was the first version of the Canadian scheme, which had very few controls in terms of what expenditure qualified and where it was spent.

"The first Canadian model was certainly rorted," Mr Shanahan told the committee.

"The second model that is in place now certainly has not been rorted." In Canada the provincial and federal governments have now influenced the areas prospected, and the amounts that go in, by varying the concessions they give for various areas in which companies are investing. "For example, if they are investing in Quebec they will get a bigger incentive than if they were investing in Alberta."

Incentives can also be built in to encourage 'greenfields' exploration (exploration of entirely new territory). This could address what many see as another worrying trend, where many of the major global players now dominant in the industry are preferring to concentrate their efforts on lower risk 'brownfields' work (re-examining already mined areas). The strategic implications of the pursuit of short-term rewards from brownfields work and the deferral of the hunt for the next 'big one' have alarmed many in the industry.

Government can directly and indirectly assist companies within the industry to identify where to explore for that 'big one' via the independent provision of high quality geoscience information. Government provision of such high quality data also helps attract interest from players in what is now a globally competitive industry.

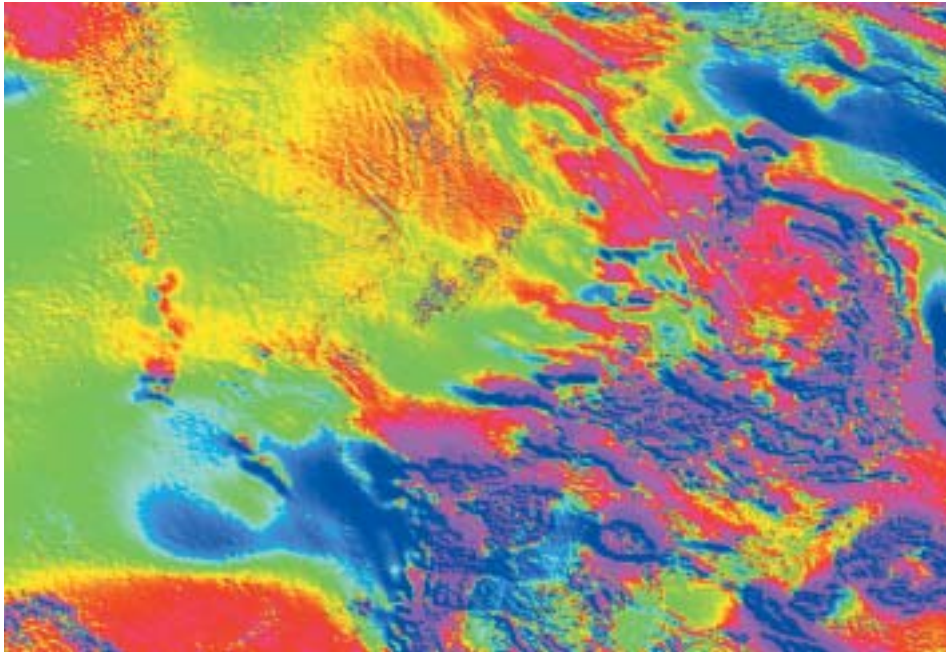
In Australia the states and territories have constitutional power over onshore mineral resources, and take a leading role in the acquisition of geoscientific information to support exploration. Examples include high resolution airborne geophysical surveys.

The federal government has a role through Geoscience Australia (formerly the Australian Geological Survey Organisation) which, according to the NSW state government submission to the inquiry, "has supported state and territory programs through its capacity to apply technologies beyond the scope of individual jurisdictions".

"The Broken Hill Exploration Initiative (BHEI) is a case in point. This National Geoscience Mapping Accord (NGMA) project involving NSW, South Australia and the Commonwealth extended from 1994 until 2000. The BHEI proved to be an outstanding success in creating renewed exploration interest in the Broken Hill region and adjacent areas in South Australia."

However, NSW says a reduced federal commitment since 1999 has had a negative impact.

"In 1999, AGSO substantially reduced its commitment in support of the Australian mining industry," the NSW submission says. "Its minerals-related programs were substantially wound back or terminated. Reduced funding and a lack of substantial priority being afforded to national minerals programs brought about these changes."



This image is a colour representation of the West Tanami area of WA, using information taken from an aerial survey by Geoscience Australia. The variations in colour represent different levels of magnetic field from basement rocks (red is high, blue is low). The information is used to identify which areas are more likely to have an economic level of mineralisation. Image: Geoscience Australia

Continued from page 21

“The next generation of ore discoveries in Australia will be made through remote exploration techniques. These deposits will have no surface expression and may lie 1,000 metres or more below the surface. The science and technologies required for such discoveries are at the cutting edge. Geoscientific understanding of the sub-surface will be fundamental. Geoscience Australia will need to play a major role in developing this understanding.”

NSW also believes Geoscience Australia has an important role in brokering the broad application of new geoscience technologies that may be beyond the capacity of individual states and territories. Such new technologies include the BHP Billiton Falcon airborne gravity gradiometry and modern airborne electromagnetic systems.

“NSW submits that the reduced support for minerals programs in Geoscience Australia is a significant impediment to mineral exploration. A renewed emphasis by the Commonwealth government is needed on such programs.”

The WA Chamber of Minerals and Energy agrees that more is required from Geoscience Australia.

“In the chamber’s view there is also a need for additional high-quality geoscience information to stimulate interest in exploration,” Mr Shanahan said. “The information currently produced is of a high quality, but there is not enough of it to stimulate exploration activity, particularly in greenfields areas. Because of the direct and significant benefits derived by the Commonwealth from taxation of the mining industry, Geoscience Australia

should be encouraged and funded to participate in land based geoscience information development to a greater extent.”

The WA Chamber also says access to land remains an area of significant impediment to exploration activity. It sees three main impediments: first, native title and heritage processes and the legislation that supports them; secondly, the veto right of freehold landowners, specifically in Western Australia; and, thirdly, limitations on access to land in national parks and nature reserves.

“The science and technologies required for such discoveries are at the cutting edge.”

Like the vast majority of industry players, the chamber does not have a problem with the existence of native title. Rather it is the complexity of some of the processes surrounding what is still a young and developing area that are proving frustrating.

“For most mining companies native title processes are a fact of life,” Mr Shanahan said. “It is 10 years since Mabo. For chamber members, the processes are a significant but normal part of doing business in Western Australia. But there remain significant issues that must be resolved.

“To put it in context, as we understand it, there is a backlog of around 11,600 mineral tenements within the state system [as at November 2002]. Clearly something is not operating correctly for there to be that

degree of backlog, and we would submit that it is a frustration that is shared by the mining companies and the Indigenous people and their representative bodies.”

According to the chamber, the mining industry is a principal driver of Indigenous employment and, linked to that, a principal trainer of Indigenous people as well. Delivery of these benefits is being held up.

“Mining companies have had to put significant resources into dealing with this issue,” he said. “We are dealing with representative bodies which have limitations on their resources and the chamber has made representations previously to both arms of government to provide additional resources to those representative bodies so that there can be an ongoing exchange and progression of these issues.

“But it is what I would describe as an intractable issue. There is this huge number of tenements tied up in the backlog. A huge amount of effort goes into progressing these issues and they go very slowly. The Native Title Act needs to be amended to encourage more agreement making and eliminate the need for litigation.”

The WA state government agrees that native title representative bodies need greater funding, a point made by Anne De Soya, the Chief Executive of the Office of Native Title within the WA Department of Premier and Cabinet.

Ms De Soya explained that the native title system includes the Federal Court, the National Native Title Tribunal and native title representative bodies, or the land councils, that operate under the Native Title Act.

“Two reports commissioned by the Commonwealth government—in 1995 and in 1998—recognised that native title rep bodies are the linchpins in the processes set up under the Native Title Act,” Ms De Soya told the committee.

“However, notwithstanding this pivotal role, there has been no increase in operational funding to representative bodies since 1995. Conversely, there have been increases in funding to the National Native Title Tribunal, the Federal Court and the Attorney-General’s Department over the last few years.”

The WA government has recently moved to provide \$1.8 million in ‘top-up’ funding over four years to representative bodies to ensure that they have some capacity to process future acts, particularly mining title applications.

Ms De Soya said another related issue is how native title might be managed after a determination of native title has been achieved.

Continued page 36

“In Western Australia there have been seven determinations recognising native title, which cover a substantial area of land. The Native Title Act requires that, once native title is determined, it must be managed by a body corporate—these are more commonly called ‘prescribed bodies corporate’. These bodies corporate are expected to handle the processing of future act notices and to represent the interests of native title holders in negotiations with governments and third parties over land use.

“Yet there is no funding—not even seed funding to purchase a telephone, let alone to buy the sort of equipment and expertise that it takes to negotiate a land access agreement. They are already not funded sufficiently to undertake their statutory functions, let alone to take on additional roles such as assisting prescribed bodies corporate after a determination of native title.”

The Commonwealth Attorney-General’s Department said it has funding under

constant review. “The government recognises that it is important that all parties are adequately resourced and have access to the skills and expertise necessary to be able to participate actively in the native title process,” the Attorney-General’s Department said in its submission to the inquiry. “The government therefore keeps the resourcing of the native title system as a whole under regular review.”

WA’s Ms De Soyza said the Commonwealth should also undertake a more fundamental review of the native title processes.

“More fundamentally, the Commonwealth could also consider whether it is in fact desirable or even workable to create a whole new level of bureaucracy involving the establishment of scores of small corporations which are charged with very complex tasks, instead of using what is already in place in the representative bodies system,” she said.

The inquiry has received submissions from more than 100 organisations and individuals, including major resource companies (BHP Billiton, Rio Tinto, Woodside Energy, Newcrest Mining, ExxonMobil, ChevronTexaco, Newmont Australia), green groups (the Australian Conservation Foundation and Greenpeace), Aboriginal groups such as the Central and Northern Land Councils, state and federal government departments, research agencies and a range of representative bodies.

Submissions and transcripts of hearings appear on the inquiry website. *About the House* will report on more evidence from the inquiry in future editions.

Links and contacts

Inquiry into impediments to resources exploration

Visit: www.aph.gov.au/house/committee/isr/resexp

Tel: (02) 6277 4594

Email: ir.reps@aph.gov.au

once the armed forces have been committed into action does not necessarily disprove the initial lack of support since some members of the public may, however reluctantly, feel obliged to support the action for fear of showing disloyalty to the armed forces.

It is true that these matters have generated considerable tension in the United States between the President and Congress where the interpretation of the *War Powers Resolution* has not been free from difficulty. Nevertheless it has been said that the “post-Vietnam years have underscored the need for the President to reach an accommodation with Congress in foreign policy and national defense”.⁹ Furthermore, the system of seeking prior approval, at least for a declaration of war, is not confined to the United States but is followed in a number of European countries.¹⁰

Opponents of the proposal might well stress that the difference between the present position and the system proposed to be introduced is not as great as might first appear. In the first place, as Canada shows, the requirement of prior approval can be followed as a matter of *practice* and, although less clearly, even *convention*, without the attendant inflexibility created by legislation. Furthermore even in the United States, apart from the difficulties already mentioned, the requirement of prior approval can be undermined by the President. The President has the potential to use his authority as Commander in Chief to commit the troops in advance of the

necessary parliamentary approval in such a way as to effectively force the hand of Congress to grant the necessary approval.

More basic, however, is the argument that only the executive has the institutional ability and information required to make an informed judgment on whether war should be declared or military forces should be deployed. There may be cases where all that information cannot be made public—a problem that may not be wholly overcome by parliament meeting in secret session. The need for parliamentary approval, and the delay that may result, may also compromise the ability to take speedy military action.

Ultimately, the answer to the question whether the change should be made will depend less on whether the change fits with some ideal or universal system of constitutional governance. As is the case with the proposal to seek parliamentary approval for the executive to enter into treaties and other international agreements, it is more likely to depend on the value and importance which each country chooses to attach to the use of a legislature as a check on executive action in such important matters. The system of prior approval need not necessarily make the decision making process in this area unacceptably cumbersome—as was illustrated by the relative ease with which the current United States President obtained Congressional authority in relation to the current war with Iraq. A different outcome might, however, have resulted in Australia if the decision to deploy military forces was

proposed by a government that lacked a majority in the Senate at a time when the community was opposed to such military action. ■

Geoffrey Lindell is Adjunct Professor of Law at the Adelaide and Australian National Universities, and Professorial Fellow at Melbourne University.

1. *Reg v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at p 275.
2. *Constitutional Commission*, Final Report (1988) vol 1 paras 2.129 and 5.176.
3. W Blackstone, *Commentaries on the Laws of England* (1783) Book 1 at pp 253, 257 and 261.
4. For a useful account of Canadian practice see M Rossignol, ‘International Conflicts: Parliament, The National Defence Act, and the Decision to Participate’ (August 1992) - a paper prepared for the Canadian Parliamentary Library <http://www.parl.gc.ca/informatiion/library/PRBpubs/bp303-e.htm>. The suggestion was advanced in K Wheare, *Legislatures* (2nd ed, Oxford University Press, 1968) at p 129.
5. G Lindell, “Judicial Review of International Affairs” in B Opeskin and D Rothwell, *International Law and Australian Federalism* (1997) 160, at pp 188-189.
6. Senate Legal and Constitutional References Committee Report, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Nov. 1995, Chapter 16.
7. As argued by L Zines, *The High Court and the Constitution* (4th ed, 1997) at pp 262-263, 267 and 269-270.
8. (1990) 169 CLR 195 at p 202.
9. L Fisher, *Constitutional Conflicts between Congress and the President* (4th ed, 1997) at p 292.
10. Wheare (see point 4 above) at pp 128-9. France is a case in point because of Article 35 of the French Constitution.