Parliaments and Mining Agreements: Reviving the Numbed Arm of Government

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This research identifies improvements for parliamentary-approved agreements in two broad areas:
• In the negotiation and establishment of a new parliamentary-approved agreement
• In the operation of an existing parliamentary-approved agreement

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Parliaments and mining agreements: reviving the numbed arm of government

A parliamentary-approved agreement is legislative endorsement of a contract between the executive government and a company to develop/operate a mine and associated facilities. These agreements have been useful in mining regulation in providing a structure by which governments can regulate large mining projects. However, the establishment and use of parliamentary agreements should be improved to better enable this form of regulation to contribute to sustainable development. Where a miner and government have agreed on proposed terms to regulate a long-term mining operation, parliamentary consideration of that proposal presents an opportunity for transparency and broader acceptance. However, if parliamentary approval is achieved simply through the government’s weight of numbers or manipulation of procedures, that will preclude the benefits that could otherwise be obtained. Companies, government officials and those advising them should allow parliament’s decisions to be made through its normal procedures.

Countries aiming to attract large mining operations may consider parliamentary-approved agreements to assist in regulation, and these agreements continue to be used in other countries with existing large operations. This paper identifies improvements for parliamentary-approved agreements in two broad areas:

1. In the negotiation and establishment of a new parliamentary-approved agreement:
   a. the executive should assess the four areas of regulatory impact assessment (i.e. examine the context, examine the proposal, conduct cost-benefit analysis, and describe public consultations) as part of its negotiations and formulation of any agreement terms, and then report this work and results to parliament
   b. international standards of social and environmental protection should be non-negotiable, so any proposal that parliament endorse a variance from these standards, through approving an agreement, should be specifically identified for parliamentary consideration
   c. parliament should be provided with adequate time and resources to be able to consider whether to approve any agreement, and that process may be assisted by committee deliberations
2. In the operation of an existing parliamentary-approved agreement: regular reports should be provided to parliament about the agreement’s implementation
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Contents

Summary........................................................................................................................................3

1 Introduction..................................................................................................................................3
  1.1 Regulating large mining projects .........................................................................................3
  1.2 Parliamentary-approved agreements: basic structure .........................................................4
  1.3 Parliament's role ....................................................................................................................4
  1.4 History and use of parliamentary-approved agreements ....................................................5

2 Context and framework for analysis........................................................................................7
  2.1 Difficulties with parliamentary-approved agreements .......................................................7
  2.2 The future for parliamentary approved agreements? ........................................................12
  2.3 Sustainable development - a basis for assessment .............................................................14

3 Parliamentary structures to improve agreement negotiation & use .......................................16
  3.1 Normal legislative process ..................................................................................................16
  3.2 Reporting to parliament about existing agreements ............................................................18
  3.3 Protecting commercial confidences ...................................................................................19
  3.4 Examination by parliamentary committees .........................................................................20
  3.5 Regulatory impact assessment ............................................................................................21

Endnotes.........................................................................................................................................24

Appendices .....................................................................................................................................34
  I - Parliamentary-agreement process in Western Australia .....................................................34
  II - Legislative System of Myanmar .........................................................................................36
  III - Parliamentary Process in Uganda ....................................................................................38
  IV - Bibliography .......................................................................................................................39
Summary

[1] A parliamentary-approved agreement is legislative endorsement of a contract between the executive government and a company to develop/operate a mine and associated facilities. Parliamentary-approved agreements have been useful in mining regulation in providing a structure by which governments can regulate large mining projects. However, the establishment and use of parliamentary agreements should be improved in order to better enable this form of mining regulation to contribute to sustainable development. Where a miner and government have agreed on proposed terms to regulate a long-term mining operation, parliamentary consideration of that proposal presents an opportunity for transparency and broader acceptance of that arrangement. But if parliamentary approval is achieved simply through the government’s weight of numbers or manipulation of procedures, that will preclude the benefits that could otherwise be obtained by a parliamentary agreement. Companies, government officials, and those advising them, should allow parliament’s decisions to be made through its normal procedures.

[2] Countries aiming to attract large mining operations (e.g. Myanmar, Tanzania, Uganda and Rwanda) may consider parliamentary-approved agreements to assist in regulation, and these agreements continue to be used in other countries with existing large operations (e.g. Australia, Botswana and Papua New Guinea). This paper identifies improvements for parliamentary-approved agreements in two broad areas:

(a) In the negotiation and establishment of a new parliamentary-approved agreement:

(i) the executive should assess the four areas of regulatory impact assessment (RIA) (i.e. explain the context, explain the proposal, conduct cost-benefit analysis and describe the public consultations) as part of its negotiations and formulation of any agreement terms, and then report this work and results to parliament: see paragraphs [82] & [98], below;

(ii) international standards of social and environmental protection should be non-negotiable [47], so any proposal that parliament endorse any variance from these standards, through approving an agreement, should be specifically identified for parliamentary consideration: [90]; and

(iii) parliament should be provided with adequate time and resources to be able to consider whether to approve any agreement, and that process may be assisted by committee deliberations: [62], [65] & [79].

(b) In the operation of an existing parliamentary-approved agreement: regular reports should be provided to parliament about the agreement’s implementation: [67] & [69]-[70].

All these processes should be specified in parliamentary procedures or rules on dealing with parliamentary agreements ([61]-[65]). These parliamentary procedures can also provide protections for commercial confidences: [71]-[75].

[3] If executive governments wish to use these parliamentary agreements to regulate mining, then that must involve greater accountability. Those who resist greater accountability may argue that, without these parliamentary-approved agreements, the large projects will not occur and therefore any concerns about executive-directed parliamentary outcomes is outweighed by the advantages in public development (e.g. revenues, infrastructure and employment): [33]. That may be the case in some instances but where any balancing is to be made of the potential impacts and benefits across a mine’s life, parliament should have some meaningful involvement in that process: [89] & [92]. While governments and ministers come-and-go, the parliament and its agreement will exist across many decades. That merits public justification of why and how the particular mine is regulated under this proposed agreement for parliamentary approval. The executive government can make whatever agreements it chooses, but if it wants parliamentary approval of an agreement, then the executive must allow parliament to make that decision itself.

1 Introduction

[4] This paper is the result of work commissioned by the International Mining for Development Centre (IM4DC) examining parliamentary-approved agreements, their use in Australia and their potential use in Myanmar, Uganda, Tanzania and Rwanda. The authors researched and drafted a paper and then discussed it with various stakeholders experienced in this area, before finalising this paper for IM4DC.1 This paper examines the use of parliamentary-approved agreements, and makes some suggestions for their improvement.

1.1 Regulating large mining projects

[5] Exploration and mining usually take a long time, with some mines enduring across several human generations. Large mines produce benefits and impacts over many decades and so the approval and regulation of these operations cannot be exclusively determined by the decisions and priorities of the government when the project first arose.2 Broader societal acceptance of the ongoing regulation of mining operations is important, sometimes essential,3 which means parliaments have an important role to play. There are many aspects to any country’s parliamentary
engagement with mining regulation. The one issue examined here is the 'parliamentary-approved agreement', which is an agreement between the executive government and the miner that receives subsequent legislative approval.

Parliamentary-approved agreements are not the only way in which large mining projects are regulated. Mining operations are usually regulated through a general mining law which sets national standards and procedures throughout the jurisdiction. However, some jurisdictions use parliamentary agreements to provide additional controls for large mining projects and operate in place of, or in conjunction with, other forms of regulation.

1.2 Parliamentary-approved agreements: basic structure

Parliamentary-approved agreements exist under various names including State Agreement, Indenture, Ratified Agreement, Statutory Agreement, Concession, Government Agreement and Mining Agreement. In this paper, the term used is 'parliamentary-approved agreement' and 'parliamentary agreement'; but there is no real significance in the title of any contract. Instead, the importance and effect of any agreement derive from the particular rights and obligations which it documents.

Most parliamentary-approved agreements are a type of relational contract where the parties agree on some basics and a framework for their future interaction. In parliamentary-approved agreements used in mining, the relationship is between the mining company and government regulator. This usually takes the form of a timetable for development stages to be proposed by the miner, then considered/approved by the government, and then implemented by the miner. Typical stages might include: feasibility study of A, a mine-plan for a mine of B magnitude, building a mine to extract C tons/year, mining infrastructure to process/transport D amount, social infrastructure for F people, environmental management to ensure F outcomes, and so on. The parliamentary-approved agreement shows, for each stage, what the parties agreed about their respective rights and obligations in the future. Some parliamentary-approved agreements, however, do not have this extent of specification but are simply the parliament's endorsement of a basic arrangement between the executive and the company; for example, the grant of a mineral title with conditions different to those available under the normal mining law, or the approval of a 'stability agreement' to fix tax or other commercial arrangements. These latter forms of parliamentary-approved agreements are not examined in detail in this paper, as the main discussions below focus on agreements which seek to address the majority of the parties' future relationship.

Parliamentary-approved agreements certainly have their advocates and their critics. In various jurisdictions, these agreements have provided the regulation (and therefore the structure for approval and development) of large mining and infrastructure projects where that was not otherwise possible or feasible. Various experts and reports reject any contemporary role for parliamentary agreements, arguing that everything should occur under a general mining law which applies to everyone, everywhere in the jurisdiction. However, that seems an unrealistic ideal considering the breadth of a large mining project which may involve:

- (a) many decades-worth of exploration and extraction, rail, ports, roads, accommodation, power-generation, access, waste and rehabilitation;
- (b) the physical and social ramifications of all these; and
- (c) the revenue and other benefits to the government and broader public.

Few parliaments have the time and resources to debate and finalise general statutory laws to regulate each of these issues, when it is not even known if such a development will ever occur. A better use of parliamentary and government resources would be to (1) identify and set fundamentals which apply to every industrial development, including mining, which are 'non-negotiable', and (2) have a process which enables additional matters to be addressed only on the very rare occasions when they will arise and can respond to the particular proposal which has arisen. Parliamentary agreements can provide this second task. But there have certainly been problems with the creation and use of parliamentary agreements, including identifying the 'non-negotiable' fundamentals. This paper examines these problems and how they might be addressed.

1.3 Parliament's role

Regulation of mining through parliamentary-approved agreements has only featured in parliamentary forms of government (i.e. where the executive is chosen from or by the legislature, as opposed to a presidential system where the executive has less connection with the legislature). This is because the essence of a parliamentary agreement depends on the executive being able to provide some control/assurance that any terms which it agrees to will subsequently be approved by the legislature. Broader aspects of parliaments' relationship with the executive and the electorate also influence the operation of parliamentary agreements (e.g. constitutionalism and parliaments' role, changing relationship between parliaments and judicial review, effectiveness of parliamentary committees, reporting to parliament by government departments and agencies, legislating for sustainable development,
parliament’s role in fiscal issues of mining, and revenue-raising comparisons between parliamentary and presidential systems but these broader issues are not examined in detail here.

Some countries, which operate under a hybrid system of the parliamentary and executive presidential systems, have not used parliamentary-approved agreements because the executive is not able to provide assurance that the terms it agrees will subsequently be approved by the legislature. Uganda is one example, where the executive is chosen from the legislature and the president enjoys a super majority in the legislature. This, however, has not guaranteed the acceptance of terms of agreements in the oil and gas, and power sector, whenever parliament has forced the executive to disclose such agreements to the (parliamentary) Public Accounts Committee and the Committee on Energy and Natural Resources. The mining laws of Uganda, Tanzania and Rwanda allow the minister in charge of mineral development to execute mining development agreements, but do not make it a requirement for these agreements to be approved by parliament. However, the requirement in Uganda that fiscal regimes under such agreements should be enacted into law, in order for them to be effective and binding on Government, may prompt parliament to ask the executive to produce such agreements for scrutiny and approval. Tanzania has signed many mineral development agreements, but none has ever been tabled in parliament for approval. However, a constitutional petition, filed in 2009, challenging the validity of these agreements, may force the executive to table the agreements before parliament for scrutiny and approval. Rwanda signed a similar agreement for development and mining of tin and tungsten but this agreement was not tabled before parliament for approval. The ripple effect of what may happen in Uganda and Tanzania may force the executive in Rwanda to table this and subsequent agreements before parliament for approval. Therefore, while mining laws of countries such as Uganda, Tanzania and Rwanda empower the executive to execute mining agreements without requiring those agreements to be tabled in parliament, the pressure for good governance and accountability may influence the use and operation of parliamentary agreements in such countries, hence making this research relevant to such countries.

A parliamentary-approved agreement is commonly, but wrongly, thought of as a contract between private parties. A 2007 study on concession agreements (of which parliamentary agreements are one type) explained these should be understood as public policy mechanisms rather than private contracts because these agreements deal with public subject matter, and the government is negotiating for the public benefit. A parliamentary-approved agreement is thus law in public policy, and so any analysis must be cognisant of the public policy differences across jurisdictions, particularly that ‘countries at different stages of development, or with different preferences, place different weight on policy objectives or public involvement in decision making.’ This caution is noted, and the paper’s following analysis of parliamentary agreements assumes only two basic fundamentals of any parliament, which are universally accepted, being that the parliament: (1) can make law, and (2) oversees the executive government’s performance to ensure it acts in a responsible and accountable manner. These tenets form a necessary base for any parliament and, beyond those two functions, the paper realises that parliament-executive-public relationships differ significantly across jurisdictions. Accordingly, the recommendations in the conclusion remain at a general and process-focused level, rather than suggesting a universal scheme for how parliamentary agreements should work everywhere.

History and use of parliamentary-approved agreements

Parliamentary-approved agreements have been used in many areas other than mining regulation. The structure, in various forms, has origins in British private bills in the 1800s for public works and arguably dates back even earlier to the 1600s and the British Royal Charters for the East India and Hudson Bay ventures. There are many examples of parliamentary approval of executive government contracts in areas other than mining; for example, land developments, inter-governmental agreements, entertainment complexes, transport projects, and agreements with indigenous groups, sometimes specifically in relation to proposed mining/resources projects.

These days, parliamentary-approved agreements are not commonly used to regulate a new mining project but many existing operations are regulated under a parliamentary agreement. Examples include Mt Tom Price (iron ore mine) in Australia; Ok Tedi (copper) in Papua New Guinea; Olympic Dam (uranium, copper, gold) in Australia; Sierra Rutile (titanium) in Sierra Leone; McArthur River (zinc) in Australia; Selibé Phiskwe (nickel) in Botswana; Weipa/Ely (bauxite) in Australia. The jurisdiction with the most extensive use of parliamentary agreements is Western Australia, where over 60 current operations and 80% of all mining and petroleum production occur through operations under parliamentary agreements. The Western Australian Government lauds parliamentary-agreements in the following terms.

For more than fifty years, State Agreements [i.e. parliamentary-approved agreements] have been used by successive Western Australian governments to foster major developments, including mineral, petroleum, wood processing and related downstream processing projects, together with associated infrastructure investments. Such projects require long term certainty, extensive or complex land tenure and are often located in relatively remote areas of the State requiring significant infrastructure development.

Parliamentary-approved agreements do seem to encourage or produce constructive relations between the mining company and government. In Western Australia, their use, over fifty years, has included provision for arbitration
between the miner and government where disagreements cannot be resolved. But only once, in all this time, has arbitration been formally resorted to.\textsuperscript{62}

[15] The research for this paper indicated that, to date, there has been no use of parliamentary-approved agreements about mining in Myanmar, Rwanda, Tanzania nor Uganda. However, each jurisdiction has a parliament, is actively endeavouring to attract international mining investment,\textsuperscript{63} and mining agreements between the executive and companies are a current feature in:

(a) Tanzania, where the Minister is authorised to execute Mining Development Agreements, not inconsistent with the Mining Act, for fiscal stability of a long-term project - the agreements shall be in the standard model (prescribed in regulations) and may contain provisions binding on the government and the mineral right holder.\textsuperscript{64}

(b) Rwanda, where the Minister is authorised to execute mining agreements to perfect the rights and obligations of the holder of a quarry or mining licence.\textsuperscript{65}

(c) Uganda, where the law envisages agreements 'with respect to any matter relating to or connected with operations or activities under an exploration licence or a mining lease for a large-scale project'\textsuperscript{66} - one such agreement was signed in 2014 for the Sukulu Phosphate and Steel project but this agreement has not been tabled before parliament for approval; and

(d) Myanmar, where the law allows the Government to ‘enter into agreements relating to … large scale or small scale mineral production with any person or organization’\textsuperscript{67}.

Accordingly, various issues regarding mining regulation through parliamentary agreements will have relevance to these countries, and various examples and structures from these countries are expanded further in the discussion below.

[16] Most jurisdictions have no laws specifying when a parliamentary-approved agreement should be used nor how it would relate to other statutes. This is left to the discretion of the executive government of the day and whatever that executive can wrangle through parliament, with any later uncertainties in the resultant statute being left to the courts to interpret and resolve.\textsuperscript{68} Two rare exceptions are Ghana and Western Australia.\textsuperscript{69} In Ghana, the national mining law\textsuperscript{70} specifically dictates where parliamentary agreements may arise and what they can address:

49. Development Agreement

(1) The Minister on the advice of the Commission may enter into a development agreement under a mining lease with a person where the proposed investment by the person will exceed US$ five hundred million.

(2) A development agreement may contain provisions,

(a) relating to the mineral right or operations to be conducted under the mining lease,

(b) relating to the circumstance or manner in which the Minister will exercise a discretion conferred by or under this Act,

(c) on stability terms….,

(d) relating to environmental issues and obligations of the holder to safe-guard the environment in accordance with this Act or another enactment, and

(e) dealing with the settlement of disputes.

(3) A development agreement is subject to ratification by Parliament.

In Western Australia, there is a separate statute about the operation of all parliamentary agreements. This is a short statute which simply confirms the validity of all parliamentary agreements and makes it an offence for anyone to interfere with their operation.\textsuperscript{71}

[17] The content of parliamentary-approved agreements has changed over time, with more recent examples featuring improvements from earlier agreements.\textsuperscript{72} Many agreements are being standardised to the jurisdiction’s general laws. For example, in South Australia, the Olympic Dam mine operates under the Roxby Downs Indenture.\textsuperscript{73} This was first made in 1982 and originally included cheaper royalties, free water use and fewer environmental obligations.\textsuperscript{74} It was not until 2011 that these were changed to accord with the mining and environmental law throughout the jurisdiction including general royalty rates, payment for water used from the Artesian basin, and meeting the normal environment management and compliance obligations.\textsuperscript{75} In Western Australia, there have been changes in the content, and use, of parliamentary-approved agreements over time. Their content is less negotiable now, and they essentially establish a framework for future proposals, rather than specifying fixed rights or obligations which operate as exceptions to the general law.\textsuperscript{76} Also, more recent parliamentary agreements have:

(a) encouraged shared infrastructure and facilities (decisions regarding whether third-party access can be refused, on the basis that it would impede the mining operations, are now made by the Minister and are not at the miner’s sole discretion – a change in response to the difficulty of access and resultant duplication of infrastructure),\textsuperscript{77}

(b) required general compliance with environmental and heritage laws (contrasted against earlier exceptions from these laws).\textsuperscript{78}
(c) restricted 'stabilisation' to only prohibit 'discriminatory' measures specifically against that operator, rather than preventing any law change which would impact that operator even if it was a general law change affecting all operators in the jurisdiction;

(d) required the company to develop and implement plans for community development and local industry participation; and

(e) imposed greater rehabilitation obligations.

Some of these developments have also been included in existing agreements through amendments so that the agreements better accord with public expectations over time; for example removing royalty exemptions, requiring local community development plans, and making agreements generally subject to (rather than quarantined from) the standard environmental law.

2 Context and framework for analysis

[18] It is perhaps useful to clarify what is not covered in this paper. There are many dynamics and issues which will influence the creation and use of any parliamentary-approved agreement but which are broader than the parliament-executive relationship and so are not addressed here. These include the following:

(a) Big company – little state: general issues of government-company dynamics and concerns about corporate power in comparison to government exist in relation to the 'state' in general and are not specific to parliamentary agreements.

(b) Public – parliament: questions about the extent of public involvement in parliament's working beyond participating in regular parliamentary elections are not addressed in detail here.

(c) Public – private: debates about whether the state should be involved in conducting mining, and what direct support the state should give to miners, are not addressed here - this paper proceeds on the basis that the government's role in the parliamentary-agreement framework is limited to that of independent regulator.

(d) General concerns about mining's impacts and how these might be regulated - parliamentary agreements should not be singled out for criticism or analysis with respect to an issue which arises regardless of whatever form by which mining is regulated.

What this paper does seek to address is those matters peculiar to parliament-executive relations in mining agreements.

2.1 Difficulties with parliamentary-approved agreements

[19] There are a range of legal complexities arising from the negotiation and use of parliamentary-approved agreements. These are described in this Section under seven headings: (a) politico-legal confusion, (b) negotiation, (c) anti-competitive effects, (d) future amendment, (e) executive accountability, (f) realities of implementation and (g) unlimited term of agreement.

(a) Politico-legal confusion

[20] Parliamentary-approved agreements involve a confusing mix of politics and law. That there is a mix is understandable (because it is regulation of public resource use) and important (to provide an accountable decision-making process). However, analysis must remain ever-vigilant of the distinction between what is law and what is not, and realise that only the former is amenable to legal solution. One example of this confusion is the various suggestions that a parliamentary agreement cannot be changed without the company's consent, e.g.:

- 'State agreements [parliamentary-approved agreements] ... provide certainty that ground rules for the life of each agreement project cannot be changed unilaterally.'

- 'Where[as]...statutes can be changed unilaterally, State Agreement provisions which have been ratified by an Act of Parliament can only be changed by mutual agreement in writing by the parties concerned, and ratified by both Houses of Parliament.'

As a matter of law, this reasoning is incorrect. Parliaments can change a parliamentary-approved agreement against the company's choice and companies have been forced to comply. The occasional complaints about parliamentary sovereignty and parliament's ability to amend a parliamentary agreement are invalid from a legal standpoint. There may be economic or political reasons for that desire (particularly in relation to sovereign risk) but legally, the parliament must be free to amend any statute. This is a foundation of parliamentary sovereignty and it is this very ability which enables a parliamentary agreement because parliament's approval enables the contract to prevail over any inconsistent existing law. What the above statements describe is not law but politics. Many governments only
amend a parliamentary agreement after the relevant company consents but that is a political choice not a legal requirement.

[21] Problems arise where the politics are used to force a legal result. The most common concern about parliamentary-approved agreements is that the arrangement receives parliamentary protection without being properly considered by parliament. The executive government can rush the legislating of the agreement, providing no account of the negotiations and then curtailing parliament’s normal procedures to pass the bill, which causes public unease and lack of confidence in the agreement. This concern has been raised not only in academic writing but also in government reviews and business and NGO commentary. Even more telling - the concern is voiced by parliamentarians who find themselves being asked to approve an agreement about which they know little, as the following two statements indicate (made during parliamentary debates of different proposed agreements, by different political parties).

A state agreement act [i.e. parliamentary-approved agreement] is an agreement made between the state and a company largely behind closed doors. In fact, there is very little public scrutiny of the process. What is delivered to Parliament is a decision in an attached agreement over which we have no say about its details. Very little transparency is involved in the creation of state agreement acts. The question is whether state agreement acts deliver good governance and good public decision making.

This is important legislation that provides for an important project for the State. ... It should have been introduced into this House properly and given time for fair debate. ... It would be sensible for the Opposition to have a briefing with the officers of the department and to at least be able to discuss any issues we might have with the proponent and to deal with them. ... There are major implications for the environment and the economics of the railway and third party access, and there are serious issues about the port proposal... Not a person in this Parliament... has had a briefing or discussion on this legislation. That is not the standard that this House should be following. ... A state agreement is an Act of Parliament; it is an expression of this Parliament that this project has bipartisan support and will be honoured for long periods into the future. That is why this Parliament should look at state agreement Acts carefully. That is why members, when they vote in support of a state agreement Act, should understand the details of the agreement and all the implications that go with it.

[22] Most parliaments have procedures for their examination of proposed laws; for example, involving prior notification/tableing (informing both parliamentarians or the public), minimum periods for debate and consideration, committee processes for more detailed examination. Some parliamentarians, who criticised the process of parliamentary-approved agreements when in opposition, sing a different tune when in government. This suggests issues beyond politics (or perhaps riven by politics) which may therefore be assisted by more explicit parliamentary procedures for legislating these agreements. Options for improving procedures are examined in Section 3 Parliamentary structures to improve agreement negotiation & use.

[23] Accountability is an issue not just at the time a parliamentary-approved agreement is made but also throughout the agreement’s ongoing operation. The situation has been colourfully and cynically described by one parliamentarian as follows.

Once these agreements are put in place, there is no obligation to come back and report on this you-beaut agreement. We never receive a report on how well a state agreement act [parliamentary-approved agreement] is going. The next time we hear from these companies is when they are ready for the next state agreement act; when they say, “More please, because the last one was so juicy and good for us.”

Some parliamentarians may see only this perspective of agreements, but it should be acknowledged that some parliamentary agreements also improve accountability. Parliamentary agreements invariably provide greater transparency and awareness of the particular parties and rights involved in mining an area than would be available if the mining occurred under the normal mining law. Nevertheless, increased accountability to parliament through reporting would be an improvement, and is addressed below in Section 3.2 Reporting to parliament about existing agreements.

[24] Many parties view parliamentary-approved agreements as a ‘facilitating tool’ or ‘governance framework’ and discount these agreements being considered ‘regulation’. That approach is wrong. Certainly, a parliamentary agreement is not a normal statute, with its terms first agreed between the executive and a company and then presented to parliament to enact. But it is that very process of enactment which makes it ‘regulation’. If the company or the executive do not wish the document to be ‘regulation’, then their choice is simple: do not ask parliament to enact it. However, if that path is to be chosen, then the parties must accept that the document will become regulation and that process is a form of regulating. The relevance of this is returned to later in examining how parliament should undertake their regulatory processes.
(b) Negotiation

[25] Negotiation is the most contentious area of parliamentary-approved agreements, in two aspects: (1) what is negotiated; and (2) how the negotiations occur. Each is addressed below.

[26] The issue of what is negotiated concerns which subjects are fixed and which are open to bargain. Historically there is an unhappy legacy of mining agreements which were negotiated between a developer and an unaccountable ruler and which imposed terms detrimental to the broader populace for the life of the mine. There are also more recent concerns about the effect of 'stabilisation' arrangements. Both of these concerns should be less prevalent in relation to contemporary negotiations because of the broad acceptance that a company should not seek to avoid minimum environmental and social standards (explained, below, in Section 2.2 The future for parliamentary approved agreements). Additionally, if a stabilisation arrangement already exists under international law covering the operation, there is little need for duplication in a parliamentary-approved agreement.

[27] The company will also want some minimum standards. The main rationale of any parliamentary-approved agreement's existence is for the company to gain additional certainty (through fixed terms or procedures) from the state beyond what the existing law already provides. Large mining projects involve multi-billion-dollar investments and so the company will want all possible assurances that the terms on which it decides to make any such investment will not vary unpredictably. A parliamentary agreement, as it operates like a statute and therefore binds the executive, provides an additional control over executive action. This can lower the risk, and therefore the overall cost, of the project. The degree to which a government can negotiate matters of interest (e.g. water, power, heritage and environmental controls) will depend on the jurisdiction's broader regulation of these matters. If they are not within the executive's control (e.g. because they have been privatised) or have a legislated non-negotiable structure (e.g. environmental assessment by independent agency), then that prevents negotiation of a different arrangement. However, the issue may still feature in an agreement, with the specification that the company needs to comply with any extant processes for obtaining any approval outside of the agreement.

[28] The how, or process of negotiation, of parliamentary-approved agreements brings the relationship between the executive and the parliament into sharp focus. Some journal articles have endeavoured to depict the negotiation process in diagrams but there is scarce explanation by any Australian government of how negotiation occurs, and certainly no requirement for any publicity or public involvement prior to the agreement being presented to parliament for approval. During or after negotiations, the executive will need to consider which aspects of any agreement should be presented to parliament, and when that should occur. Even a government-commissioned review, in Western Australia, identified the problem here:

The negotiation process is totally carried out within government with no opportunity for public involvement or scrutiny. Not even the Local Government that will “host” the project becomes involved in the negotiations. The first public access to an Agreement is when it is introduced to Parliament as a Bill.

There is a complexity in relating the two processes of negotiating (between the executive and the company) and legislating (parliament's deliberations). It would be impossible for a full negotiation to occur through the parliament and that course is not proposed here. However, what this paper does explain is why and how there should be greater transparency about the negotiations and agreement before the parliament is asked to enact that into law.

(c) Anti-competitive effects

[29] Competition is another area where attention on parliamentary-approved agreements and the relationship between law, politics and policy is merited. A parliamentary agreement, and the procedures and preferences it establishes, will necessarily affect what may otherwise be a free market. One of the ‘public policy’ criticisms of any particular parliamentary agreement is the implications that it has for the broader industry or specific operators. A parliamentary agreement can give greater flexibility to government to favour established operators. Whether you consider that good probably depends on whether you are an established operator!

[30] An example is provided by the enactment of the most recent parliamentary-approved agreement for the Olympic Dam mine in Australia. The following is from the Minister's second reading speech.

I thank Marius Kloppers, an outstanding corporate leader, and somebody who has shown enormous support. I think other company in the world would have had the balance sheet, the available cash and the appetite for risk that BHP Billiton has. I doubt that any other mining company would have that. I also say equal to that is a chief executive officer who is at the point in his career where he can bank and make a decision of such enormity. … These are not decisions that conservative, cautious leaders make. This is a leader, Marius Kloppers, who has taken an enormous challenge and risen to it, as has the board. It is our duty now as a parliament and as a state to back the board of BHP in.
That this statement is complimentary of the relevant company is unsurprising as any government would be grateful given the extent of investment and associated benefits expected for the State. However, some broader implications are unstated here. 'No other company' would have undertaken the investment says the Minister. Were any other companies given the opportunity to consider this investment when the government started these negotiations about the mine's expansion? Almost certainly not because it was an existing BHP operation. Recall, however, the Minister's words here are part of the Second Reading Speech, outlining the statute's purpose and to be used by any court to help interpret any future ambiguities in the statute. It is difficult to reconcile these kinds of statements, and presumably the reality they present of agreement negotiations and implementation, with the many government policies and assertions of an open, competitive, resources sector.

[31] There are increasing international expectations for greater transparency in contract negotiations which need to be considered in relation to parliamentary-approved agreements. There are laws against anti-competitive practices, both internationally and also within many countries. Yet, some parliamentary-approved agreements have specific exemptions from, or variations of, competition law. The issue and importance of competition controls, and what the parliament is being asked to approve, will partially depend on how the original negotiations occurred between the company and executive. If there was an open bid/auction process for the mining rights and options in an area, or in initially selecting the company, there is justifiably less need for competition at later stages. However, where a company has secured mineral rights simply by being the first party which applies for them, it is difficult to justify that automatically entitling the company to the benefits of a parliamentary agreement.

[32] If the agreement is good for competition, but the basis for that is not explained to parliament, the parliamentarians will be unable to meaningfully approve the arrangements. The following statement by one parliamentarian, being asked to approve an agreement in the absence of knowing the government's assessment, demonstrates the situation well.

Fortescue Metals could come forward with a proposition to mine the iron ore and another company might say that it could possibly do it. We could enter into an agreement with neither a cost-benefit analysis nor a clear business case for Western Australia. A business case has been constructed by the company, but there is no business case for Western Australia; that is, what is the revenue stream, investment, return on investment, obligations and what the state will get out of it. By setting up a state agreement act [parliamentary-approved agreement], effectively we are setting up an anti-competitive arrangement. It is not growing competition.

[33] There is another view on competition, influenced by what 'competition' is focussed on. The Government of Western Australia has sometimes seemed more concerned about its competing against other jurisdictions, rather than business being able to compete within an open market. A 1998 study of three parliamentary-approved agreements, commissioned by the Western Australian Government, considered the economic developments seen to arise from parliamentary agreements outweighed any anti-competitive effects.

[34] In assessing competition, comparison needs to be made with the standard legal position existing for all other (non-agreement) companies. Some parliamentary agreements have operated to allow the holder to sit on undeveloped resources for longer than was usually allowed for companies. In Western Australia, there is a general transparency in relation to mining operations, with operators having to regularly report on their work on general mining tenements, and those reports are publically available. During research for this paper, one respondent observed there is significantly less transparency under many parliamentary-ratified agreements, with reporting being private to the government, if it is required at all. This is also an accountability issue.

(d) Future amendment

[35] Parliamentary-approved agreements can permanently entrench a law to operate for the life of the mine, which may be unsuited to unexpected events or developments which occur in the future. One example is seen in the judicial responses to the unexpected discovery of gold in land which had been dedicated for bauxite operations under a parliamentary agreement:

> The pre-existing special agreements with both Alcoa and the Worsley Joint Venture probably both need amendment as soon as possible to take into account the discovery of gold in bauxite ore. The complete loss of the ground and ore in huge exploration licences by the bauxite miners is an intolerable prospect. A form of reversion, and recovery, of ground and mineral will be required.

[36] Difficulties, other than unexpected geological discoveries, can also arise from the longevity of parliamentary-approved agreements. When tax reductions have achieved their original intent (of encouraging and supporting the company's investment), maintaining these reductions can be anti-competitive. In Western Australia, the Auditor-General examined the discounts on mineral royalties and indicated that these were justified in the 1960s in encouraging massive private investment through parliamentary agreements. However, the discounts were still operating many decades later, when that earlier justification had long expired, and unpredicted mineral prices had resulted in losses to government revenue exceeding $40 million a year. These tax discounts, enjoyed by a couple of
Context and framework for analysis

(e) Executive accountability

[37] The law and procedures about parliamentary agreements need to ensure better engagement and integration with other interests - the current executive does not speak for everyone. Historic parliamentary-approved agreements, like many forms of mineral regulation, were deficient in that they ignored parties or interests other than the executive and the company. The executive assumed it legitimately acted on behalf of everyone else who might be affected by the agreement: land users (whether formal or informal), mining competitors, taxpayers, local government, and future communities. This approach is no longer acceptable.

[38] Parliamentary-approved agreements can blur the division between executive and legislative roles, and in so doing, risk impairing the integrity of both. The traditional distinction between these roles is that 'legislative activity involves the process of formulating general rules of conduct without reference to particular cases (and usually operating prospectively), while executive action involves the process of performing particular acts, issuing particular orders or making decisions that apply general rules to particular cases'.

[39] Parliamentary-approved agreements can be alluring when the executive can use its parliamentary numbers to legally override any previous policy or law. There have been various occasions where mining and resources projects have used parliamentary agreements to override or extinguish other rights or interests which had previously been protected against mining, for example, permitting developments in conservation areas where such activity was otherwise prohibited, waiving the need to comply with legal protections for indigenous culture, impeding property rights, and extinguishing the rights of other miners. Such a course has obvious implications for general confidence in the rule-of-law in the jurisdiction. This is, however, a dynamic of parliamentary law-making in general (i.e. the executive can sometimes use its numbers to control the parliament's decisions and outputs) and not specific to parliamentary agreements. What is relevant, however, is that that this autonomy makes it difficult to recommend or entrench any general rules about the creation or use of parliamentary agreements which can be guaranteed to apply in all contexts. There are, nonetheless, options for improvements in parliamentary procedures which are discussed below in Section 3 Parliamentary structures to improve agreement negotiation & use.

[40] Where a parliament is not given adequate information or time to consider an agreement's negotiation and content, that hinders the legislature in reaching an informed decision. This reduces the potential for cross-political support which is one of the key benefits the parliament could provide. The entry of any agreement, and the resultant revenues that that will likely bring, obviously have some benefits to the state. But without knowing the compromises and obligations negotiated, parliament will be unable to reach any informed approval. Transparency through parliamentary approval is important, and a key aspect of that can be disclosing a cost-benefit analysis across the full range of the proposed activities. These are various examples where parliament has expressed frustration at not knowing whether the executive has even conducted such an analysis.

The question is: in the case of FMG, for example, where is the comprehensive cost-benefit analysis that says that the kind of arrangement that has been put in place for FMG will deliver the maximum or optimal benefits to the state of Western Australia, be they financial, economic, social or environmental? Where is the cost-benefit analysis? It does not exist. Even if it did exist, it would not be part of the public process because it would have been negotiated not by a government department but by a section within a government department. I understand it is called the major projects unit and it negotiates on behalf of the entire state of Western Australia. My understanding from the briefings I have had is that a cost-benefit analysis has not been undertaken. When I asked whether certain elements had been costed - for example, water resources, energy resources and other resources that will be impacted upon - I was told it did not have to consider those costs because another department is doing that. Surely they are part of a comprehensive economic analysis that suggests this is a viable, economical, feasible and desirable project. That has not happened. Effectively, we do not have a clear mechanism for evaluating the cost-effectiveness of this proposition.

The process by which parliament can be presented with the relevant information is examined, below, in Section 3.5 Regulatory impact assessment. Rushing through without any regulatory impact assessment (RIA) process may mean that parliament has no idea whether the government negotiators have made the relevant assessment.

[41] Part of accountability is recognising potential difficulties and explaining how these will be addressed. There is a risk that a parliamentary-approved agreement can amend other laws without clarity about how those laws are being changed or the ability to debate/amend those changes. On the executive side, there can be an effective commitment to approve a project before its impact has been properly assessed. A parliamentary agreement, with its provisions of an ad-hoc arrangement for one mining operation, can cause confusion among the normal government agencies involved in mining regulation. In response to this, the Australian Government's Productivity Commission emphasised that:
For compliance and enforcement activities to be effective, it is important that agency responsibility for these activities is clearly assigned. It is also important that all approval conditions have an agency explicitly responsible for ensuring monitoring and compliance with them, and that overlap of these responsibilities is avoided to prevent confusion and duplication (or where some overlap is inevitable, that arrangements are in place to enable coordination).\textsuperscript{157}

[42] All these concerns should be addressed through careful drafting. If there are to be any exemptions from existing laws, then these should be specifically noted. This gives the executive and company certainty about what they have agreed, and allows the parliament to specifically examine the exemptions and, if considered appropriate, approve the arrangement. Compliance issues should also be clearly explained in any parliamentary agreement and not left to government agencies to guess and have to wrangle resources if no budget has been allocated for that. These are all matters which should be addressed in a comprehensive regulatory impact assessment, explained below in Section 3.5.

(f) Realities of implementation

[43] A parliamentary agreement may provide terms which are useful at that time, but their ‘stabilisation’ then fixes a regulatory scheme for that project different from the rest of the jurisdiction. The impact of that on regulation needs to be considered by the government during negotiations. Regulators talk of practical difficulties for government agencies where the processes which exist for all other mining in the jurisdiction do not apply to a particular minesite (or, even more difficult, different minesites have different legal regimes). One experienced regulator observed that the more ‘bespoke’ the agreement is, the more resources and experience will be needed within government to make it work. This all suggests that an important evaluation for government must be to account for the additional regulatory difficulties which would be created by an agreement (and its unique regulatory system created for that operation).

(g) Unlimited term of agreement

[44] Many parliamentary agreements will endure for as long as the company chooses to operate the mine. This may cause the state to ‘over-compensate’ the miner because that company’s decision to invest (and the benefits it needed for that investment decision, to be delivered through the parliamentary agreement) will be taken by reference to a shorter period of time.\textsuperscript{158} One proposal from an experienced regulator was that the time period for any agreement should only cover the mine’s development phase (which is the company’s largest expenditure) and not the whole mine life. Another option, for the agreement term, could be ‘the duration of government incentives and subsidies necessary to encourage the initial investment and development of the mine [and the] Agreement could provide that, after this period, government benefits cease’.\textsuperscript{159}

[45] It is not the place for this paper to identify a specific time period which will be appropriate in every situation, but these examples do show that the issue needs careful consideration in any negotiation, and the parliament’s consideration of the agreement. Indeed, regardless of the duration of the agreement, there are various issues the parliament should know if the executive is asking its approval of any agreement. Here are some examples.

Through their oversight role, parliaments should:

- Ask the government to provide revenue projections over the life of any major project — particularly when special fiscal exemptions or incentives are granted — and request a detailed listing of all assumptions (prices, costs, etc.) upon which these projections are based. Over time, legislators should request regular reporting of revenues the state receives and compare them against these projections.

- Request the disclosure of all exemptions and incentives granted to specific companies and question the government on the rationale for granting them.

- Ask government officials to explain the actions they are taking to ensure compliance with the fiscal regime, including conducting independent tax audits.\textsuperscript{160}

The above is from a 2011 report on ‘getting a good deal from oil and minerals’, and although it deals with governments’ extractives regulation in general, it is relevant to parliamentary-approved agreements too. It indicates the kind of information which parliaments need to know if they are to have any meaningful understanding of, and make meaningful decisions in relation to, agreements which the executive proposes for parliamentary approval.

2.2 The future for parliamentary approved agreements?

[46] Parliamentary-approved agreements will remain a regulatory form in the foreseeable future. Many current mines operate under an existing parliamentary agreement, and there is no move for those agreements to be repealed nor for those operations to revert to regulation under the jurisdiction’s general mining law. In Western Australia, the
jurisdiction with the greatest use of parliamentary agreements, a study in 2004 showed many of the operations under the then 64 different agreements are expected to continue for decades into the future. This is shown in Figure 1.

While agreements regulating existing operations will continue, the use of parliamentary agreements for new mining developments will likely depend on how well the proposal fits the jurisdiction’s contemporary legislative approaches.\(^\text{162}\)

(a) **Minimum standards are no longer ‘negotiable’**

\(^{[47]}\) So there is uncertainty about the exact role for new parliamentary-approved agreements but one thing is clear - many areas are no longer negotiable. There is broad acceptance of universal minimum standards,\(^{[163]}\) particularly in relation to environmental and social issues. The importance of non-negotiable minimum standards is evident in commentary\(^{[164]}\) and approaches by government\(^{[165]}\) and industry\(^{[166]}\). It is reinforced in international law:

(a) The 2002 *Johannesburg Declaration on Sustainable Development*\(^{[167]}\) emphasises that any mining must be part of 'sustainable natural resource management' and specifically incorporates fundamental labour rights and 'actions at all levels to [s]upport efforts to address the environmental, economic, health and social impacts and benefits of mining, minerals and metals ...[and] promote transparency and accountability for sustainable mining and minerals development'.\(^{[168]}\)

(b) The *OECD Guidelines for Multinational Enterprises* require companies to 'refrain from seeking or accepting concessions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives or other issues'.\(^{[169]}\) These Guidelines apply to governments and companies operating from or in an ‘adhering country’ which includes over 40 countries and around 80% of all foreign direct investment.\(^{[170]}\) Most major mining companies need to follow the *OECD Guidelines* because these cover companies registered in Australia, Brazil, Canada, Chile, France, Germany, Italy, Japan, Korea, Mexico, Poland, Sweden, the UK and USA.

(c) The United Nations’ *Guiding Principles on Business and Human Rights* outline responsibilities for every business to 'avoid infringing on the human rights of others and…address adverse human rights impacts with which they are involved'.\(^{[171]}\)

(d) While there is no international customary or treaty provision which directly creates 'environmental rights',\(^{[172]}\) there are many standards on specific issues which are relevant to mining operations. These include: rights to information about environmental decision-making;\(^{[173]}\) prohibiting marine pollution\(^{[174]}\) and environmental damage to other states;\(^{[175]}\) regulating Antarctic mineral activities;\(^{[176]}\) protecting biological diversity;\(^{[177]}\) governance of resource-sharing with neighbouring countries;\(^{[178]}\) combating desertification;\(^{[179]}\) regulating hazardous wastes;\(^{[180]}\) and adopting ‘polluter pays’ regulation\(^{[181]}\).

These various standards may already be reflected in the country’s constitution or other laws, and therefore apply to mining operations in the jurisdiction. However, if they are not, a parliamentary agreement should not grant permission to operate at lower standards. The procedure by which parliaments can address these minimum standards is discussed, below, in Section 3.5 Regulatory impact assessment.

\(^{[48]}\) Standardisation will likely feature not only in any new parliamentary-approved agreements\(^{[182]}\) but also in amendments of existing agreements. A parliamentary agreement, once passed, is not fixed forever. Like other statutes, these can
be amended over time. There are many reasons for amending parliamentary agreements; for example, the government responding to court decisions, or the company wanting to change or expand operations from previous plans. Regardless of why the change is sought, it will trigger re-negotiation and likely a whole range of other issues will arise for attention such as public and competitors' expectations about the project's environmental and financial obligations; or the company's perspectives on processing obligations. Some of the longer-lasting parliamentary agreements have had many variations, with negotiations reaching agreed changes183 and then that being ratified in a parliamentary statute and becoming the new parliamentary agreement to regulate that project.184

2.3 Sustainable development - a basis for assessment

The credible assessment or analysis of parliamentary-approved agreements requires some objective basis against which that assessment will occur. For instance, why is it 'better' for parliaments to proceed one way rather than another, or why is some content criticised while other content commended? The basis for assessment in this paper is drawn from sustainable development and the integration that demands of economic, environmental and social perspectives.185 There is a broad consensus that sustainable development is relevant to mining regulation and legal analysis, but it is useful to expand on the integration aspect of sustainable development because this has particular relevance for parliamentary agreements and how they can be improved.

The extraction of natural resources is not contrary to sustainable development.186 Instead, sustainable development demands attention on how those resources are extracted and the conversion of natural resource wealth into other resources for the State's current and future populations187; for example, through revenue for education, public infrastructure, and health; contributing to employment and business opportunities; and ensuring these benefits are not outweighed by broader impacts.188 Reference to sustainable development does not, however, simply mean focussing on environmental and social aspects of parliamentary-approved agreements. Rather, it urges better integration of those aspects with economics, and also emphasises a broader understanding of those economics. Sustainable development will not countenance a solely economic focus which ignores the impacts or benefits in social and environmental spheres. But equally, sustainable development will be critical of an approach that, for example only considers social aspects and not environmental or economic interests, including the economics of the company189 or of the broader economy.190 The main benefit that mining can provide a State is revenue (not employment, business development, nor infrastructure)191 which depends on the mine's financial success. That financial success is, however, derived from resources which belong to the State192 and through impacts on the State's environments and populace. This illustrates the multitude of goals facing the State, and with which parliamentary agreements need to engage.193

The relevance and requirements of sustainable development for mining has been widely accepted by industry and other parties, justifying this as an analytical tool in considering parliamentary-approved agreements.

a) The International Council on Mining and Metals (ICMM), the global industry-body for mining,194 requires member companies to implement and measure their performance against 10 sustainable development principles. These principles are benchmarked against leading international standards,195 including the Rio Declaration, Global Reporting Initiative, OECD Guidelines on Multinational Enterprises, World Bank Operational Guidelines, OECD Convention on Combating Bribery; the Voluntary Principles on Security and Human Rights; and ILO Conventions 98 (collective bargaining), 169 (indigenous people), 176 (safety & health in mines).

b) The following 2007 statement, from a national association of mining companies, is indicative of changed perspectives:

The industry has recognised … that corporate social responsibility is not an adjunct to our business, it is our business – our core function is to convert natural endowment to societal capital, and that can only be achieved sustainably when there are real mutually beneficial considerations of the environment, our host communities, and the rights and interests of Indigenous peoples.196

c) There is an abundance of material from NGOs and academics advocating and using principles of sustainable development in analysing and recommending mining regulation and operations.197

A similar approach is seen in government, both at a domestic level198 and also internationally.199 The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development200 comprises 47 governments and it adopted its mining policy framework in late 2013: Mining and Sustainable Development managing one to advance the other. The Forum's objective is 'to improve, enhance, and promote the contribution of the mining, minerals and metals sector to sustainable development and poverty reduction'.201 The framework agreed by these governments identifies the following six areas, which provide useful guidance as to what should be examined in considering
parliamentary-approved agreements. Each area is detailed in the Forum’s framework but the following summary headings are sufficient for current purposes of analysing parliamentary agreements.

**Legal and Policy Environment**
A mature modern legislative regime is one that provides clear lines of responsibility and accountability. Such a regime provides the foundation of good governance and contributes to sustainable development in all aspects of social and economic life.

**Financial Benefit Optimization**
Taxes and royalty revenues derived from exploration, mine development and mining reflect the value to society of the resources mined. They are collected and put to work in support of the sustainable development of the nation.

**Socio-economic Benefit Optimization**
The conversion of natural capital into human capital holds the greatest promise for sustainable outcomes from mining activities.

**Environmental Management**
The management of the natural resource base within ecosystems is the continuous responsibility of any society seeking to become more sustainable.

**Post-mining Transition**
A mining operation which is considered consistent with sustainable development is one whereby planning for closure is present during the entire operation of the mine.

**Artisanal and small scale mining**
Artisanal and small scale mining is a complex and diversified sector that includes poor informal individual miners seeking to eke out or supplement a subsistence livelihood, to small-scale formal commercial mining entities that can produce minerals in a responsible way respecting local laws.

[53] The relevance of sustainable development to parliamentary-approved agreements is twofold. First: the negotiation and enactment of any parliamentary agreement needs to address the triple bottom line, and a process to guide that already exists: see Section 3.5 Regulatory impact assessment below. Second: any analysis or advocacy of parliamentary agreements needs to consider the different perspectives and issues (e.g. at least the six areas outlined in the above paragraph). There is little use in criticising, or supporting, an aspect of a parliamentary agreement if considered only from that one perspective; because that sole perspective will not be the only aim the parliamentary agreement needs to address. This broadening of perspectives has occurred in much mining regulation and analysis but it needs to occur in how parliamentary agreements are used and approached. This particularly so given considerations of sustainable development are moving from mere policy ideals to legal obligations, both at an international level and also domestically.

[54] There is debate about what sustainable development exactly requires and so the specific legal obligations it imposes within any jurisdiction depends on that country’s particular ‘sustainability’ laws and their relationship with any parliamentary agreement. However, this paper uses the concept at a broader level - the six areas noted above and also in examining the parliamentary agreement’s process and public participation. These latter requirements arise from the emphasis which sustainable development places on public accountability and involvement.

[55] In considering public accountability, parliamentary-approved agreements have some advantages over other forms of resource regulation. This is positive from the perspective of sustainable development. A parliamentary agreement is the most transparent way in which a company’s rights and obligations can arise because these terms are freely available in a parliamentary statute which is a public document. Contrast that to a general mining law (which does not, in itself, publically identify who holds what rights in any particular area of land) or a simple contract between the company and the executive (which is not public). Some jurisdictions may provide ways to access that information - through registers or freedom of information laws - but they involve additional processes, time, and money to obtain the information. A parliamentary agreement shows all this information; it is freely and easily available. Or, at least, as easily available as parliamentary laws are in that jurisdiction. Indeed, this is reported as one reason why Papua New Guinea stopped using parliamentary agreements - that the government and investors wanted greater confidentiality.

[56] Another benefit from parliamentary-approved agreements is the further information available in parliamentary debates which can provide information about the negotiations and concessions that each side made during negotiations. Questions of parliament’s autonomy in any such debate are important, and addressed below in Section 3 Parliamentary structures to improve agreement negotiation & use. The ongoing implementation of a parliamentary agreement can also increase transparency and accountability; for example, by making decisions more open to judicial review and documents publicly available.
3 Parliamentary structures to improve agreement negotiation & use

Parliamentary mechanisms and procedures already exist which can be used to improve the negotiation and implementation of parliamentary-approved agreements. Every parliament has processes and rules about how it will debate proposed laws and its engagement in the decisions and actions of the executive government.217 These may be called 'standing orders', 'rules of procedure', 'regulatory assessment' processes or suchlike and they explain how proposed laws should progress. This Section examines five aspects of parliamentary procedure and their potential relevance to parliamentary agreements:

3.1 Normal legislative processes
3.2 Reporting to parliament
3.3 Commercial confidences
3.4 Committee examination
3.5 Regulatory impact assessment

A possible response to the recommendations in this paper is that they do not realistically account for the political reality of agreement negotiations and workings of parliament.218 Parties will sometimes say or do things to influence the deliberation of a parliamentary-approved agreement, not because of a particular aim in relation to that agreement, but because of wider political dynamics, ideology, or ignorance. The authors realise that procedures and opportunities for engagement need to be carefully monitored to ensure they are not being misused for purposes other than good-faith consideration of whether to approve the agreement. However, that potential exists in relation to every law and parliamentary procedure, and does not justify a position that the parliament should simply 'rubber stamp' the executive's agreement.219 What this research reinforces is that a parliament's existing processes can be used to improve the implementation of any parliamentary agreement. Equally, the capacity of parliaments and parliamentarians to undertake their important roles is critical and where the capacity is inadequate, it should be strengthened.220

3.1 Normal legislative process

Parliamentary rules about minimum notice and debate and legislative procedures can help increase the accountability in creating parliamentary-approved agreements, thereby increasing their potential efficacy and longevity.221 These structures can provide two particular advantages to parliamentary-approved agreements. First, they promote greater understanding and acceptance of the structure through all parties seeing an objective and defendable process through which it arose. The second aspect is "future proofing" by documenting the basis on which the parliament examined and endorsed the agreement. If the parliament is provided with the detailed basis of how and why the agreement's terms arose, and then endorses those terms, that is an enduring record. This provides a useful basis in face of the inevitable change of government or varying political power of various parties and interests in the future. Any future questioning of the parliamentary agreement can be better dealt with by showing that all interests and parties were considered in enacting that agreement.

As mining operations under a parliamentary agreement usually endure for many decades, it makes little sense for parliamentary shortcuts to be taken in establishing the basic regulation of these operations. Instead, a parliament's usual procedure should be used in establishing the regulatory structure (which is the agreement endorsed by parliament) which gives opportunity for other parties and interests to understand and have some involvement and engagement with the process. Of course, this gives those parties more opportunity to object to the agreement and that is why this course is sometimes curtailed. However, to deliberately choose and follow procedures aimed at preventing others' knowledge and involvement creates a potentially unfixable Achilles heel in the mine's regulation. Those in government and the company who have examined the proposals and consider the project will provide overall benefits, despite any local impacts, should be able to explain that to broader public and political processes. When negotiating a parliamentary agreement, parties should be cautious about the political cycle over-influencing the terms of the agreement. A protection against that is explained, below, in Section 3.5 Regulatory impact assessment.

International 'good practice' for parliamentary legislating involves various steps which are relevant to how the parliament should approach a proposed parliamentary-approved agreement. These steps include the following.
Parliamentary structures to improve agreement negotiation & use

- 'effective publicity through different media giving due notice of forthcoming parliamentary bills, enquiries [and] public hearings...;
- targeted invitations to relevant organisations and experts, including representatives of marginalised groups as appropriate, to make submissions or give evidence;
- procedures for tabling submissions from individual citizens;
- a public record available...of all submissions made; and
- public hearings arranged in local centres, with written summaries of oral evidence'.

The International Parliamentary Union also recommends that parliaments ensure the public availability of parliamentary business and programs. This provides another way in which parties should be able to learn and have input into parliament's consideration of a parliamentary agreement.

[63] Some parliaments have different procedures for bills that affect only particular parties (rather than applying generally to everyone in the jurisdiction), often termed 'hybrid bills'. Procedures for hybrid bills usually involve mandatory examination by a committee to enable input from 'anyone directly and specially affected by the Bill', which is a process which could apply to agreements proposed for parliamentary approval. The role of committees is discussed further, in Section 3.4 Examination by parliamentary committees. Also relevant, is where a parliament has additional procedures about explaining or assessing the drafting of a proposed new law (e.g. assessing the effect on certain rights, scrutinising against human rights standards etc.). Where these exist in a parliament's normal process, there is no reason why they should not also apply to a proposed parliamentary agreement.

[64] These standard steps of parliamentary 'good practice' should also be present in how a parliament engages with a proposed agreement. Many parties, however, oppose any parliamentary engagement with the proposed bill which covers a parliamentary-approved agreement. The rationale is supposedly that parliament's role is simply to 'rubber stamp' the bill and agreement which the government has presented. A contrary approach arose in Western Australia, where a proposal for greater parliamentary scrutiny of these agreements was put forward by the Government. This explained how the parliament's decision can remain only 'yes or no' but that it was preferable for the parliament to make an informed decision to that effect. The Government's proposal was that any bills which presented an agreement for legislative approval should go to a standing (i.e. permanent) committee for examination and report before the parliament decides on the bill. The Government explained its position:

'The Government's decision to introduce this motion is not based on any thought... that a state agreement Act [parliamentary-approved agreement] is an Act of such nature as can be amended by the House [parliament]. A state agreement Act is a contract expressed in the form of a statute and it cannot be amended. ...

[A] state agreement Act is an instrument of legislation that can provide a legal means of doing things that, without its existence, would be illegal. ...[T]hat fact alone is probably enough to justify this legislative change to allow state agreement Acts ... to be subject to the scrutiny of a standing committee ... It is a powerful instrument, and one that can override all other laws. A reference to a standing committee ... is a valid way of addressing the issue of state agreement Acts, not because such a committee can change the Act, and not because the committee's advice to the ...[parliament] can cause it to change such an Act, but simply because it enables the public of Western Australia to be aware of what is in the Act.

We have had many disputes about state agreement Acts in the past. ... So many issues involved in that and other such Acts remain contentious because they have never been subject to proper scrutiny. It is a reasonable expectation on the part of a Government that is setting out to be open and accountable that it expose such Acts to this level of scrutiny.'

The proposal did not proceed because it failed to pass before the parliament's term ended with the next election and it was not reintroduced by the new government. The rationale, however, has much to commend it. A parliament's decision can ultimately only be a yes or no on whether to approve the proposed agreement - the parliament cannot change the agreement as that would not represent the consensus which the executive and company has reached. However, the fact that parliament can only approve or reject the agreement does not mean the parliament should be denied the necessary time and information to take its normal deliberations in deciding.

[65] When any law, including a parliamentary-approved agreement, is passed without the parliament's usual procedure of consideration and debate, that can increase the law/agreement's vulnerability to potential invalidity outside the country. While the OECD Guidelines discourage companies from receiving exemptions, the Guidelines do envisage that 'there are instances where specific exemptions from laws or other policies can be consistent with ... legitimate public policy reasons'. So an agreement may contain exemptions, permissible within the OECD Guidelines, where that is consistent with 'legitimate public policy reasons' - but it is difficult to see how that could exist if the normal public debate is curtailed and an agreement (for a decades-long operation) is rushed through parliament. Another
forum of international review exists in various human rights courts and bodies which monitor compliance with human rights standards. Many of these standards recognise that, beyond the essential minimums, there can be variation and a domestic parliament/government is permitted flexibility in determining the measures appropriate in that country's current situation.232 However, this flexibility is only permitted where considered decision-making has resulted in the balance being struck where it is; so parliamentary short-cuts can lead to laws being ruled to be in breach of the state's international obligations.

When examining whether and to what extent the Court should grant a Member State a margin of appreciation, as to the latter's assessment of the necessity and proportionality of a restriction on human rights, the quality of decision-making, both at the legislative stage and before the courts, is crucial and may ultimately be decisive in borderline cases.233

These various international structures represent another reason why any mining company should steadfastly resist if the executive proposes "using its numbers" to curtail parliament's debate and consideration of an agreement seeking parliamentary approval.

In summary, the procedure for parliamentary-approved agreements should be no different to any other draft laws presented to parliament. While the final decision must, necessarily, be a 'yes' or 'no', parliamentarians should be given the normal notice and information (and opportunity for briefings) as would normally occur. Parliamentary debate procedures should also be allowed to run, including any broader publication/information about the proposed legislation for other parties to make submissions. This is also consistent with the Mining and Sustainable Development Framework of the Intergovernmental Forum which calls for clear lines of responsibility and accountability.234 Accordingly, regardless of whether the parliament's normal procedure is found in standing orders, executive guidelines, or constitutional provisions - they should apply to the proposal for parliamentary agreements. The usual law-making process in Myanmar and Uganda are explained, in detail, in the Appendices.235

### 3.2 Reporting to parliament about existing agreements

Parliamentary-approved agreements can usefully adapt structures from some parliaments and laws which require regular reporting on specified subjects. In other areas, various laws require reporting through written documents to a government regulator or public register (e.g. compulsory reports for corporations, continuous disclosure statements to the stock exchange) or through oral or written material to parliament (e.g. delegated legislation made by the executive, or proposed treaties to be enacted). A reporting/monitoring structure seems particularly appropriate to parliamentary agreements because these agreements have identified procedures and stages for the mining operation's future. For each of those stages or procedures, regular reporting of progress is possible and desirable.236 Parliamentary oversight of executive management of mining is important.237

The Auditor-General of Western Australia considers that 'Given the importance of Agreements to the State, there should be regular disclosure of Agreement status and performance to Parliament. By comparison, public companies have to comply with continuous disclosure obligations to meet the information needs of their shareholders'.238 More recent parliamentary-approved agreements have included reporting obligations,239 but the Auditor General considered the Government's monitoring insufficient because it was unable to determine whether operators have been meeting their obligations.240 The absence of the executive conducting this monitoring makes it even more important for reporting to parliament. Obligations to report to Parliament could be imposed on the executive government or company, or both, but there may need to be some provision for confidentiality which is addressed below in Section 3.3 Protecting commercial confidences.

There is always tension between parliaments and executives about the divisions of information and control. The exact point of demarcation will, quite legitimately, vary between jurisdictions. But what is clear is that withholding information from parliament about the agreement's operation is untenable. The frustrations of a parliamentarian who was unable to get copies of local content reports produced under a parliamentary-approved agreement are evident in the following:

[The government refused to provide the parliament with copies of the local content reports, because the government claimed that the] information is commercially sensitive as it contains information which if disclosed would cause unreasonable detriment to the owner of the information or another party... [and that] Local content reports contain information about commercial operations of both [the operator and its] suppliers which is commercially sensitive.

[The MP responded] That is an extraordinary statement. I am not asking for trade secrets. I am not asking for contract details or commercial details. I am just asking: how much of the work to be done is being done in Australia, and Western Australia in particular, and how many jobs does that mean? ... I cannot see how telling us the number of contracts that go to Western Australian and Australian companies and the number of jobs it is estimated they will create can cause detrimental value to the company...[The parliamentary-approved agreement is law; it has been passed by this Parliament. The Parliament demands that those [local
content] reports be given and those reports have to be given. What is the point of having a state agreement that asks for local content reports if the Parliament cannot scrutinise them? What is there to hide?241

The exact details of reporting requirements must be consistent with the general division of responsibility between the parliament and executive in that jurisdiction. However, the logic of the above is difficult to fault: parliament should know what is occurring in relation to agreements it has approved.

[70] There are ways to ensure reporting gives parliament the necessary information while still protecting any necessary commercial confidences. Reporting can be done in a way which collates the information so that individual aspects and confidences are protected while parliament is still able to examine the overall operation. This is used in Western Australia in relation to local content reporting.242 It is also the structure used under the Extractive Industries Transparency Initiative.243 These provide examples of how reporting and transparency can occur at a broader level while still protecting the confidences of individual mining operations. Similar structures should be included, wherever feasible, in parliamentary-approved agreements. Of course, this format will not allow the monitoring of an individual operation, so where that is necessary, a different structure will be needed and other mechanisms can be used to protect commercial confidences - examined in Section 3.3 Protecting commercial confidences.

3.3 Protecting commercial confidences

[71] Commercial confidentiality is the main objection raised against increased transparency and disclosure in the creation and use of parliamentary-approved agreements.244 This is a valid concern: for any business to be required to publicly disclose the exact price it pays for any service/good will put the business at a disadvantage of potential competitors. However, there are ways in which that concern can be met while still enabling disclosure and transparency, and the majority of every government-company contract about mineral resources should be publically available.245

[72] Legal structures in other areas provide ways to approach commercial confidentiality: protecting legitimate claims while rejecting spurious claims and allowing disclosure. Issues of commercial confidentiality can arise regarding information at three different stages of a parliamentary agreement: (1) material created for or during the initial negotiations which lead to the agreement, (2) any commercial terms which have been reached in the agreement itself, and (3) documents/information which will be created through the agreement's implementation, including any reporting to government under the agreement.

[73] Many jurisdictions have freedom of information (FOI) regimes which govern disclosure and exemption on various grounds, and these include commercial confidentiality.246 Similar structures are also present at an international level in the Aarhus convention247 which provides general rights to information but allows exemptions from disclosure for commercial confidentiality.248 These laws, and their interpretation and implementation, provide a useful guide for how to deal with commercial confidentiality.249 FOI law has been applied in relation to parliamentary agreements, with one case confirming that FOI can also provide protections to the confidential and commercially-sensitive documents that may exist during negotiations for agreements.250

[74] Confidentiality of particular arrangements in, or created by, a parliamentary-approved agreement can also be accommodated. Commercially sensitive information - such as power costs, freight charges, compensation payments - can be addressed under subsidiary processes and not exposed in the main terms of the parliamentary agreement which will be available on the statute books.251

[75] Another way in which parliaments have dealt with commercial confidentiality in relation to parliamentary-approved agreements is to arrange for details to be available for inspection by parliamentarians, while prohibiting any copying or disclosure to any other parties. This structure was used in relation to one parliamentary agreement proposed in Western Australia. The executive and the company had signed an initial agreement but were still negotiating some aspects which might feature in any eventual draft to be put to the parliament for approval. Through a committee, the parliament heard from the government why confidential protection was needed for commercial reasons, and then arranged for the current agreement to be inspected by parliamentarians but not be public. The particular arrangements the executive and parliament put in place were as follows.

Recognising both the desire for Government to preserve the confidentiality of the SDA [the potential parliamentary-approved agreement] and the Parliament’s right to scrutinise the actions of Government, the Committee resolved to provide a copy of the SDA to the Clerk of the Legislative Council [parliament’s upper house] to be made available to all Members of the Legislative Council for viewing purposes only (not to be copied or disclosed), for a limited time period. The Clerk destroyed his copy of the SDA at the expiry of the designated time.252

This structure is a sensible way in which parliamentarians can be provided with information about a proposed parliamentary agreement without confidential confidences being lost. Other than what is legitimately commercially confidential,253 everything else should be publically available.254
3.4 Examination by parliamentary committees

[76] The committee process allows the parliament to better examine and understand parts of a proposed law and to be given more information by the executive of the day. Committees enable a closer assessment of issues, usually with expert and public input, before reporting back to the full parliament. In relation to parliamentary-approved agreements, committees could have two roles: (1) examining and reporting on the initial agreement which parliament is asked to approve, and (2) monitoring the operation of existing agreements. This is a way in which the parliament can understand an agreement, and make better informed decisions, without necessarily interfering with the executive's valid decision. A committee process can help the parliament in examining and understanding a proposed parliamentary agreement, as the Western Australian Government proposed.

[77] Various parliaments use a committee process in two analogous situations to a parliamentary-approved agreement, where the parliament also has limitations on its autonomy: (1) implementing international treaties, and (2) enacting uniform legislation in a federal system. In both situations, the parliament cannot have complete freedom regarding the content of the document because that will have been set by some broader process outside of the jurisdiction. The parliament's choice is whether or not to enact that fixed content. The parallel with parliamentary agreements is obvious, from the following description from a parliamentary report in considering the executive's proposals in these circumstances.

In legal terms, a... Parliament might not be bound by an intergovernmental agreement to enact legislation to implement a uniform scheme. The Executive does not have the power in law to commit or compel a... Parliament to follow a particular course of action. However in practical terms...there may be a fiscal imperative to pass a uniform bill. These intergovernmental agreements result in considerable pressure being placed on... Parliaments to enact uniform legislation by making funding contingent on compliance with the agreement.

...It is observed that the Executive is, in effect, exercising supremacy over... Parliament when it enters agreements that, in practical terms, bind... Parliament to enact legislation to give effect to national uniform schemes or an intergovernmental agreement. Where... Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.

[78] The Western Australian Parliament has an automatic reference to a standing (i.e. permanent) committee to examine any bill which proposes to (1) legislate 'uniform scheme or uniform laws throughout the Commonwealth', or to (2) approve any 'bilateral or multilateral intergovernmental agreement to which the Government... is a party'. Even where committee procedures like this exist, however, tensions between the parliament and executive are evident. This committee issued a general report about its work and procedures to address 'the limited information at times provided to the Committee; lack of preparedness of departmental witnesses at some Committee hearings; and assertions and challenges as to the issues the Committee is empowered to inquire into'. These examples reinforce that it is not simply the establishment and reference to a committee that is required, but that that process be properly engaged in terms of resources and time.

[79] The committee structure has been seen as the key way in which parliaments can have an effective role in relation to contracts.

Parliament is likely to have an effective role in scrutiny of contracting practice only through use of a parliamentary committee... Such a committee might have at least the following responsibilities, it should: monitor the tabled rules and policies for government contracting by reference to criteria that give effect to the understanding of the constitutional implications of contract; oversee compliance with maintenance of the database and evaluate contested claims in relation to confidentiality; monitor and report to the Parliament on tabled contracts with constitutional implications; and it should have the authority to inquire into and report on systemic aspects of government contracting practice.

This applies, with even more force, to parliamentary agreements, as these are a contract effectively involving the parliament. Parliaments therefore quite justifiably have a role in monitoring an agreement it is being asked to approve and give regulatory force.

[80] Committees can also assist with addressing compliance with parliamentary-approved agreements. A difficulty faced by some governments is that, where a company is not following its obligations under an agreement, the only option available is (through parliament) to have the entire agreement terminated and the company's rights cancelled, which is the so-called 'nuclear option'. That course would significantly deter any future investment - it would be critically as 'sovereign risk'. However where the agreement provides no other structure then the government is left with little option and, if they choose to avoid the 'sovereign risk' of cancelling the entire agreement, then they effectively 'give up' on being able to enforce the agreement. Greater involvement of parliament, through examination and reporting...
by parliamentary committees, can assist in providing an additional way to monitor and encourage agreement implementation.

3.5 Regulatory impact assessment

[81] Regulatory impact assessment (RIA) is a process which is aimed at providing broad and objective evidence about proposed changes to the law.268 This is used in many jurisdictions, for proposed new or amending laws, to ensure that parliamentarians/parliamentary committees consider all the potential effects (both good and bad) of the proposed laws and that those laws are framed in a way most likely to achieve the desired objectives with the least unintended impacts.269 RIA has various names and aspects (e.g. "regulation impact analysis", 'impact assessment', 'impact analysis', 'better regulation statement'268) and exists as a policy initiative in some jurisdictions but is a legal requirement in others.269 In essence, RIA involves examining the proposed regulatory change against a series of questions/tests and reporting the outcomes of that examination to help in deciding whether and what new regulation should be made. As explained above, a parliamentary-approved agreement is 'regulation'270 and therefore any jurisdiction which requires RIA for new regulation should also apply it to any proposed parliamentary agreement.

[82] RIA structures and processes present a useful way in which a parliament can be provided with information regarding a proposed parliamentary-approved agreement. The information gathered and presented in the RIA would help the parliament reach an informed decision about whether to statutorily approve the agreement it has been presented.271 It would also document the basis on which the parliament's approval was given. The exact form of RIA varies across jurisdictions272 but broadly covers four areas which are summarised below:273

(a) **Explain the context** by: (i) identifying the policy objective(s) of the regulatory proposal; and (ii) describe the nature and extent of the 'problem' to be addressed by the regulatory proposal.274

For mining agreements proposed for parliamentary approval, this would involve describing the potential breadth of all possible mining activities which could occur under the proposal, and the existing regulation relevant to those activities. The main aims the government seeks to achieve from its regulation of the proposed mining operations will also be outlined, including government actions (e.g. obtain revenues, promote economic productivity and employment) and protections (e.g. prevent various environmental and social impacts). The inability of existing regulation to achieve these aims will need to be explained.

(b) **Explain the proposal**, detailing: (i) wording of the new/amended regulations, (ii) legal authority to make that regulation, (iii) groups likely to be affected by the regulation, and (iv) proposals for compliance.275

Part of this analysis is ensuring compatibility with existing laws, including international norms or agreements.276 That involves examining the rights of other parties who may be affected by the proposal, and whether those rights can be protected while still providing the arrangements sought by the company. Alternatively, if there are incompatibilities which cannot be avoided, then they need to be directly addressed. This step should also ensure that the agreement presented for parliamentary approval is 'clear, consistent, comprehensible, and accessible to users'.277

(c) **Conduct cost-benefit analysis**: (i) outline the benefits and costs expected from the regulatory proposal in relation to each of administrative, economic, social, environmental, enforcement and compliance; (ii) compare the proposal's costs and benefits in each of these areas, and also do the same for any practical alternatives to the proposal.278

This part includes not only economic costs to the company but also broader implications on communities. For each aspect of an agreement, consideration needs to be made of who will likely benefit and who may bear any costs.279 Various areas identified by Framework of the Intergovernmental Forum on Mining and Sustainable Development can be addressed here: optimising financial and socio-economic benefits, environmental and post-mining management.280 Compliance is also a key issue - what resources will be needed (from the company and from the government) and how will compliance be achieved281. The conscious assessment of alternatives is always a feature of RIA; necessitating broad and objective thinking about alternatives to the proposed regulation, or in meeting the public-policy objectives without the proposed new regulations.

(d) **Describe the consultation** and stakeholder involvement282

One of the aims of RIA is that the distribution of effects (e.g. here effects of a parliamentary-approved agreement) across society is transparent,283 which will involve the cost-benefit analysis above. However, it is also important that all interested parties had the opportunity to present their views.284 Critically, this would involve anyone else affected by the potential mining operations, including other miners (both businesses and also artisanal miners), communities and businesses.

All the above information, from (a)-(d), should be made publically available together with the agreement proposed for parliamentary approval.285 This provides accountability to stakeholders and the public, and informed decision-making by parliament. RIA needs to start early in any regulatory process286 so the government's negotiation and drafting of any agreement with a company should consider each of the four above areas. If these RIA areas have
been addressed and the government’s decision remains that the agreement requires parliamentary approval, then it should not be onerous to describe that RIA reasoning and results to parliament.

[83] The above has briefly explained how RIA could operate in relation to parliamentary-approved agreements. The hard work, however, will be in convincing parties why that course should be taken. The processes involved in RIA would assist parliamentary-approved agreements in two main ways: (a) to better inform and engage parliament rather than being driven solely by the executive, and (b) to assist the integration required by sustainable development. Each of these is addressed below, followed by some observations regarding (c) practicalities.

(a) Parliamentary, not executive, decision

[84] There is substantial industry and inter-governmental support for the outcomes and process which RIA seeks to provide in supporting effective parliamentary law-making and laws. This equally applies to parliament-approved agreements. The OECD emphasises that governments’ approach to regulation should ‘Adhere to principles of open government, including transparency and participation in the regulatory process ... This includes providing meaningful opportunities for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis’. A 2007 analysis of global mining finance urged that ‘companies should try and arrange that government negotiators are backed by parliamentary legal advisers and intend to seek parliamentary approval in due course’. These perspectives reinforce a role for RIA to provide the parliament with adequate information and time to enable it to make an informed decision on whether to approve the agreement that has been proposed.

[85] RIA processes can protect the political cycle from dominating the terms of any agreement. The political cycle pressure arises when agreements endure for long terms but the government is generally incentivised through the political system to prioritise short-term over long-term gains. The decisions and priorities resulting in a parliamentary agreement will ‘remain in place long after the government leaves office, in circumstances that limit the capacity of future governments and voters to change them, in response to changing needs or changing perceptions of needs’. Parliamentary agreements are like all long-term contracts, in which parties should negotiate and draft for what can be foreseen in the future. It is clearly foreseeable that governing political parties will change and therefore seeking terms only known to, and acceptable to, the current executive (which can push these through by parliamentary majority) will not assist long-term stability of the agreement or the mine’s regulation.

[86] This has various implications. Obviously those of accountability and good governance, but perhaps less apparent is the financial and competitive effects. If RIA has not been done or cannot be shown, then the parliament may be entrenching a situation which has long-term drawbacks for everyone but the company. This RIA can help counter the potentially anti-competitive effects of a parliamentary agreement.

[87] RIA can also assist in structuring the interaction of parliamentary-approved agreements with other law. The RIA process should help identify issues and inform good drafting practice – i.e. making sure that anything that has the effect of amending, or granting an exemption, to an existing law is specifically drawn to the parliament’s attention. Clarity around which laws are being amended, and why, should be addressed as part of any RIA provided to parliament with any proposed agreement.

[88] Some of these recommendations regarding parliamentary-approved agreements are aspects of broader trends and observations that, for a parliamentary system to work effectively, it needs accountability and constructive engagement from political parties. This paper realises that governance and capacity in developing countries are the central issues for effective regulation about mining’s benefits and impacts far more than fine-tuning procedures about parliamentary-approved agreements. But where parliamentary agreements are used, they must be improved. The institutions and capacity for the public to review or engage with parliament varies widely across jurisdictions. Therefore parliament’s role and relevance in parliamentary-approved agreements will also vary. But the recommendations about RIA (and other parliamentary procedures) present reasoned ‘default’ positions which should apply to any proposed parliamentary agreement. Where government considers a different approach is merited, then it should be able to justify that to parliament and to the public.

(b) Sustainable development

[89] RIA assists sustainable development by encouraging the content and process of proposed laws to address and integrate various perspectives. The OECD, in its most recent recommendation in this area, emphasised the importance of ‘clear objectives and frameworks for implementation to ensure that, if regulation is used, the economic, social and environmental benefits justify the costs, the distributional effects are considered and the net benefits are maximised’.

[90] Part of RIA involves analysis of what existing legal standards and rights exist, not only those within the domestic law, but also international standards. It is through this step of RIA that the parliament should be informed of minimum
standards. If a proposed parliamentary-approved agreement contains any provisions which would fall below internationally-agreed standards, then that should be specifically identified to the parliament. It is difficult to envisage any circumstances in which a company or executive government could justify an agreement to regulate a mining operation below international standards, nor where the parliament could endorse that through legislative approval. However, if that is ever something sought to be emplaced in a parliamentary-approved agreement, then that is quite properly an issue to be considered by the parliament, and at the very minimum, it should be publicly identified through RIA for parliamentary debate and decision.

[91] Examining international legal obligations will also include any relevant arrangements in international investment agreements. Many countries are parties to bilateral investment agreements which provide certain protections and guarantees for investors from specified countries. If these exist, then their protection provisions should be considered in drafting or finalising the parliamentary-approved agreement.

[92] Parliament needs to know whether all parties with material interests have been addressed in the proposed terms of a parliamentary-approved agreement. This is another area which can occur through the questions and reporting in RIA. However given the long duration of these agreements, not everything can be agreed 'upfront' and parliaments may also want to see processes built into an agreement for future consultation. Sustainable development has been assisted by provisions in recent parliamentary agreements which require the company to consult with local government and communities, and to agree a community development plan. The agreement can also require that such plans be agreed before the government will consider any of the company's future development proposals under the parliamentary agreement.

[93] Integration has implications not only to the mining operations but also for government agencies. As parliamentary-approved agreements establish a 'whole-of-government' approach, this means agencies may need to better understand and integrate their different operations. In Western Australia, the Auditor General examined mining regulation and parliamentary-approved agreements and recommended that all government agencies need to 'Resolve and formalise arrangements for monitoring and enforcement of conditions on State Agreement Act projects [i.e. operations regulated under a parliamentary agreement].'

[94] Ignoring sustainable development has growing implications for the enforceability of government decisions. For example, a 2008 Australian court decision observed that the failure to consider sustainable development issues 'will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted...and thus become capable of avoiding decisions [i.e. invalidating governmental approvals]'. While it is unlikely a parliamentary enactment could be legally invalidated on this basis, ignoring sustainable development will certainly pose questions about the propriety of an agreement approved by parliament.

(c) Practicalities

[95] There are processes and benefits which RIA offers parliamentary-approved agreements but there are also some practicalities which will temper the role of RIA in any jurisdiction.

(a) The RIA process takes time and resources and

(b) RIA places greater accountability on the government agencies which: (i) negotiate the agreement, (ii) facilitate any RIA process, and (iii) put forward the resultant proposal for parliamentary approval.

For these reasons, there is sometimes resistance to using RIA generally and especially in relation to parliamentary agreements. Many people, on reading the draft of this paper, discouraged the use of RIA in relation to proposed parliamentary agreements. Their main reasons were: (1) the resource and time involved in the RIA process especially given the frequent inadequate resources or capacities of government to fulfil these, and (2) they considered the government agencies involved in negotiating and drafting the agreement appropriately consider the relevant issues leaving little or nothing for RIA and parliament's role is simply to approve the agreement. These reasons obviously represent a reality: despite RIA being a standard practice in various Australian jurisdictions, and seemingly mandatory for any proposed parliamentary-agreement, the research and inquiries in writing this paper were unable to find any occasion in which RIA had occurred for a parliamentary agreement. Instead, it seems the executive's consent is considered to be the only necessary examination of the agreement's content and parliament should automatically approve the agreement without debate.

[96] Despite this reaction, the authors maintain there is a value in greater use of RIA in relation to parliamentary-approved agreements: even if a full RIA process is not feasible then ideas and techniques from RIA still have great value in avoiding problems which can arise with parliamentary agreements. The authors appreciate that the application of RIA in developing countries, with under-resourced government agencies, is mixed. The reaction to this draft, and absence of RIA on parliamentary-agreements in developed countries, is sobering. The various warnings about RIA's misuse perhaps explain why parliamentary agreements appear to have 'slipped through the net' here.
There is a large gap between the prescribed ... RIA formats and the practice of political decision-making ... If assessment processes are seen rather separate from policy formulation, important actors will not devote substantial resources to carrying out a thorough analysis, discussing implications or drawing conclusions about desirable courses of action.  

If RIA is to contribute to economic development ... it is important that it is operated properly with due consultation and without 'capture' of the process by special interests. RIAs that simply exist to impress outsiders...and rubber stamp all decisions made by the executive are not worth the cost and effort.

RIA can assist parliament's consideration of a proposed agreement but only if the necessary information is provided for parliamentarians to make an informed decision as to whether to approve or reject the proposal. This will most certainly require adjustments in how the government negotiates and presents a proposed agreement to parliament.

This paper does not presume to say there is one perfect and universal solution, but it does maintain there is a legitimate and important role for RIA processes. An agreement's negotiation, obviously, occurs solely between the executive and the company. There is no role for parliament in that. However, if parliament is to be asked to approve what the executive has agreed, then it is reasonable that parliament be provided with some concrete evidence that an RIA or other comparable assessment and analysis has occurred across government. There needs to be some demonstration and justification of the decision-making about the agreement's terms, and RIA processes can provide that.

In summary, our recommendation is that wherever an executive government is proposing a parliamentary-approved agreement, the government should:

(a) as part of the negotiation and any agreement it reaches with a mining company, examine and address each of the four RIA areas (namely: explain the context, explain the proposal, cost-benefit analysis, and describe consultations);

(b) present that RIA assessment to parliament together with the agreement text for approval; and

(c) allow parliamentarians adequate time and information to consider the RIA material in determining whether they will give statutory approval to the agreement.

These three steps should be the default position before parliament is asked to approve any agreement. That 'default' could be achieved by having these steps as part of the parliament's rules/standing orders or in a law regulating how the executive can propose parliamentary-approved agreements. If the government considers any particular proposed agreement does not require these steps to be fulfilled, then the government needs to justify why. Failing that, the above steps should occur before the parliament can approve any agreement.

Endnotes

1 The draft paper was sent to various persons in government, company and academia with experience in the area. Feedback and meetings were had with various of these, but to preserve people's anonymity (as they were speaking from personal experience and not providing their organisation's formal response), their identities are not revealed. The authors thank everyone who has assisted in the research, or commented on, the draft paper.

2 Agreements with governments remain in place long after the government leaves office, in circumstances that limit the capacity of future governments and voters to change them, in response to changing needs or changing perceptions of needs': Saunders & Yam 2004, 58 (talking about government contracts more generally, not just parliamentary-approved agreements, but the dynamic here is the same). 'The resources themselves are non-renewable and consequently finite. Transparency and accountability are therefore essential to re-assure all stakeholders that expectations are reasonable, developments are fair and benefits are spread equitably throughout society': CPA 2012, 1. 'Effective management for extractives requires a long-term vision for a country. Political parties should reflect the interest of citizens in reaching inter-party consensus on oil, gas and mining issues': CPA 2015, 3.

3 'The growth of public participation in major natural resource decisions is one of the signal developments of the last years of the [twentieth] century. Public participation promises to be an essential element of development in the [twenty-first] century': Zillman 2002, 1. The costs to mining of conflict from community dispute and disagreement can be massive, with large operations losing around US$20 million a week in delayed production which can be forced out of business, and may be 'captured' by special interests. IMC 2001, 310, and see text at [24].

4 e.g. see Bryan & Hofmann 2008 (legislature's general role in transparency and accountability of the extractive industries); WA Gov 2015 and CPA 2012 (parliaments and the extractive industry); Atta-Quayson 2013 (examining Ghana in particular); De Schryver & Johnson 2011 (parliaments and the Extractive Industries Transparency Initiative); and Moore 2003, WA Pmtn 2004a, WA Gov 2005 & Barnett 2011b, 10160-10161 (relationship between parliament and local government in mining regulation).

5 Many parties do not consider parliamentary agreements as 'regulation' but simply a 'facilitating tool'. While it may be correct that a parliamentary agreement assists in facilitation, it is most certainly regulation – see text at [24].

6 Large projects may be processed through the normal mining law, special legislation, private contract between the executive government and miner (which has no subsequent parliamentary approval), or have prioritised and streamlined decision-making and approvals through additional policy/legal processes: see AUS Gov 2013, 71 & 75; Southalan 2013, 162-163.

7 e.g. WA Gov 2013.

8 e.g. Olympic Dam Agreement (1982, AUS).

9 e.g. Hunt 2009, section 1.5.

10 Seddon 2004, 96.

11 e.g. Selebi-Pikwe Agreement (1978, BWA).
12 e.g. Government Agreements Act 1979 (1979, AUS), s 2.
13 e.g. Barberis 1998, 18 & 88; Fitzgerald 2005, 682.
14 e.g. Llewellyn & Tehan 2005, 35; The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates, and not by the label the parties put on it: TNT v. Cunningham (NZL, 1993), 699; see, to similar effect, ex p. Delhasse (GBR, 1878), 525-526 and Hollis v. Vabu P/L (AUS, 2001), [58].
15 Wäde 1984, 1384.
16 ‘Relational contracts’ is a term describing long-term contracts that aim to ensure cooperation between the parties, and not merely an exchange of goods and risks between them: Grosskopf 2011, 1; see also Eisenberg 1999.
17 More description of usual terms in a parliamentary-approved agreement is provided in Southalan 2013, 168-169.
18 e.g. Selelogbi-Pikwe Agreement (1978, BWA).
20 Some of the observations in this paper will still have relevance but where the miner’s regulation is addressed by the country’s main general law provisions and improved institutional capability to administer them’: Naito & o’ns 2001, 28; Smith & Wells 1975, 565; ‘Clarity in legislation and a minimum of ministerial discretion is the preferred option in a mature mining country where there is no difficulty in integrating non-mining legislation with a comprehensive mining code’: World Bank 1992, 22; ‘I]t is often better to avoid state [i.e. parliamentary-approved] agreements and, when possible, to simply use the ordinary laws of the state for business to operate, because in that way there is no question about special favours being done for one project over another. Also, there is a superior regulatory regime from the state’s perspective, so that over time, as particular issues may arise, the state has the capacity to adjust its laws to take account of the evolving situation and is not tied to the past’: Johnston 2014, 1061.
22 e.g. [Some holders of [parliamentary-approved] Agreements [i.e. mining companies] have expressed a desire to determine [i.e. terminate] their Agreements. While this is a matter between the State and the holder, the … State should be prepared to end, as well as enter, Agreements at the request of companies’: WA Gov 2002, 101; see also Watson 2010, 7199; World Bank 1992, 22; Naito & o’ns 2001, 28.
23 In the mid-1900s, Australian State governments had Commonwealth restrictions on raising money for infrastructure and so used the State Agreement process as a way in which resources could be exploited while tying that to the development of related infrastructure. Fitzgerald 2005, 692; Hillman 2006, 301.
24 Many general mining laws in jurisdictions cannot, or cannot conveniently, address the issues that arise in large mining projects such as: infrastructure (for mining operations and also ‘social’ for workforce and dependents); land and water access; mining titles (extending the usual scheme in terms of size, duration, vulnerability to forfeiture); and agency coordination: Southalan 2012, 192. Parliamentary-approved agreements have described as an ‘exceptional course’ (i.e. not the normal way) in which parliaments can regulate mining: Wik Peoples v. Old (AUS, 1996), 255-256 per Kirby J (agreed by Toohey, Gaudron & Gummow JJ): pp 131, 135 & 170 respectively.
25 e.g. ‘Over time, the more experienced mining countries have moved beyond such agreements to substantial reliance on reformed general law provisions and improved institutional capability to administer them’: Naito & o’ns 2001, 28; Smith & Wells 1975, 565; ‘Clarity in legislation and a minimum of ministerial discretion is the preferred option in a mature mining country where there is no difficulty in integrating non-mining legislation with a comprehensive mining code’: World Bank 1992, 22; ‘I]t is often better to avoid state [i.e. parliamentary-approved] agreements and, when possible, to simply use the ordinary laws of the state for business to operate, because in that way there is no question about special favours being done for one project over another. Also, there is a superior regulatory regime from the state’s perspective, so that over time, as particular issues may arise, the state has the capacity to adjust its laws to take account of the evolving situation and is not tied to the past’: Johnston 2014, 1061.
26 e.g. Albert 2010, 208 ‘parliamentary systems [have] two defining traits [which] are [1] the reliance of the head of government on the legislature for its political survival and, [2] the executive power to trigger elections by dissolving the legislature’.
27 e.g. Ludwikowski 2003, 34-35 (a presidential system ‘is character[ised] by a concentration of executive power in the office of the President. The President, as the sole executive, is elected as head of state and head of the government. The legislature is independently elected for fixed terms and separated from the executive. The President … cannot dissolve the legislature or mandate new elections. …[C]abinet members are not part of the legislature. Although the legislature can call upon cabinet members to account for their actions, the legislature cannot veto those actions by a vote of no confidence.’).
28 e.g. Bradley & o’ns 2007.
29 e.g. Gardbaum 2010.
30 e.g. Monk 2009; Argument 2011b.
31 e.g. Can Gov 2000.
32 e.g. Ross 2007.
33 Genasci 2011.
34 e.g. GBR Plmnt 2012, ev12
35 Nevertheless some of the problems and recommendations about parliamentary agreements, explained later in this paper, are instances of broader trends particularly in governance, accountability, and sustainable development.
36 On the ground that the failure by the executive to table these agreements for approval is a contravention of Article 63(3)(e) of the Constitution (TZA) (1977).
37 Explained in Miranda 2007, 515.
38 Miranda 2007, 532.
39 AUS Gov 2013, 44, explaining that these differences arise because ‘countries have different regulatory objectives, institutional frameworks and political systems’; more broadly on differing social institutions across jurisdictions and the effect of these on legal objectives and outcomes, see Rodrik 2007, 15-41.
40 e.g. IPU & UNESCO 2004, 6 (which identified an additional basic function of ‘allocat[ing] financial resources to the executive through the budgetary process’) and De Schyver & Johnson 2011, 19-20 (which identified an additional basic function of ‘representation’). Another summary of standard parliamentary functions identifies four other tasks (‘ratification of treaties and monitoring of treaties and cooperation frameworks and political systems’; more broadly on differing social institutions across jurisdictions and the effect of these on legal objectives and outcomes, see Rodrik 2007, 15-41.
41 IPU & UNESCO 2004, 5.
43 Hollick 1983, 253; ‘Private bills were common in the 19th century. They were principally used for the construction of railways, docks, harbours, and gas and water systems’: Kelly 2014, 3.
44 See discussion of East India Charter 1661 (1661, GBR) & East India Charter 1685 (1686, GBR) in Dharmana & Southalan 2011, 2. The Hudson Bay Scheme in terms of size, Day & Page 1904, 441, although, as a retailing business listed on the Toronto Stock Exchange (HBC 1933) rather than as the pseudo-nation which was granted enormous land and powers under the Hudson Bay Charter 1670 (1670, GBR).
45 e.g. Golden Grove Agreement (1984, AUS); AUS Gov 2013, 75.
46 e.g. Lake Eyre Agreement (2009, AUS); Border Groundwaters Agreement (1985, AUS).
47 e.g. Cairns Casino Agreement (1993, AUS)
Horsley 2013, 284. Another Australian jurisdiction, Queensland, has at least 13 coal, aluminium and nickel mines under state agreements, as well as for other projects, such as the Gladstone Power Station Agreement Act 1993; AUS Gov 2013, 75.

Barnett 2014, 1064; WA Gov 2011, 14. Although these are not all mines, the mining projects include operations for bauxite (and associated alumina production), coal, copper, diamonds, gold, iron ore, mineral sands, nickel, salt and uranium. A list of all the extant parliamentary-approved agreements in Western Australia is provided in WA Gov 2013. A comprehensive discussion of the trends in parliamentary agreements in Western Australia is provided in Horsley 2013. Not all large mining projects in WA are, however, regulated under parliamentary agreements, many are also regulated under the jurisdiction’s general mining law: Mining Act 1978 (1978, AUS).

61 WA Gov 2013.

62 In 2009, it was reported that there had been no arbitration because ‘resolution of differences of opinion have been satisfactorily resolved by negotiation’: Hunt 2009, 20. Since that was written, the single instance or arbitration has been Mineralogy v- Western Australia (Award) (2014). That was the only formal arbitration under any Western Australian parliamentary agreement, in over 50 years, was confirmed by relevant actors during the research for this paper.

63 e.g. UGA Gov 2000, s 7; TZA Gov 2009, 4; MMR Gov 2012; Nishiuchi & Perks 2014, xi; Okupa 2012, 32.

64 Mining Act 2010 (2010, TZA), s10; see also TZA Gov 2009, 13 (agreements to stabilise fiscal arrangements).

65 Mining & Quarrying Law (RWA) (2014), art51; see also Nishiuchi & Perks 2014, xiii (about agreements).

66 Mining Act (2003, UGA) s18 & Mining Regulations 2004 (2004), r61 (mining agreements to be maintained on register).


68 On judicial interpretation of parliamentary approved agreements, see Southalan 2013, 170-172.

69 South Australia’s mining law contemplates agreements between the government and company, ratified by the Governor, which can modify the general mining law (Mining Act 1971 (1971, AUS), part 8A) however this is not a parliamentary-approved agreement, which leaves the scope for modification of that law simply at the executive’s discretion.


71 The Governments Agreements Act 1979 (1979, AUS), has only two operative sections: sections 3 (Operation and effect of Government agreements) and 4 (Offences). The reasons for this legislation are explained in Hillman 2006, 315 & 317.

72 e.g. Horsley 2013, 297 (in the 1990s, ‘new provisions did begin appearing which seemed to address some of the community concerns…[about] community and social benefits’); Hillman 2006, 296 (environmental law exemptions ‘for pre-1972 State Agreements’ were removed in 2003) & 302 (‘Rating exemptions are no longer provided to developers, … other exemptions, such as for stamp duty, have been progressively reduced’).


74 The original legislation is available at www.austlii.edu.au/au/legis/sum_act/rdra52o1982430/.

75 Foley 2011, 5297, 5300 & 5301.

76 This was explained by stakeholders during the research for this paper. The usual framework does, however, prevent the Government from refusing the company’s proposals (unless those proposals are outside the agreement’s scope): Mineralogy v- WA (AUS, 2005), [34] & [88]-[89] per McLure JA with Stetlter P agreeing.

77 See description in In re Fortescue Metals (AUS, 2010), [123] & [464]-[469] per Finkelstein J, Member Latta, Professor Round; for an example of a recent agreement, see Canning Basin Agreement (2012, AUS), cl 16(5).

78 e.g. Canning Basin Agreement (2012, AUS), cl 2(2).

79 e.g. Canning Basin Agreement (2012, AUS), cl 29.


81 e.g. Canning Basin Agreement (2012, AUS), cl7.

82 e.g. Canning Basin Agreement (2012, AUS), cl38 & 39.

83 WA Gov 2011, 19; and see in relation to earlier removal of gold and other royalty concessions WA Gov 2004a, 16.

84 e.g. Barnett 2011a, 9347.

85 Hillman 2006, 328.

86 e.g. GW 2006; LBR Gov ud; Southalan 2012, 15; Bebbington & o’rs 2008, 898-903.

87 However the dynamic is also present in parliamentary-approved agreements, as shown by the 2011 amendments to the Olympic Dam agreement, with the South Australian Parliament openly ‘making an offer’ for the company to consider: “[T]he indenture contains a 12-month sunset clause which ensures that, if the BHP Billiton board has not made a decision within 12 months of the revised indenture passing through the parliament, then the entire agreement will lapse. Under the sunset clause, they have 12 months … on a decision by the board to commit to the immediate expansion. It should encourage a decision by the board in early to mid-2012, and I am very confident that will happen’: Rann 2011, 5298.

88 e.g. Papadakis 2006; Beetham 2006.

89 There is more general work on parliamentary accountability in mining in see Bryan & Hofmann 2008.

90 e.g. In various states, the government has a ‘5% ownership of all mining operations, or specific operations/companies (including in Sweden, Chile, Poland and India), see examples in UNECA 2011, 33.

91 e.g. WA Pinnt 1996, Padmore 1992.

92 The ‘private industry’ paradigm of mining is prevalent in most contemporary writing and analysis: Southalan 2012, [1.17] & [1.27].

93 Barnett 1996, 317; see to similar effect WA Pinnt 2004c, 48.

94 ACIL1998, 2.

95 e.g. Aurukun Agreement (1975, AUS) terminated by Aurukun Act 2004 (2004, AUS) (see Young & o’rs 2005, 196-198); Comalco v- Att Gen (AUS, 1974) (the parliament passed a law changing royalty rates, contrary to the original agreement’s terms, and the company objected but the court ruled the parliament has this power).

96 e.g. Comalco v- Att Gen (AUS, 1974) approved in Wik Peoples v- Old (AUS, 1996), 254 per Kirby J (agreed by Toohey, Gaudron & Gummow JJ; pp 131, 135 & 170 respectively). This was also acknowledged by the WA Parliament in a 2004 report: All Agreements contain a provision that they cannot be amended without the consent of the parties. For Parliament to act unilaterally could be seen
as a breach of good faith and detrimental to the State’s reputation and interest. Ultimately, however, Parliament’s authority to amend or repudiate its legislation is not restricted: WA Plmnt 2004c, 48.

97 e.g. CME 2005; ACIL 1998, v; Young & o’s 2005, 197-198.

98 e.g. Hillman (2006) “No Act of Parliament can effectively provide that no future Act shall interfere with its provisions”: Vauxhall Estates - v- Liverpool (GBR, 1932), 743 per Avery J. See to similar effect Humphreys J at 745-746 and, more recent authority Manuel -v- Att-Gen (GBR, 1982), ‘The Legislature cannot...bind itself as to the form of subsequent legislation... If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature’ per Slade LJ (Cumming-Bruce & Eveleigh LLJ agreeing). Australian authority includes Karnyier -v- Commonwealth (AUS, 1998), [13] per Brennan CJ & Mc-Hugh J who observed ‘The Parliament cannot bind itself or its successor Parliaments not to amend the laws it makes’.

99 As Hillman explains clearly: ‘Western Australian political parties have a bipartisan policy that they will not unilaterally modify Parliamentary approved agreements and, although Parliamentary approved agreements have been directly affected by subsequent legislation, in almost all cases these modifications were negotiated or made in accordance with the agreement’: Hillman 2006, 295-296.

100 e.g. Resources Minister -v- Caazly Iron (AUS, 2007), [284] per Buss JA (Wheeler & Pullin JJA agreeing) describing a ‘Statement of Principles’ agreed between the State and Rio Tinto Group agreeing to some changes in royalties and to negotiate in good faith about changing the agreements in relation to local government impacts.

101 Hollick 1983, 255. Examples include being brought on without notice, not providing normal briefings/information, curtailing the usual time for debate and consideration of the bill (e.g. see Barnett 2004, 8668 & 8672; Hansard 2011, 5298-5299 & 5305), Australia's High Court has dismissed legal challenges that a parliamentary-approved agreement is invalid because it contravenes parliamentary procedure: Wik Peoples -v- Qld (AUS, 1996), 255-256 per Kirby J (agreed by Toohey, Gaudron & Gummow JJ: pp 131, 135 & 137 respectively).

102 The secrecy and the close and continuing association required between the government causes ‘...popular unease with the negotiation process [for parliamentary-approved agreements], stemming from the lack of public involvement or scrutiny. This secrecy and the close and continuing association required between the government and the developer...is detrimental to the parties’ reputations and to public confidence in the agreement’: Hillman 2006, 307.

103 e.g. Miranda 2007, 517; Hillman 2006, 307.

104 e.g. WA Gov 2002, 101; WA Gov 2004a, 26-27.

105 e.g. ACEP 2013 (Ghana); NMJD 2010 (Sierra Leone); WA Gov 2002, 101-102 (reporting industry concerns).

106 Llewellyn 2006, 6140, 40.


109 Llewellyn 2006, 6144.

110 This is explained, below, in Section 2.3 Sustainable development - a basis for assessment.

111 ‘State Agreements ... unlike all other statutes of the Parliament of Western Australia, are facilitating documents’: Barnett 1996, 317.

112 A governance framework to allow the government’s future assessment of proposals, and structure for the miner to submit proposals and, when approved, to implement them. Some responses to the draft paper emphasised this approach is more important than the parliamentary-agreement being treated like ‘regulation’.

113 The OECD sees ‘regulation’ as essentially ‘synonymous with “law” ... Regulations are rules or norms adopted by government and backed up by some threat of consequences, usually negative ones in the form of penalties’: e.g. Coglanese 2012, 8. Parliamentary-approved agreements certainly come within the definition of “regulation” as that concept is understood by the Australian Government, Council of Australian Governments, and the various Australian State Governments who use parliamentary agreements in mining regulation: e.g. AUS Gov 2012, 31 & 106; COAG 2007, 3 (Council of Australian Governments); WA Gov 2010, 3; Qld Gov 2013, 15; and SA Gov 2011, 3.

114 For descriptions of earlier, now discredited, agreements see Rankin-Reid 1984. 1300; Southalan 2012, 176-177; and a gentler critique in WA Gov 2002, 49 (‘The early Agreements are reasonably criticised now for their lack of attention to environmental issues and almost casual ignoring of public interests and concerns.’)

115 Stabilisation are terms which freeze the jurisdiction’s laws at the date of the agreement and prevent any future regulatory change, even sometimes preventing changes aimed at improving broader environmental or social standards which do not discriminate against the particular operation: e.g. Cotula 2008. While stabilisation clauses are more commonly the remit of bilateral investment treaties between nations, they also feature in some parliamentary-approved agreements.

116 See Section 3.5 Regulatory impact assessment.

117 e.g. Olympic Dam Agreement (1982, AUS), cl 41 (stating government can only terminate the agreement following a breach by the company), Sierra Rutile Agreement (2001, SLE), cl 11(f) (similar); Aurukun Agreement (1975, AUS), s 4 (prohibiting variation without the company’s agreement and that anything contrary to that is ‘void and of no legal effect whatsoever’). This last example provides a useful reminder that the control is only over the executive, and cannot limit the parliament from subsequently acting contrary to what the earlier statute had suggested: Aurukun Act 2004 (2004, AUS)Aurukun Repeal Act 2004 (AUS), ss 3-5 (with the court confirming the parliament had the power to do so: Wik v QLD [1996] FCA 1205 (AUS), [163]).


119 See Appendix I which provides two diagrams depicting the process (from 1983 and 1996).

120 The WA Government has nothing publically available on their websites about the negotiation process for parliamentary-approved agreements, instead merely stating that these ‘are contracts between the Government of Western Australia and proponents of major resources projects which are ratified by an Act of the State Parliament’: WA Gov 2013. A 2006 article observed of Western Australia: ‘There are no clearly identified public criteria to guide the [executive agencies] or Cabinet on the use of State Agreements’: Hillman 2006, 295. The South Australian Government also has nothing online in relation to agreement negotiations in general, but explains in relation to the most recent agreement that ‘a lengthy process of negotiation that has taken place ... concluded in sufficient time to allow the necessary legislation to be enacted by the South Australian Parliament by the end of 2011’: SA Gov 2013. The Queensland Government has a ‘policy not to enact mineral resource State Agreements’: Hillman 2006, 312 (fn193).


122 e.g. Moore 2006, 6144 (‘The bill is an agreement ... [As for parties that are] suggesting that Parliament should be involved in the negotiations between a company and the government, we would still be debating the 1965 Hamersley Iron agreement, because that is how long it would take to debate.’). Mongolia (although it does not use parliamentary-approved agreements) provides a relevant example of an executive finalising agreements with a miner and the parliament's desire to revisit or renegotiate, e.g. Baatar 2009; Ivanhoe 2011.

123 Parliamentarians may want some involvement in what they will eventually be asked to approve but the executive (i.e. government) position may be that until the negotiations are finalised there is nothing that parliament can usefully examine, e.g. see exchanges
between the Premier and Leader of the Opposition regarding a proposed development and Parliamentary Agreement, Hansard 2010, 9689.

124 e.g. ‘Perceptions of preferential treatment are heightened by a lack of transparency. In February 2000, the Minister for Mines granted the Argyle Diamond joint venture (“Argyle”) a mining lease over tenements at Ellendale, days before an application by Kimberley Diamond Company for an exploration licence over the same area was to be heard in the Warden’s Court. The Minister for Resources Development had purported to retrospectively restate Argyle’s rights at Ellendale, which arose under a Parliamentary Agreement, and gave Argyle an extension of time to submit a development proposal. A legal challenge was eventually settled, but the Ministers both failed to provide written reasons for their decisions, despite court orders requiring them to do so’: Hillman 2006, 307; see also Papamatheos 2007.

125 e.g. Recently in Western Australia the Government formalised a policy, after negotiations with miners and local governments, for local government rates to be paid by mining operations. The Minister for State Development promoted his government’s policy that it ‘will provide local governments with more revenue and more control over their income, and industry will gain certainty and clarity over its obligations to pay rates’, and that ‘The policy is designed to have consistent application across the resources industry’. Barnett 2011, 10160. However the Minister then explained that the Government’s approach will not be applied to projects under state parliamentary-approved agreements: Barnett 2011, 10160-10161; other examples are described in Travers 2011, 905-906; WA Gov 2011, 33 (operations under parliamentary agreements do not need to comply various general mining requirements on all other operators such as closure plans and environmental bonds); Resources Minister v- Cazaly Iron (AUS, 2007), [26], [50] & [126]-[127]; and WA Gov 2004b, 3 (To date, no access seeker has been able to negotiate satisfactory access arrangements with a State Agreement company. The State Agreement access provisions, therefore, have not been effective).

126 Roxby Downs Amendment Act (2011, AUS) which is a parliamentary-approved agreement modifying the earlier parliamentary agreement

127 Foley 2011, 5302.

128 e.g. Police v Holloway (AUS, 2013), [18], [24]-[27] & [38]-[39]; Acts Interpretation Act 1901 (1901, AUS), s15AB; Interpretation Act 1984 (1984, AUS), s19(2)(f); Hunter Resources v Melville (AUS, 1988), p253 per Dawson J.

129 In particular, the South Australian Government identifies that ‘Key features of our regulatory processes that will deliver effective and efficient regulation are: Fair and Equitable. The interests of all stakeholders will be considered… Transparent. Public release of information on the regulatory processes and decisions will be timely and appropriate. … [and] Inclusive. Stakeholders will be engaged and informed and their views will be taken into account’: SA Gov 2009, 2-3.

130 There have been concerns about lack of transparency in contract negotiations (and even IMF urging greater transparency): RAID 2007, 3-4.

131 For example, the establishment and various arrangements under the World Trade Organisation, and also regional and international trade arrangements and agreements, such as the European Union and the many ‘free trade’ agreements; there are also far greater controls within domestic levels: e.g. Gerber 2010, 3 & 6.

132 e.g. NW Gas Agreement amendment (1996, Western Australian Parliament), cl 41A (sch 4); Thiess Peabody Coal Agreement; (1962, AUS), cl 37 & 51. Competition law and requirements are not addressed in this paper because their regimes vary significantly between jurisdictions, but it is an issue necessary to examine in relation to any specific parliamentary agreement.

133 e.g. Moore 2011, 904-905.

134 e.g. OECD 2007, 3 (the awarding of concessions ‘is where competition for the market occurs, and therefore it is a critical stage’).

135 The ‘first in first served’ system of allocating mineral rights is used in many countries: Southualan 2012, 48-49; CSMI 2010. For a critique of that approach, see Campbell 2004.

136 Llewellyn 2006, 6142.

137 e.g. ‘In the case of mineral resource development, the Western Australian government’s objectives have tended to be far more aligned with that of foreign capital than with the Commonwealth government or other states leading it to view its relationship with such capital as far more important. … In brief, there are some features that can be observed in the evolution of state agreements in Western Australia …including; the emphasis on international competitiveness; the subordination of social policy to economic policy; a challenge to the national scale of policy making; and growing reliance on partnerships, consultation and networks.’- Horsley 2013, 294-295 & 299.

138 138 [T]he state agreement acts are likely to have generated substantial public benefits as compared with the trivial anti-competitive effects on public costs incurred’: ACIL 1998, 19. It is interesting to note, however, the statement that ‘public benefits ‘were only ‘likely’ to have been generated but were described as ‘substantial’, whereas anti-competitive effects were described as having occurred but were downplayed as being trivial’.

139 e.g. Papamatheos 2007, 605-606; the same point was also raised by a company officer commenting on the draft of this paper.

140 ‘Under the Mining Act 1978 companies submit annual exploration reports some of which contain drillhole data. This information is made available when the reports are released to the public usually after a confidentiality period of five years. … The drilling data available comprises a minimum of a collar file that has been validated against the tenement outline. Additional files such as assays, geology and surveys may also be available depending on the company’s submission’: WA Gov 2014.

141 To force fixed terms from the beginning, when important facts are not yet not known, makes great potential for future dissatisfaction: Asante 1979, 410; Schanze & o9n 1978, 155. Instead, an agreement’s stability is better assured through making ‘an initial agreement which is fair and flexible enough to remain fair’: Barberis 2001, 19.

142 Balmoral Resources v- Worsley JV (AUS, 1985), [2].


144 Carpenter 2005, 2713.


146 e.g. Southualan 2012, 73-74 (discussing integrated land-use planning). ‘Ultimately the greatest obstacle to the accurate evaluation of a State Agreement is the insulation of agreement provisions from demand and competitive pressures’: Hillman 2006, 300; ‘Parliament must scrutinise[e] government institutions, administrative processes and regulatory agencies involved in extractive industry development’: CPA 2012, para 2.

147 ‘SOME misunderstandings about compliance and monitoring responsibilities can emerge when projects are approved through special legislation [parliamentary-approved agreements]… For example… [different government agencies] seemed unclear about their respective roles in terms of monitoring conditions for projects taking place under State Agreements’: AUS Gov 2013, 294-295.

148 Pearce & Argument 2005, 1. Although note the traditional understanding of regulation has changed over time to vary the distinctive roles of executive and legislature.

149 e.g. ‘In 1961 a WA agreement [Scott River Agreement (1961, AUS)] included the transfer of 80 ha of national park to the company… [and a] 1975 agreement [Western Titanium Agreement (1975, AUS)] permitted mining in a flora and fauna reserve’: Hollick 1983, 256. Other examples include the Gorgon Agreement (2003, AUS) (s6 of its enacting statute enabling the Government to ‘grant a lease of land that is part of the …[class A reserve for the conservation of flora and fauna] for a gas processing project purpose, even though that land is part of the reserve’, and the Marandoo mine which ‘operates under the [Hanserdley Agreement}

150 The Marandoo mining operations were later given further protection with the Parliament waiving the need to comply with heritage laws protecting Indigenous culture: Marandoo Act (1992, AUS), ss3 (see description in Unggumi Nganjiryn v WA (AUS, 1995), [15 per Member Summer).

151 e.g. Sierra Rutile Agreement (2001, SLE), cl 10(b)(1); Argyle Diamond Act 1981 (1981, AUS), s9 (which extinguished others’ ‘right, title, interest, benefit or entitlement’ in the land subject to the agreement.

152 See various descriptions in Southalan 2013, 174.

153 e.g. Saunders & Yem 2004, 52 & 57-60; Watson 2010, 7199.

154 e.g. CPA 2012, 1; also confirmed in RWA Gov 2015 (reporting on the outcomes from the 2015 Global Seminar on The Role of Parliaments and Extractive Industries).

155 Llewellyn 2006, 6141-6142.

156 ‘There is a risk that non-compliance with environmental requirements will not be identified or addressed on all 26 State Agreement mines [mines operating under parliamentary-approved agreements] because DSD [agency which coordinates negotiation of agreement] and DMP [normal agency for mining regulation] have different views of their roles. DSD does not conduct active monitoring and enforcement, and expects that DMP will do so. DMP considers that it does not have the legislative powers to fulfill a monitoring and enforcement role on State Agreement projects where the Mining Act is not specifically applied’: WA Gov 2011, 9 & 16-17, 24, 31.

157 AUS Gov 2013, 294.

158 ‘Mining companies expect to invest based on predicted income over the medium term (e.g. a 10-15 year period) and rarely take account of production or possible events beyond that time in their initial decision to develop the mine’: Southalan 2012, 180 (referencing Zorn 1986, 17).

159 Southalan 2012, 180.

160 Genasci 2011, 4.

161 WA Gov 2004, 11.

162 The most detailed academic assessment of the future for parliamentary-approved agreements is Hillman and he concludes ’they should only be used as a facilitative means of last resort. A significant element of their facilitative value is based on their ability to operate outside the general legislation. In the long run, government action may be better directed towards improving the existing legislative framework. An efficient system should not require exceptions to be made to it’: Hillman 2006, 329.

163 e.g. Barberis 1998, 59-60 & 251-2. The WA Government, which makes the most use of parliamentary-approved agreements of any jurisdiction in the world, recently stated ‘Projects developed under State Agreements [parliamentary agreements] are subject to, and are regulated by, the general laws of the land’: WA Plmnt 2013, 11 (reporting the response by the Government’s Department of State Development which is the agency responsible for negotiating and overseeing parliamentary agreements).

164 e.g. Rose-Ackerman 2011, 537-538; Mayeda 2011, 544; Mann & o’s 2006, xi; De Koster & Van den Eyndt 2009, 133.

165 e.g. Nkol 2013, 5; ‘Stabil illation clauses seeking to shield companies from future political and legislated changes are inappropriate and generally ineffective’: CPA 2012, [7] (from the Concluding Statement of the 2012 Global Seminar on the Role of Parliaments and Extractive Industries, comprising ’a select group of Parliamentarians from 11 Commonwealth jurisdictions with extractive industries’).

166 e.g. ICMM 2009, 3; COMSA 2013, 25, 32 & 39.

167 Jo’burg Decn (2002) and Jo’burg POI (2002), endorsed by the UN General Assembly who called ’for the implementation of the commitments, programmes and timebound targets adopted at the Summit and, to this end, for the fulfilment of the provisions of the means of implementation, as contained in the Johannesburg Plan of Implementation’: UNGA 2002, [2] & [6].


170 OECD 2014, 11.

171 UN 2011a, 13 is an unanimously endorsed by the UN Human Rights Council: UN 2011b, [1]. The three obligations this basically imposes on business are: (1) adopt a human rights policy, (2) conduct due diligence, and (3) address any impacts: UN 2011a, principles 16, 17 & 22.

172 Triggs 2011, [13.27].

173 e.g. Aarhus Cntnr (1998), art 1.

174 e.g. UNCLOS (1982), arts 42, 194 & 195.

175 e.g. Rio Declaration (1992), principle 2, and customary international principles from cases such as Island of Palmas Case (1928), 839 (Territorial sovereignty… has as corollary a duty: the obligation to protect within the territory the rights of other States)’ through to the Advisory Opinion on Nuclear Weapons (ICJ, 1996), [29] (‘the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment’).

176 e.g. CRAMPA (1989).

177 e.g. CBD (1992).


179 e.g. UNCEDC (1994).

180 e.g. Basel Convention (1989).

181 e.g. Rio Declaration (1992), principle 16.

182 Although terms are negotiated, these usually tend to be standard format so that parliamentary-approved agreements in one jurisdiction generally have similar contents: ACIL 1998, 5. This was confirmed in the research for this paper, with experienced stakeholders explaining that there is more standardisation and the flexibility in earlier agreements and not present in more recent ones, nor would be considered in contemporary negotiations. Stabilisation clauses are also being restricted so as to not limit broad regulation which seeks to address social or environmental improvement, e.g. Maniruzzaman 2006, 24; Rodrigo Prado 2005, 20-7; Bougainville Agreement (1967, AUS), cl 17(b) (company’s rights can be interfered with where necessary for national defence or peace and good government).

183 The renegotiation process of amending a parliamentary-approved agreement in Western Australia is described in Resources Minister v Cazaly Iron (AUS, 2007), [284].

184 e.g. Iron Ore (Mount Newman) Agreement Act 1964 (WA) has seven variation agreements; Iron Ore (Hammersley Range) Agreement Act 1963 (WA) has fourteen; and Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA) has five.

185 For a general description of sustainable development and its relevance in resources analysis, see Southalan 2012, 25-27.

186 The United Nations has unanimously stated ‘mining, minerals and metals are important to the economic and social development of many countries. Minerals are essential for modern living. Enhancing the contribution of mining, minerals and metals to sustainable development includes actions at all levels to… Support efforts to address the environmental, economic, health and social impacts

Endnotes 29

187 This is simplifying the issue, and there are debates about the extent to which sustainable development will counteract 'substitutability' of resources types, e.g. AUS Gov 2013, 96-97; Whilmore 2006 (criticising a perceived over emphasis on economic factors); Crowson 2002 (criticising a perceived under emphasis on economic factors). But there is considerable emphasis on the role of parliament to ‘play an important role in creating viable oversight mechanism to monitor the collection and use of revenues from extractive industries, and in ensuring that the interests of citizens are taken into account during the allocation and disbursement of revenues collected by governments’. Tashobyia 2015 (reporting on the outcomes from the 2015 Global Seminar on The Role of Parliaments and Extractive Industries).

188 See the concept of five forms of resources or capital (Porrit 2006, 111-115) and the application of this in relation to mining: e.g. Breton & Pattenden 2007, 3 and Southalan 2011, 220. See, on the potential for broader costs (for remedying impacts) outweighing the benefits derived from some operations: Giurco & o’rs 2010, 22 & 24-25.

189 e.g. 'Rights- or justice-based argument faces strong opposition, both because it shifts the focus on benefits entirely from the community (or population) to more importantly, because despite having procedurally suggested, it focuses on substantive outcomes. …[I]t is difficult for governments and concessionaires to implement the procedural suggestion without recognising the underlying substantive ownership or right': Miranda 2007, 542; ‘In Western Australia, State Agreements are used by the State to facilitate development, provide for infrastructure and achieve policy objectives. This last role can cause the most economic waste. State Agreements are sheltered from the discipline of the market and the objectives they seek to implement are not necessarily achieved by commercial obligations alone. This, together with the large costs involved in negotiating a State Agreement indicates their use will often be inefficient’: Hillman 2006, 313-314.

190 e.g. WA Gov 2004b, 4 (criticising State Agreement companies forcing duplication of railways because the Government saw increased environmental and social impacts even if the companies could afford it); Duplication is effectively encouraged by some provisions in Parliamentary approved agreements, because the agreement is targeted at a single project and not the needs of the economy. It has been suggested that too many new towns were created in the Pilbara, at the expense of existing towns. The towns were constructed independently of market demand, being established due to obligations imposed by the State to promote regional development.’: Hillman 2006, 302.

191 e.g. UNCTAD 2007, 136; Crowson 2008, 342.

192 In most jurisdictions the State owns the resources while these are in the earth; the company is given a right to extract the resources, and usually obtains ownership once they are extracted; see Southalan 2012, 41-45.

193 ‘A regime designed to invest and develop resources while ensuring that the state—the owner of those resources—becomes richer than it was before the extraction. This is the essence of a good deal in the oil and mining sector.’: Genasci 2011, 1.

194 ICMH comprises over 20 of the world’s leading mining companies and 30 mining and commodity associations, representing about 50 per cent of the world’s copper and platinum group metals; 40 per cent of the world’s iron ore, nickel, and gold; and 25 per cent of the world’s zinc: http://shapingsustainablemarkets.iied.org/icmm-partnerships-development.


196 MCA 2007, 5.

197 e.g. Gerber & Sindico 2014; Esonu 2009, 17-20; Brueckner & o’rs 2013.

198 e.g. In South Africa see ZAF Gov 2007: In Australia the COAG Standing Council on Energy and Resources (comprising the resources ministers from each Australian State or Territory plus the Commonwealth), in an earlier incarnation, issued its ‘vision’ which illustrates the broad perspectives to be considered in any resource regulation, by parliamentary-approved agreement or otherwise: AUS Gov 2003.

199 e.g. OECD 2011, 21 (Commentary on General Principles, para 3); Parliaments, parliamentary committees and individual Parliamentarians …and multi-stakeholder groups [should] ensure that mineral and petroleum resources are converted into social and financial assets for the benefit of the people of the jurisdictions which own them. They will help governments to provide a stable environment and efficient, effective and robust policy, legislative, administrative and regulatory frameworks for investment in exploration, development and marketing of these resources’: CPA 2012, 1 (from the Concluding Statement of the 2012 Global Seminar on the Role of Parliaments and Extractive Industries, comprising ‘a select group of Parliamentarians from 11 Commonwealth jurisdictions with extractive industries’).

200 An organisation of 49 states (as at February 2015): Argentina, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Canada, Dominican Republic, Egypt, Ethiopia, Gabon, Ghana, Guatemala, Honduras, India, Jamaica, Kazakhstan, Kenya, Kyrgyz Republic, Madagascar, Malawi, Mali, Mauritania, Mexico, Mongolia, Morocco, Mozambique, Namibia, Niger, Nigeria, Papua New Guinea, Paraguay, Peru, Philippines, Republic of Guinea, Republic of the Congo, Romania, Russian Federation, Senegal, Sierra Leone, South Africa, Suriname, Swaziland, Tanzania, Uganda, United Kingdom, Uruguay, Zambia (per IGF 2014).

201 IGF 2013, 3.

202 IGF 2013, 7-44.

203 IGF 2013, 6-16.

204 e.g. ‘...The State Government has announced the development of a sustainability strategy… This strategy will require that economic, social and environmental considerations are taken into account in an integrated fashion during the decision-making process.’: WA Gov 2002, 103; see also IGF 2013; MMSS 2002; AUS Gov 2011; CSRIM 2003; Horowitz 2006; ICMM 2003; IPIECA 2005; Lange & Wright 2004; Lapalme 2003; Mudd 2009; Oshionebo 2009; UNDP 2010; Zillman & o’rs 2002.

205 For example, Hillman wrote in 2006, that ‘Economic factors are the fundamental influence upon the design of a mining regime, affecting the developer’s decision to commit to a project and, together with political considerations, the State’s mineral policy.’: Hillman 2006, 294. That is probably too narrow a view in today’s understanding, which examine broader perspectives.

206 e.g. ‘...The concept of sustainable development imports the idea of sustainable use and is reflected in the Rio Declaration … As state practice increasingly seeks to apply policies of sustainable use, at least within national jurisdictions, it is likely that a customary rule [of international law] will emerge over time’: Triggs 2011, 810; international laws using sustainable development since 1992 are summarised in Fuentes 2004, 8-11. Note, however, ‘When compared to other sectors, however, mining is relatively new to sustainable development. The first official references to mining within the international community’s efforts to drive sustainable development go back to 2002 with the Johannesburg Summit on Sustainable Development’: Gerber & Sindico 2014, 336.

207 e.g. in Canada the Mines & Minerals Act 1991 (1991, CAN), s2(1) ‘the object and purpose of this Act is to...facilitate [mineral] exploration...and production...consistent with the principles of sustainable development’; the law also defines sustainable development in s(21); South Africa’s Mineral Resources Act 2002 (2002, ZAF), s2(9) ‘(The objects of this Act are to...ensure[e] that the nation’s mineral...resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development)’; Philippines Model Agreement (PHL) (ud), s 10.1 (obliges the company to operate in a ‘technically, financially, socially, culturally and environmentally responsible manner to achieve the sustainable development objectives and responsibilities’ under the mining law; in Australia, the Mineral Resources Act 1990 (1990, AUS), s2A (in the administration of this
Act regard should be given to the principles of sustainable development' and then details what those principles involve; New Zealand’s Resource Management Act 1991 (1991, NZL), s 5 (which states ‘1) The purpose of this Act is to promote the sustainable management of natural and physical resources. (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables natural people and communities to provide for their social, economic, and cultural well-being and for their health and safety while— (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remediating, or mitigating any adverse effects of activities on the environment.’). Legal cases addressing sustainable development in the decade to 2010 are summarised in Bernasconi-Oetterwalder & Johnson 2011 & 2011.

208 e.g. NZL Gov 2012, 149-150 (examining contrasting court decisions on the legislative requirements for ‘balancing of socio-economic aspirations with environmental outcomes, or whether these provisions represent an ‘environmental bottomline’ that must be secured regardless of the social or economic cost’): ‘The concept of “sustainable development” is probably suffering from its success as a buzzword. So frequently adopted by so many groups with wildly varying agendas – from [environmental groups] to the coal industry – the term might seem to be well on its way to becoming meaningless.’ Nelson 2004, 615.

209 See main text [52] above.

210 e.g. Barton 2002, 102

211 In Australia, at least. Of course not every jurisdiction’s statutes are available, but that is contrary to international standards (e.g. Beetham 2006, 59). The availability of parliamentary statutes is an issue broader than parliamentary-approved agreements, see discussion in main text at [10]. Examples where this greater accountability through a parliamentary-approved agreement (as opposed to other forms of regulation) has been raised domestically include Moore 2006, 614.

212 Barriers 1998, 38

213 e.g. ‘regulation by contract may, in some circumstances, enhance accountability to the achievement of government policies’: Saunders & Yam 2004, 55. It should be noted that, in discussions with various stakeholders during research for this paper, doubts were expressed about the benefit of parliamentary debate because parliamentarians are often unrestrained in what they say and therefore have no checks or records of debate (or other records of debate) may contain assertions which are inaccurate. However, it still serves to provide the Government’s formal justification and explanation of the proposal to parliament.

214 In Australia, a decision under an enactment (which includes a parliamentary agreement) can be judicially reviewable (see Southhalan 2013, 183-184; examples include Buzzacott v, v. Sustainability Minister (No 2) (AUS, 2012); BHP Coal v, v. Resources Minister (AUS, 2011), [3], [68]-[69] whereas a decision under a simple contract between the company and government has less option for judicial review.

215 e.g. The WA Information Commissioner explained this dynamic in relation to information access, in relation to the mining company in one parliamentary-approved agreement which was: ‘a private, and not a public, company and that, in general, its business and commercial affairs are not open to public scrutiny. However, by engaging with the State Government under the State Agreement [i.e. parliamentary-approved agreement], its documents have come into the possession of various government agencies with the result that the provisions of the FOI Act operate in respect of those documents, notwithstanding its status as a private company. The “shield” from public scrutiny of its financial and commercial operations by being an unlisted company is reduced by virtue of its participation in a State Agreement and because it has provided information to government agencies in the course of its business activities.’: Yamatji Corp v, v. Department Indigenous Affairs and Mineralogy, (AUS, 2008), [63].

216 Australian Jobs Act, (2013, AUS). Published plans are available at AUS Gov ud.

217 Parliaments from the Westminster system often have procedures which have developed from earlier British conventions and procedures. The current English parliament has two ‘Standing Orders’ documents with one set adopted by the lower house (GBR Plmnt 2013b) and one by the upper house (GBR Plmnt 2013c).

218 One commentator has noted the tension: ‘RIA ... has quasi-scientific ambitions, but also takes place at the heart of government where political decisions are transformed into laws, regulations and other policy instruments’: Hertin & or's 2009, 1. During the research for this paper, several stakeholders raised doubts about the value of parliamentary debates or the application of RIA to parliamentary-approved agreements: see [93] of text and endnote 213 above.

219 While not specifically dealing with parliamentary-agreements, the UN’s highest human rights body (comprised of national governments) recently passed a decision in which it acknowledged ‘the crucial role that parliaments play in, inter alia, translating international commitments into national policies and laws, and hence in contributing to the fulfilment by each State Member of the United Nations of its human rights obligations and commitments to the strengthening of the rule of law’: UN 2014, preambular para 2. Additionally, in relation to parliaments and extractive industries more broadly, a 2012 Global Seminar of Parliamentarians concluded that ‘Parliament must have access to the contracts, licences and other agreements between the government and resource developers and investors, including provisions on changes in ownership of projects and the arbitration of disputes.’: CPA 2012, para 3.

220 A 2015 Global Seminar on the Role of Parliaments and Extractive Industries, involving ‘Members of Parliament and development partners from Australia, Cameroon, Niger, Seychelles, Tanzania, Uganda, DRC, Nigeria and Rwanda. Delegates from GOPAC, Private Sector Federation of Rwanda, International IDEA, and extracting associations in Rwanda’ agreed that Parliaments should ‘Encourage the capacity building of Parliamentarians as regards contract negotiation, implementation and monitoring process as part of adequate legislation and oversight tools’: CPA 2015, 3.

221 ‘The ways that the parties create and treat concessions undermines the potential for effective and stable agreements’: Miranda 2007, 521; ‘Parliaments should be provided with the information and the resources necessary for effective oversight, including where possible the provision of expert technical advice’: CPA 2011, para 9.

222 Beetham 2006, 86-87.

223 This includes a ‘Legislative agenda and schedule of the current session [and]... Status of current parliamentary business by bill number, topic, title, date, document code, parliamentary body’: Beetham 2006, 59.

224 e.g. in the UK a ‘hybrid bill’ is a bill which affects a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class; GBR Plmnt 2013a, 1; in South Australia a ‘hybrid bill’ include bills which ‘authorise the granting of Crown or waste lands to an individual person, a company, a corporation, or local body’; SA Plmnt 1999, order 268(b).

225 e.g. GBR Plmnt 2013a, 4; SA Plmnt 1999, order 268.

226 GBR Plmnt 2013a, 4.

227 Examples are described in Argument 2011a, 122-127.

228 e.g. ‘[A] state agreement [parliamentary-approved agreement] is an agreement that is made between the Executive and another party and only comes to this House in a particular form that enables the House to either accept or reject - that is, ratify or not ratify - the proposition’: Cash 2001, 443.

229 GBR Plmnt 2013a, 4.

230 See [47](b) in text above.

231 OECD 2011, 21 (Commentary on General Policies, para 6).
232 Examples from the International Covenant of Civil and Political Rights include the limitation and derogation provisions (e.g. UN 1984) and the ‘margin of discretion’ (e.g. Hertzberg v FIN (Human Rights Comm, 1982), [10.3]); the WTO system also features the ‘margin of discretion’ (Kratcovic 2011, 325 fn 4); jurisprudence from the International Court of Justice uses the similar concept of ‘margin of appreciation’ (e.g. Shary 2005, 908) which also features extensively in the European Court of Human Rights (e.g. Benvenisti 1999).

233 Spany 2014, 498 writing about the jurisprudence of the European Court of Human Rights, and contrasting decisions where the Court did allow domestic legal variance of standards because of the extensive debate and study which had preceded that (e.g. Animal Defenders v GBR, (ECtHR, 2013), [106]) and decisions where the Court found the domestic variance to breach international law because the parliament’s decision-making had not been shown to have that quality (e.g. Hirst v GBR, (ECtHR, 2005), [79]).

234 See [52] in text above.

235 See Appendices II - Legislative System of Myanmar and III - Parliamentary Process in Uganda

236 e.g. WA Gov 2004a, 26-27; Saunders & Yam 2004, 58 & 69: ‘Government must report to Parliament fully on its use of the revenues and in-kind benefits, including social development projects, received from extractive industries.’ CPA 2011, para 14 (from the Concluding Statement of the 2012 Global Seminar on the Role of Parliaments and Extractive Industries, comprising a select group of Parliamentarians from 11 Commonwealth jurisdictions with extractive industries).

237 e.g. ‘There are many oversight tools that Parliaments can refer to in order to oversee the extractive sectors. Evidence suggests that there is not a direct relationship between the number of tools and accountability outcomes; rather it is the way in which Parliaments use these tools in order to promote political accountability that matters. Parliamentarians should think about the tools available to them in their jurisdictions and how they can be deployed effectively to enhance accountability of the extractive sector’: CPA 2015, 2.

238 WA Gov 2004a, 26.

239 ‘The local content clause has been revised...from earlier precedents and now] The company is required to report quarterly and then monthly on local content during the important preconstruction in construction phases and after commissioning from time to time on the request of the minister’: Brown 2004, 8667.


241 Ford 2011, 5632.

242 O’Brien 2011, 5640; see also main text of this paper [75].

243 e.g. EITI 2013, 8 (diagram of reporting process) and 21-29 (description of reporting process).

244 Indeed this is seen as a reason that Papua New Guinea changed from regulating mining operations through parliamentary agreements: Barberis 1998, 31.

245 ‘Other than what is legitimately commercially confidential, everything else should be publicly available’: see [75] of main paper. Other reasons supporting disclosure are that contract secrecy undermines parliamentary oversight, invites corruption, and threatens the public interest: Pellegrini 2011, 4.

246 ‘Nearly all FOI laws contain provisions setting out categories of information that can be withheld from release. There are a number of common exemptions found in nearly all laws. These include the protection ...[of] commercial confidentiality’: Banisar 2006, 22.


248 e.g. Banisar 2006, 11.

249 e.g. Kimberley Diamond Co -v- Dept Resource Development (AUS, 2000a) & Kimberley Diamond Co -v- Dept Resource Development (AUS, 2000b).

250 e.g. see Resources Minister -v- Cazaly Iron (AUS, 2007), [293]-[294].

251 e.g. Fitzgerald 2002, 258.

252 WA Pntmt 2010, 3.3.

253 On the question of whether a claim for confidentiality is legitimate, see Pellegrini 2011, 2-3 (indicating that competitive harm is unlikely to arise from disclosure of information about any of the following: work obligations, local content, employment and training, financial terms of the deal, or parties to the contract). Where competitive harm may arise, that could justify confidentiality protections, and Pelligrini indicates two areas: trade secrets and references to future transactions.

254 e.g. In any parliament’s ‘Scrutinizing Extractive Industry Agreements... Commercial confidentiality should be kept to a minimum and should be time-constrained.’: CPA 2011, para 8 (from the Concluding Statement of the 2012 Global Seminar on the Role of Parliament and Extractive Industries, comprising a select group of Parliamentarians from 11 Commonwealth jurisdictions with extractive industries).

255 e.g. CPA 2011; De Schryver & Johnson 2011, 21.

256 That claim was made by parliamentarians from India and Australia, e.g. ‘Working in Parliamentary Committees is advantageous in many ways. The first and foremost advantage is objectivity of subject. As the Committee proceedings are held in Camera, there is an objective consideration of the subjects discussed and the members perform their duties in non-partisan ways. ... There is an opportunity to hear experts/witnesses in Parliamentary Committees and getting their expert advice, which is not available in Parliament.’ (India’s Additional Secretary Lok Sabha, Shri S. Bal Shekar) and ‘Much of the important work of the West Australian Parliament is done by the Committee System. Once a member joins the Committee, the political issues are set aside and he/she functions on [a] non-partisan line.’ (Western Australia’s Attorney General, Michael Mischin) as reported in CPA 2011, 2-3. However it seems naive or willfully blind to consider that MP’s completely ignore their own parties’ views and allegiances when working in committees. Accordingly, the authors currently place little reliance on this aspect in support of their advocacy for greater use of committees.

257 e.g. Parliament must make full and effective use of all its oversight practices and procedures to monitor the performance of extractive industries, including: public accounts and audit reviews, approval of the budget, questions to Ministers, departmentally related committee reviews, requests for the production by ministries of persons and papers, special parliamentary committee inquiries and debates on policies and motions: CPA 2012, para 13 (from the Concluding Statement of the 2012 Global Seminar on the Role of Parliament and Extractive Industries, comprising a select group of Parliamentarians from 11 Commonwealth jurisdictions with extractive industries).

258 Described in the main text at [64].

259 Uniform law, in a federal system, arises where each province or region has independent jurisdiction over a subject but have a

260 law because the parliament’s jurisdiction over a subject but have agreed to make standard or uniform laws to operate throughout the country.

261 WA Pntmt 2004, 11.

262 WA Pntmt 2013, Order 126(2) and Sch 1(6).

262 WA Pntmt 2011, 1.3.

263 Saunders & Yam 2004, 69. See also, in relation to parliaments and extractive industries more broadly, the conclusion of a 2012 Global Seminar of Parliamentarians that ‘Parliaments and parliamentary committees must have clearly defined roles in the approval of contracts, the oversight of regulatory agencies and the scrutiny of income and expenditure of revenue emanating from resource development.’ CPA 2012, para 4.
264 This point was raised by one respondent, after reading the draft of this paper.
265 See Young & o’rs 2005.
266 For a general description of RIA, see OECD 2006;Coglianese 2012; AUS Gov 2012, 3.
267 “RIA contributes to the broader process of better governance through more consultative and accountable procedures. The consultation with consumers, business and civil society that is inherent in RIA helps to build legitimacy in law-making and can help promote equity and fairness.”: Parker & Kirkpatrick 2007, 174.
269 Southalan 2013, 179; a survey of RIA in ‘developing and transition countries’ indicated that RIA ‘is a legal requirement in 10 of the 40 countries, namely Korea, the Philippines, Algeria, Botswana, Tanzania, Jamaica, Mexico, Albania, Lithuania and Romania’: Kirkpatrick & o’rs 2004, 292.
270 See [24] of main text above.
271 The standard RIA questions will require some modification for parliamentary approved agreements, but the concepts are flexible enough to allow that to happen: e.g. Welch & Waddington 2005, 17.
272 Hertin & o’rs 2009, 1; Kirkpatrick & o’rs 2004, 294-295.
273 These four grounds are summarised from OECD 2008, 22-23; OECD 1995, 13-19; COAG 2007, 4; and AUS Gov 2012, 351-353.
274 e.g. OECD 1995, 14-15; OECD 2012, 4.2; AUS Gov 2012, 152-158.
275 e.g. OECD 1995, 15-16; OECD 2012, 4.3; AUS Gov 2012, 178-185; OECD 2008, 5-6.
278 e.g. OECD 1995, 16-17; OECD 2012, 4.3, 4.4 & 4.6; AUS Gov 2012, 158-163 (examining alternatives) and 164-176 (conducting cost-benefit analysis).
279 AUS Gov 2012, 164-165.
280 See [52] above.
281 e.g. OECD 1995, 18-19.
282 e.g. OECD 1995; AUS Gov 2012, 198-220.
284 OECD 1995, 18.
285 OECD 2012, 4.5.
286 OECD 2012, 4.8.
289 Miranda 2007, 523. The executive may also structure the agreement so that costs may only become apparent after they have left office: Miranda 2007, 524. Failing to account for political differences (through parliament or otherwise) increases the likelihood that the resultant agreement will be identified with the then executive: Miranda 2007, 525.
290 Saunders & Yam 2004, 58 (talking about government contracts more generally, rather than parliamentary-approved agreements in particular, but the dynamic here is the same).
291 Kelly 2013, 86-87.
292 e.g. Abdukadirov 2009, 296.
293 e.g. Vivoda & O’Callaghan 2010; IGF 2013, 4; Grindle 2010, 13 (addressing issues more generally than mining regulation).
294 e.g. Van Rooij 2007.
297 e.g. OECD 1995, 9 & 15-16; see Southalan 2012, 220 – 221.
298 These standards were explained, above, in Section 2.2 The future for parliamentary approved agreements?: see also ICMM’s reference to various international standards in [51a] above.
299 See in general Subedi 2012, 82.
300 e.g. Brown 2004, 8667.
301 e.g. Brown 2004, 8667.
303 Planning Minister v. Walker (AUS, 2008), [56].
304 AUS Gov 2012, 71-76.
305 The aversion to RIA is reported in academic writing and was apparent in the interviews and research for this paper. ‘Politicians tend to see policy assessment as restricting their discretion as ministers or parliamentarians and focus on defending the suggested measure from fairly early stages. Policymakers in ministries tend to see it as counterproductive to their effort to push a legislative proposal through the legislative process. Major stakeholder groups with access to ministries also tend to benefit from traditional corporalist styles of consultation and tend not to press for transparency. Given these fundamental barriers, any formal policy assessment system would face resistance’: Hertin & o’rs 2009, 17; see also AUS Gov 2012, 12.
306 This is because parliamentary agreements are statutory regulation (see n113 above), and various jurisdictions require RIA for any statutory regulation (see n269 above); see also e.g. Southalan 2013, 179.
307 This includes examining the exceptions and exemptions which various RIA procedures allow (see AUS Gov 2012, 127-148). For example, some RIA procedures do not apply to ‘commercial contracts’ entered by the government (e.g. Qld Gov 2013, 15) but that exemption should not apply where the agreement is subsequently sought to be enacted as parliamentary law. In Western Australia, the RIA process should apply unless there is an exemption (WA Gov 2010, 11-12), and although there is no evidence that any exemptions have been granted for parliamentary-approved agreements (or amendments thereto), there is no evidence that any such agreement Act (or amendment) has been subject to RIA.
308 Survey of RIA in ‘developing and transition countries’ indicated that ‘it seems that some form of RIA is used in the majority (75 per cent) of these countries, However, the coverage of RIA, both in terms of types of regulation and number of regulation proposals included, appears to vary widely between countries. Few countries appear to be applying RIA consistently to regulatory proposals affecting economic, social and environmental policies. ’: Kirkpatrick 2010, 295; see also Welch 2005, 17.
309 Hertin & o’rs 2009, 18.
310 Kirkpatrick & o’rs 2004, 295.
311 Speaking more generally, it has been observed that ‘the introduction of RIA will often have to be accompanied by more fundamental and wider reforms in public administration.’: Parker & Kirkpatrick 2007, 174.
312 See discussion in [28] above.
313 See, above [82][a]-[d].
Appendices

I - Parliamentary-agreement process in Western Australia

[99] The following two diagrams are depictions of the process by which a parliamentary-approved agreement is established in Western Australia.

Procedure (as described in 1981)

Project development process (as described in 1996)\textsuperscript{B}

\begin{center}
\textbf{PROJECT DEVELOPMENT PROCESS}
\end{center}

\begin{itemize}
  \item Decision to proceed to detailed feasibility
  \item Cabinet nominates DRD to co-ordinate project
\end{itemize}

\textbf{Key:}
- : Proponent action
- : DRD/proponent discussion
- : DRD/proponent discussion
- : Project commences

\textit{B Barnett 1996.}
II - Legislative System of Myanmar

[100] The legislative system of Myanmar (Burma) is a bicameral system in which the power to make laws is vested in two Chambers, both of which must approve a bill before it becomes law.

(a) Constitutional Guarantee

[101] The Pyidaungsu Hluttaw (Congress) comprises the following two Hluttaws/Chambers:\(^C\)

(a) the Pyithu Hluttaw (House of Representatives/ Lower House) formed with its Hluttaw representatives;\(^D\) and

(b) the Amyotha Hluttaw (Senate/ Upper House) formed with its Hluttaw representatives.\(^E\)

[102] Various functions shall be carried out in a Pyidaungsu Hluttaw (Congress) session, with the Constitution dictating that that is the forum which holds the function of submitting, discussing and resolving a Bill.\(^F\)

[103] The Constitution defines the law-making powers of both chambers, including that:

(a) "If a Bill initiated in the Pyithu Hluttaw (Lower House) or the Amyotha Hluttaw (Upper House) is approved by both Hluttaws, it shall be deemed that the Bill is approved by the Pyidaungsu Hluttaw (Congress)";\(^G\) and

(b) "If there is a disagreement between the Pyithu Hluttaw and the Amyotha Hluttaw concerning a Bill, the Bill shall be discussed and resolved in the Pyidaungsu Hluttaw".\(^H\)

[104] The Constitution also states that "The Legislative power is vested in the Pyidaungsu Hluttaw relating to other matters not enumerated in the legislative list of the Union, Region or State and Self-Administered Division Leading Body or Self-Administered Zone Leading Body".\(^I\) Therefore the Pyidaungsu Hluttaw (Congress) enacted two laws for the Upper House and Lower House detailing the law making process in each Chamber, and these are explained further, below.

[105] The Constitution also addresses the submission of a Bill, and its subsequent promulgation as a law.

(a) "The Bills submitted to the Pyidaungsu Hluttaw (Congress) by the Union level organisations formed under the Constitution, except the Bills that are prescribed in the Constitution to be discussed and resolved exclusively at the Pyidaungsu Hluttaw (Congress), are entitled to initiate and discuss at either the Pyithu Hluttaw (Lower House) or the Amyotha Hluttaw (Upper House) in accord with the prescribed procedures".\(^J\)

(b) "The Bills, which are to be discussed and resolved exclusively at the Pyidaungsu Hluttaw (Congress) need to be vetted before being discussed at the Pyidaungsu Hluttaw, those Bills shall be vetted jointly by the Pyithu Hluttaw Bill Committee and the Amyotha Hluttaw Bill Committee, and the findings and remarks of the Joint Committee together with the Bill may be submitted to the Pyidaungsu Hluttaw session in accord with the prescribed procedures".\(^K\)

(c) When the bill is passed by both houses, there are set time periods within which it must be signed by the President and then the law is made public in the official gazette.\(^L\) The President does have power to comment/suggest amendments to the Pyidaungsu Hluttaw (Congress), and the Congress can amend the Bill or reject the comments and confirm the Bill in its current form.\(^M\)

(b) Hluttaws' (Law making bodies') functions

[106] In 2012, the Pyidaungsu Hluttaw (Congress) enacted two laws to detail the law-making functions for each respective Chamber.\(^N\) The laws are largely the same, detailing a similar procedure in each Chamber.

(a) Both Chambers (Hluttaws) have the same powers to make and to pass a Bill.

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\(^{C}\) Constitution (MMR) (2008), s74.
\(^{D}\) Constitution (MMR) (2008), s109.
\(^{E}\) Constitution (MMR) (2008), s141.
\(^{F}\) Constitution (MMR) (2008), s80(c).
\(^{G}\) Constitution (MMR) (2008), s95(a).
\(^{H}\) Constitution (MMR) (2008), s95(b).
\(^{I}\) Constitution (MMR) (2008), s98.
\(^{J}\) Constitution (MMR) (2008), s101.
\(^{K}\) Constitution (MMR) (2008), s102.
\(^{L}\) Constitution (MMR) (2008), ss105-107.
\(^{M}\) Constitution (MMR) (2008), s106(a).
(b) Each Chamber’s law provides powers to its representatives to ask questions and submit proposals and Bills. The submission, discussion and decisions about the Bill occur at the Hluttaw sessions. The Chambers can also form a Joint Committee between both Chambers, comprising an equal number of representatives from the Pyithu Hluttaw and Amyotha Hluttaw to form that Committee. The formation of Hluttaw Committees, Commissions and Bodies is also provided for in the Constitution.

(c) Each Chamber has the power to form a Permanent Bill Committee (Law Drafting Committee) to draft a law (Bill), and to form Commissions and Bodies (Teams/Groups) if there arises a need to study some limited matters/issues if necessary to do so. The submission, discussion and decisions about the Bill occur at the Hluttaw sessions.

(d) "A matter that shall be resolved in the Hluttaw (Pyithu Hluttaw/Amyotha Hluttaw), save as otherwise provided by the Constitution, shall be determined by a majority of votes of the Hluttaw representatives who are present and voting". At that time, it becomes a bill to be sent to the other Hluttaw (Chamber).

(c) **Summary**

[107] A necessary matter for the sake of the Union must be proposed/discussed by a member of (each) Chamber at their respective legislative sessions (sometimes started with Questions and Answers on the matters). If it is favoured by a majority of the votes at their respective session, the bill goes to their respective Bill Committees.

[108] A proposed law is placed before a legislative body (at the Bill Committee) for examination, debate and discussion. A Bill approved by the Bill Committee is generally submitted in their respective Chamber sessions.

[109] A Bill must be introduced by a member of the Chamber or the Bill Committee at their respective legislative sessions. A Bill can also be submitted by a 'Union level organization' (which is a body formed under the Constitution) and any such Bills are then deemed to have been initiated in the Pyithu Hluttaw and follow that procedure.

[110] A Bill (approved by the Bill Committee or by a Union level organisation) is generally debated (almost always through discussions) on the floor, and amendments may result. A vote is then taken. If the Bill receives a favourable majority vote, it is sent to the other Chamber of Pyidaungsu Hluttaw (Congress), where a similar procedure takes place.

[111] If either Chamber receives a Bill for debate and vote from the other Chamber, and it makes any amendment, then the amended Bill must return to original Chamber for reconsideration.

[112] Any remaining differences between versions of a Bill passed by the Pyithu Hluttaw (Lower House) and Amyotha Hluttaw (Upper House) are resolved by a Joint Committee; both the Pyithu Hluttaw and the Amyotha Hluttaw must approve the compromise bill that emerges.

[113] The Bill goes to the President for approval (by signing) or not. Presidential approval renders the Bill into law. Even with a Presidential refusal (e.g. not signing to promulgate within the prescribed period, or by not sending the Bill back to the Pyidaungsu Hluttaw together with his signature and comments), the Bill shall become a law as if the President had signed it.

[114] Finally, the laws signed by the President or laws deemed to have been signed by him/her shall be promulgated by publication in the official gazette. The Law shall come into operation on the day of such promulgation unless the contrary intention is expressed.
III - Parliamentary Process in Uganda

[115] These processes can be generally referenced to the Rules of Procedure of the Parliament of Uganda (the “Rules”), and also the 2014 Manual on the legislative process in Uganda.

[116] The process starts with the ministry concerned approaching Cabinet through a Cabinet Memorandum with a proposal for Cabinet to approve the principles for the drafting of the Bill. Cabinet approval in principle is required before drafting of the subject legislation. Cabinet then considers the proposals as contained in the Cabinet Memorandum of the ministry concerned and approves the principles on the basis of which a Bill is to be drafted, and authorises the responsible Minister to issue drafting instructions to the First Parliamentary Counsel/Attorney General to draft the necessary legislation. All Bills shall be accompanied by an explanatory memorandum setting out the policy and principles of the Bill, the defects in the existing law if any, the remedies proposed to deal with those defects and the necessity for introduction of the Bill. An explanatory memorandum shall be signed by the Minister or by a member introducing the Bill (in the case of a Private Member’s Bill). While the First Parliamentary Counsel is drafting the bill, the concerned ministry will commence consultations with stakeholders.

[117] After the First Parliamentary Counsel has drafted the Bill and forwarded it to the concerned ministry, the ministry will submit the Bill to Cabinet for approval together with a Cabinet Memorandum and any comments of the stakeholders. The First Parliamentary Counsel will then authorise the publication of the Bill in the Government Gazette and provision of copies of the Bill to members of Parliament for use during the legislative process. Thereafter, the Bill goes through the processes of Parliament necessary for passing it. Every Bill shall be read three times prior to its being passed. The first reading marks the formal introduction of the Bill in Parliament and the Bill is then committed to the relevant Sessional Committee of Parliament for consideration. The committee will normally invite the relevant Minister to introduce the Bill. The Session Committee will also invite other stakeholders to state their views on the provisions of the Bill, and the committee may hold hearings for this purpose. Thereafter, the Session Committee will submit a report on the Bill to the plenary of Parliament. At the second reading, Parliament deals with the provisions of the Bill, clause by clause and all proposed amendments to the Bill. The Committee of the Whole House will then report to the plenary on the Bill, and amendments that have been considered. At the third reading, the Bill is passed as a formality upon a motion “that the Bill be now read [a] Third Time and do pass”.

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X UGA Gov 2012.
Y UGA Gov 2014.
Z UGA Gov 2010, section (Q-b) paragraph 2.
AA UGA Gov 2012, rule 106(2).
BB UGA Gov 2012, rule 106(3).
CC UGA Gov 2012, rule 114.
DD UGA Gov 2012, rule 125.
EE UGA Gov 2012, rule 126.
IV - Bibliography


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