

# MINING SERVICES CONTRACTS

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## 1. Standard Form Contracts

A number of years ago I made a comment in a paper that I gave to an AMPLA conference in Adelaide that, given the significance of the mining sector in Australia, it was odd that there was no standard form mining services contract. There are many standard form construction and construction services contracts put out by industry bodies and organisations such as Standards Australia, but no mining services contract.

Not only was there no standard form mining services contract in Australia, but it seemed that there was no such standard form of contract elsewhere in the world, or at least that was readily available in the public domain. What we had seen, certainly in Australia, over the years was the development of different mining contracts by mine owners and larger contractors. Some of those contracts seem to have worked reasonably well while others, it would be fair to say, have not. The real test for these, as with any contract, is not whether the mining services were delivered to the satisfaction of both parties but how effectively those contracts dealt with issues that arose during the term of the contract.

Most of the mining contracts were based on standard form civil engineering contracts such as Standards Australia General Conditions of Contract AS2124. The Standards Australia Standard Form General Conditions are in similar terms to other internationally used engineering and construction general conditions such as the FIDIC forms of contract.

Although contract mining is fundamentally civil engineering, the basic thrust of a construction contract is in large part inapplicable to the mining context. Construction and engineering contracts are generally all about building a known structure for a particular price within a specified period. Quite rightly such contracts extensively address things such as the completion of the defined works by a particular date, variations to the works, applications for extensions of time for practical completion, the achievement of practical completion, the quality of material installed and ongoing warranties as to the structure being built. In simple terms, however, a mining contract is all about removing material which belongs to another party, not about building something. The fundamental nature of a mining contract is for the provision of services, not construction of something. Accordingly, many provisions of and the basic premise of a lot of engineering and construction contracts are inappropriate to mining operations.

Following the Adelaide AMPLA conference the board of AMPLA commissioned a representative reference group comprising members from private practice, mining companies and contractor organisations to develop a standard form mining services contract. Under the guidance of and with the considerable input of John Grace, the end result of the Reference Group's efforts was the AMPLA Model Mining Services Contract (the Model Contract).

## **2. Key Elements**

The Model Contract seeks to address the core elements that need to be addressed in a mining services contract. As the cover note to the Model Contract states, it is not intended as a rigid precedent to be adopted without amendment. Rather it is a guide which includes representative provisions dealing with matters that would normally arise in the course of the provision of mining services.

The Model Contract was prepared initially principally for surface mining operations, however, its general provisions can be adapted for selected surface and underground mining. The Model Contract includes proforma schedules or schedules by way of example only.

Since the release of version 1 of the Model Contract, a second version has been released as well as alternative clauses, optional clauses and clauses dealing specifically with coal and iron ore mining operations. These are all available on the AMPLA website [www.ampla.org](http://www.ampla.org).

## **3. What is the Contract?**

The first and most fundamental issue in a mining contract is determining what the fundamental nature of the contract is. In particular, is it a contract for:

- (a) a set period;
- (b) a set volume of material;
- (c) the exploitation of a defined resource; or
- (d) the duration of the convenience of the owner.

Many contracts are confusing and confused as to exactly what they are. For instance, it is not uncommon for contracts to express themselves as being for a set period, say five years, for the mining of 8 million BCM including 2.8 BCM of ore. The question that this raises is - which is it? Is it a contract for five years, irrespective of the volume mined or is it a contract for moving 8 million BCM irrespective of how long it takes and how much ore is mined or, in the further alternative, is it a contract for mining 2.8 million BCM of ore irrespective of the volume of material moved or how long it takes?

What happens when the five years is up and the contractor has only mined 5 million BCM? Is the contractor entitled or obliged to stay on until it achieves the 8 million BCM? What if the contractor delivers 8 million BCM but only 2.3 million BCM of ore? What if the contractor achieves 8 million BCM including 2.8 million BCM of ore in four years? All these matters need to be spelt out in the contract. The Model Contract is based on a contract for a set term with the precise quantities to be mined during the term to be set by the owner through the issue of mining schedules.

Clause 3.1 of the Model Contract provides:

**"3.1 Contractor's primary obligation**

The contractor's primary service obligation is to provide the Mining Services to:

- (a) develop the mine, extract Ore and Waste and to haul, stockpile and produce ore from the Mining Titles safely and efficiently during the Term in a timely manner within the Production Requirements Range in accordance with the plans and schedules set out in Schedules 2 and 11 and all Authorisations."

The precise volumes of ore to be produced or waste to be moved are determined by the owner through the issue of Mine Plans and Production Schedules in accordance with clause 8 of the Model Contract. I will address the issue of Mine Plans and Production Schedules in more detail below.

The unamended version of the Model Contract therefore is for a specified period rather than for the production or shifting of a specified quantity of material. It is a relatively straight forward exercise to change that format to a different model such as a contract for the production of a specified quantity of ore or for the overall shifting of a specified quantity of material. The model would then obviously have to be varied to provide requirements in relation to the timing for the production of the stipulated quantity of ore or material. Provisions would need to be tailored to ensure that the contractor is not forced to produce the required volumes within an unrealistic or unreasonable timeframe or, alternatively, that it is not limited in the volumes that it can produce where it is required to mine for a period in excess of that which it has anticipated in structuring its fleet and rates.

The Model Contract in its base form is for the provision of excavation, loading and hauling. The requirements are set out in clause 3 - Contractor's Primary Service Obligations (see above), and Schedule 2 - Description of Mining Services. Obviously both clause 3 and Schedule 2 need to be tailored for the particular operations. As noted earlier in the paper, AMPLA has also prepared some optional clauses dealing with specific types of mining. For

instance AMPLA has prepared clauses which specifically cover coal mining and provide additional clauses to be inserted into clause 3 of the Model Contract which deals specifically with requirements particular to coal.

AMPLA also has prepared optional clauses for insertion in clause 3 that expand the services to be provided by the contractor to operation and maintenance of processing plant as well as an optional clause dealing with rehabilitation security.

In addition to suggested amendments to clause 3 of the Model Contract, the specific coal provisions also make amendment to other parts of the Model Contract such as clause 8 (Mine Plans and Production Schedules) to add specific provisions in relation to the quality and quantity of ROM coal, clause 10 (Payment) to add provisions in relation to lost stockpile coal and Schedule 10, (Method of Measurement). In addition Schedule 11, Mine Planning and Production Requirements - Performance Criteria is amended to incorporate specific provisions peculiar to coal and a suggested coal specific rise and fall adjustment formula in the alternative to the standard Model Contract Schedule 17 is provided.

Through the use of the above identified clauses and schedules and the appropriate tailoring of the clauses and schedules to the specific operation in issue, ambiguities in relation to exactly what it is that the contractor is expected to produce and what the owner is expected to provide and pay for, are avoided.

#### **4. Control**

As a consequence of, or perhaps as a function of, the decisions made in relation to the matters canvassed above, the contract needs to spell out who controls the mining operations and how. In this regard control has two aspects. The first is how much, what type, from where and at what rate material will be mined and the second is, how material is to be mined.

Dealing with the first, generally the owner will want to keep as much control as possible over what is produced, from where and the rate at which it is produced. After all the subject matter of the contract, the ore, remains the property of the owner and the exploitation of that ore must be within the control of the owner. Further, the volume of ore mined should primarily be determined by the owner's needs at any particular time which may in turn be dictated by outside factors such as commodity prices, process and plant availability, shipping schedules, government regulation and generally commercial considerations.

Also, as mine development would normally be something that the owner would want to retain control of, it would likely reserve to itself control over the location of waste dumps, access roads and haulage routes, location of the ROM pad, the type and timing of drilling and blasting and the exploitation of the ore body itself.

Not only must the contract spell out the above things but it also must provide mechanism for measuring cost and/or time impacts that the exercise of this control has or may have on the contractor and how the contractor is to be remunerated or compensated in circumstances where the exercise of the owner's control impacts on the contractor's costs and return.

The second element of control under a mining contract relates to how the mining operations are to be conducted. It is very common in mining contracts for the contractor to be required to identify the equipment that it is going to use and to provide other information, including methods of work and to require the owner's approval for any departure therefrom. That can in some circumstances and depending on the operations in question, be unnecessary or counterproductive as a contractual provision. If the contractor is charged with the obligation to deliver a specific volume of ore per month at a fixed rate it should be up to the contractor how it achieves that. If it can do so more efficiently or cheaper by changing its equipment, why shouldn't it be able to? If it chooses a more expensive method and the rates are fixed, that will be its loss.

Although information relating to methodology equipment and the like is obviously relevant in considering tenders, it is in a lot of circumstances an unnecessary interference with the contractor's ability to run operations as it sees fit, and therefore liability for what it produces. The obvious point to be made is if the contractor is to be held responsible for performance then how it achieves that performance cannot be dictated by the owner.

It is often the case that circumstances may change throughout the term of the contract which good mining practice dictates require a change in the equipment or methodology. If the contractor is to be held liable for its end performance then how it achieves that performance should, as far as possible, be left within its control.

Having made the above general observations, however, there are obviously circumstances in which it is quite appropriate for the owner to have some degree of control over the type of equipment and methodology utilised. Obviously if the methodology is likely to interfere with other operations on the mine site then the owner has a legitimate interest. Further, in most jurisdictions there is legislation imposing strict liability on mine owners for the safe and environmentally appropriate exploitation of the resource. In these circumstances the owner must retain to itself a degree of control sufficient for it to fulfil its statutory obligations. For instance in Western Australia the *Mining Act*, the *Mines Safety and Inspection Act* and the *Environmental Protection Act* all have provisions imposing certain obligations and liabilities on the owner. Accordingly, although the contractor must be able to control its operations and workforce on a day to day basis, there must be an overriding ability on the part of the mine owner to protect its exposure to vicarious and statutory liability for the actions of the contractor.

## **5. Control of Production**

The Model Contract addresses the first issue of control, namely control over what is produced, how much is produced and from where it is produced, in clause 8 - Mine Plans and Production Schedules.

Under the mechanism set out in the Model Contract, the owner provides the contractor with a Mine Plan which is the long term of mine life plan prepared by the owner and attached to the Model Contract as Exhibit B. This document describes the sequence of mining of ore from the site during the term and includes mining sequence, landform designs access and haulage roads and the like.

Under clause 8.3 of the Model Contract the shorter term and more detailed Production Schedules are produced by the contractor to comply with the Principal's Mine Plan. These production schedules set out on a monthly basis the volumes of ore and waste within the production requirements range to be mined and delivered to the processing plant. The Model Contract requires that these monthly volumes fall within a prescribed range and at the end of the day deliver the volumes required over longer periods under the Principal's Mine Plan.

The mechanism under clause 8 of the Model Contract is fairly basic. There are any range of more complex models for control of production that can be used. It goes without saying that the draftsman of the contract should attempt to tailor the particular mechanism to be inserted into clause 8 to reflect the procedures actually utilised by the owner and the contractor.

I also note that the coal and iron clauses, offered as alternatives in the Model Contract, have a specific clause 8.4 dealing with production schedules for coal. Particular considerations as to the quality of the coal are set out in this optional clause.

The draftsman should understand the physical process by which ore is mined each day. For instance, in some cases the owner's geologists and mining engineers will, on a weekly if not daily basis, direct exactly where ore is to be mined or overburden shifted and stored. In other cases the owner will have a more basic requirement that the level of a stockpile be maintained at a certain level. In those circumstances there is less prescription on the contractor as to how it undertakes its operations.

One issue in relation to production which is not presently dealt with in the Model Contract but which may be the subject of optional clauses is make up of production shortfall. It is obviously impossible to hold the contractor to mining, down to the last bcm or tonne, a particular volume of ore each day, week or whatever the designated period is. Consideration therefore needs to be given to the inclusion of a clause to the effect that if in one particular specified period the contractor fails to deliver the prescribed amount or in some circumstances delivers more than the prescribed amount, that that shortfall or over-supply is

addressed in the following relevant period. Provisions then need to be considered to address the consequences of the contractor's failure to redress the shortfall or over-supply.

## **6. Control of Methods and Contractor's Equipment**

As noted above, clause 13 of the Model Contract assumes a fairly high level of control by the owner over the plant and equipment being used by the contractor. Care must be taken to ensure that the owner does not, by the exercise of its powers in relation to plant and equipment, unduly interfere with the contractor's ability to comply with its production and other obligations. The Model Contract addresses this issue in clause 13.1(b) which deals with approval for variation to equipment by providing:

"Approval of the contractor's request must be given in writing on a timely basis by the Principal's Representative and must not be unreasonably withheld. Any approval may be given subject to conditions. The Principal's Representative must provide written reasons for any non-approval of such request."

The degree of control that the owner has over the equipment on the mine site will be driven by two considerations. One is to give comfort to the owner that the contractor is using equipment sufficient and appropriate for the levels of production required under the contract. As noted above, both as a contract drafting consideration and an operational consideration, efforts to obtain that comfort cannot interfere with or be used as an excuse by the contractor for its failure to achieve required production levels.

Another consideration for the owner in controlling the contractor's equipment is that in certain circumstances the owner may be entitled to take over operation of that equipment or, in some cases, to purchase that equipment.

In this regard clause 13.6 of the Model Contract provides for use of the contractor's plant and equipment in the event of the contract being terminated in prescribed circumstances.

Another not uncommon provision, but one which is not currently provided in the Model Contract, is for the owner to have the right to purchase certain of the contractor's plant and equipment either on the expiration of the term of the contract or alternatively on termination of the contract. In those circumstances the owner needs to be able to have a greater degree of control over the plant over which it may exercise such powers.

## **7. Remuneration**

It seems self-evident, but is in a surprising number of circumstances overlooked, that the method of payment under the contract has to be appropriate for the nature of the work and the contract. For instance, in circumstances where volume and type of material mined is to be determined solely by the owner, it is likely to be inappropriate for the contractor to be remunerated simply on the basis of the volume moved. The contractor has no control over

that element and therefore its income. While nearly all mining contracts will be tied to volumes shifted, they must provide appropriate protection for both parties' commercial interests. This would need to include mechanisms to ensure that proper compensation to the contractor to cover its costs, margin and the like, where there is reduced or no production, at the direction of the owner. For instance, its basic holding costs would need to be covered by some contractual minimum monthly payment similar to a take or pay obligation.

Although it may be seen by some owners as a good thing to have the power to have the contractor sit and do nothing, other than lose money, such a situation, in the end, benefits neither party.

Remuneration based on cost is not common in mining contracts but may be appropriate in limited circumstances, for instance, where the scope is unknown and the conditions too unpredictable to enable a proper rate to be calculated in advance. In circumstances where any remuneration is based on cost, it is critical that the parties agree a comprehensive and prescriptive definition of what is cost. One man's cost is another man's preliminaries is another man's mark-up.

The Model Contract provides a fairly standard mechanism for calculation of entitlement and methods of claiming and payment. The formula included in the Model Contract provides for payment of a service fee, an example of which is provided in Schedule 14. The intent of Schedule 14 is to provide for a base payment to be payable to the contractor to cover its fixed holding and operating costs with further remuneration payable on the basis of actual tonnes of ore and/or waste shifted with rates being prescribed for each in Schedule 15.

There are an infinite number of other models that can be used which will be dictated by the type of operation involved and even the financial structure of the contractor or the owner.

It is critical to read the payment and remuneration obligations in conjunction with the production provisions. In the case of the Model Contract clause 8, by which volumes, type and locations of production are dictated, has to be read in conjunction with clause 10 dealing with entitlement to payment. The two are inexorably linked and must be consistent. Again it is too often the case that prescription as to type, volumes and timing of production are not reflected in the remuneration provisions. As noted earlier, an obvious example would be for the levels and type of production to be at the sole discretion of the owner with remuneration payable purely on a volume delivered basis.

In order to coherently tie the production obligations and discretions to appropriate remuneration, the parties must understand and be open and up-front as to the assumptions underlying the number and type of equipment and, where rates have been put forward, the assumptions upon which those rates are based.

The methodology adopted by the Model Contract is to have a production requirements range. This prescribes the range within which production on a monthly basis can fluctuate but still have the scheduled rates apply. The range is dictated by the capacity of the equipment and, in circumstances where the owner wishes to go outside that range, it is of considerable assistance if the criteria by which the range was calculated, in particular the type of machinery upon which the range is based, are set out in the contract.

Optional clauses are also provided dealing with stockpile losses for coal contracts. The optional clause provides for additional clauses to clause 10 dealing specifically with adjustments brought about by losses to the coal stockpile.

## **8. Variations to and Review of Schedules of Rates**

Clause 11 of the Model Contract provides a fairly standard provision for the review of agreed rates. The basic driver for a change to the rates in the Schedule of Rates is a variation to the services instigated by the owner either to introduce a new mining service to the scope or require a material change to the production requirements range. As noted earlier this production requirements range is the range of production within which an existing agreed rate will apply and will usually be dictated by plant and equipment capacity.

If the parties are unable to agree on the adjustment to be made to the rates the Principal's Representative makes such determination, however, that determination is subject to final determination under the dispute resolution procedures.

In addition to the need to review rates brought about by variations to the services or to the volumes, the Model Contract by clause 11.2 also provides for review of the rates on an annual basis. Again, in the absence of a final agreement to adjustments to rates, the matter is sent through to determination under the issue resolution provisions of the contract.

## **9. Rise and Fall**

As part of a proper mechanism for appropriate remuneration, consideration has to be given to whether the contract will have a rise and fall provision. This is a different consideration to changes brought about by geological or operational assumptions changing. A rise and fall clause looks more to the impact of increases in labour rates, the cost of diesel, water, power and consumables on the cost of the mining operations themselves.

The Model Contract in Schedule 17 sets out a fairly basic rise and fall adjustment provision. The one in the Model Contract is based on indices published by the Australian Bureau of Statistics.

An alternative, more complex and prescriptive model is set out in the alternative Schedule 17 provided in the coal and iron clauses.

As with all rise and fall formulae, care must be taken to ensure that the indices are not contentious or subject to dispute. Each of the factors inserted into the formula must be ascertainable with a high degree of particularity failing which the purpose of an automatic formula for rise and fall will be defeated.

## **10. Allocation of Risk**

It is, in my experience, a common misconception among certain quarters, particularly contractors, that if they are adversely impacted by forces over which they have no control, they are entitled to an increase in rates or price. The common cry is that "how can we be expected to carry costs over which we have no control?". The answer to that question is that if the contract does not provide otherwise, then the contractor does carry that cost. The contract should be unequivocal in its allocation of risk which entails a clear statement of the circumstances in which a contractor will be entitled to an increase in rates, relief from its production obligations or whatever other consequence flows from the occurrence of outside forces.

As with all contracts, risk in mining contracts broadly falls into three categories:

- (a) risk within the control of the owner;
- (b) risk within the control of the contractor; and
- (c) neutral or outside risk over which neither party has any control.

A good contract is one that allocates risk unequivocally and appropriately. Although it may be seen by some, owners in particular, as good contracting practice to push as much risk as possible to the other side, that often ends up being counter-productive. A competent contractor will work into its price a contingency for risks allocated to it. Accordingly, the rate eventually struck may needlessly be inflated for risks which may not eventuate or which would be more appropriately dealt with if and when they arise under appropriate contractual mechanisms.

Under clause 14 of the Model Contract a model is put forward for allocation of responsibility and liability for care of the mine. Again, depending on the particular type of mining operation involved, there may need to be adjustments made to the allocation of risk under the Model Contract. As an example, risks associated with damage to the fabric of the mine in deep underground operations would be fundamentally different to risks of damage to the mine associated with mineral sand operations.

Appropriate risk allocation is also achieved not only through specific clauses dealing with risk allocation, but with the use of appropriate mechanisms for adjustment of remuneration. The appropriate question to pose at the point of drafting a contract is "what if X happens?" If the answer to that is "if it happens then, under the remuneration provisions, the contractor

will be entitled to a properly defined and ascertainable payment and pursuant to the contractual provisions relating to production requirements the contractor will be entitled to an appropriate adjustment", then the contract has fulfilled its obligations. The more Xs that can be thought of and test run to see that the contract covers them, the better the contract and less the scope for dispute during the term of the contract. In order to be able to do that effectively the parties need to understand and be open with each other as to what their various assumptions are, particularly assumptions underlining levels of production and remuneration.

## **11. Dispute Resolution**

The Model Contract lays out in clause 17 one particular regime for resolution of disputes. The Model Contract provides for representatives of the parties to attempt resolution and, failing resolution at that level, the dispute is elevated to the chief executive officers. Clause 17 also provides for mediation and, in prescribed circumstances, expert determination. There is deliberately no provision for disputes to be determined by arbitration and, accordingly, parties utilising the Model Contract need to consider what method of dispute resolution best suits their particular circumstances and whether they will specifically insert an arbitration clause.

Many disputes that arise in the course of a mining contract are suitable for determination by an expert. Clause 17.3 of the Model Contract provides for the expert, failing agreement, to be nominated by the Institute of Arbitrators and Mediators Australia. The expert determination is also to be conducted in accordance with the rules for expert determination of that body.

Consideration could also be given by the parties to agreeing on the identify of the expert from the outset. I have been involved in a number of projects, including one large mining contract, where an expert was appointed from the beginning of the term by the parties to make determinations of disputes on operational issues as and when they arose. This process enables one person to obtain a degree of background and understanding of the particular operations which facilitates quicker and, usually, more satisfactory determinations. The introduction of such a procedure would require only minimal amendment to clause 17.4 of the Model Contract.

## **12. Termination for Convenience**

Termination for convenience or early termination clauses are more common in mining contracts than other forms of engineering and construction contracts. This is a function of:

- (a) the long-term nature of mining contracts;
- (b) the risks associated with predicting where and how ore bodies will unfold; and

- (c) commodity prices and outside commercial pressures.

There are several commonly used models for termination by the owner for reasons other than default of the contractor. Some contracts provide an absolute discretion on the part of the owner to terminate. Others qualify the exercise of that power to circumstances where it would be some commercial hardship on the owner being required to continue with the contract. It should be noted that in certain jurisdictions in Australia the courts have held that even where the power to terminate the contract is expressed to be solely at the convenience of the owner, equity will intervene to limit the exercise of that power to circumstances where the owner would suffer some hardship if it were required to continue with the contract.

The formula that the Model Contract adopts in clause 18.3 is termination by the owner for convenience where to continue with the mining operation would cause financial loss. In most cases a competent contractor would require such a qualification to what would otherwise be an absolute discretion on the part of the owner in any event.

It is not unusual to provide some specific compensation to the contractor where the owner terminates for convenience. As well as being held harmless against liabilities that it has incurred and which will be unavoidable notwithstanding the termination of the contract, it is common to provide some payment to the contractor to recognise its loss of profit through no fault of its own. One commonly used mechanism is to stipulate payment of identified amounts depending how far into the term the contract is terminated. The payment is in part representative of the return on capital that will not be achieved or the cost of equipment for the balance of the term that may not produce income to cover its holding costs.

### **13. Consequences of Termination**

The alternatives found in mining contracts range from immediate removal of all contractor's plant and equipment through to compulsory acquisition or taking over of contractor's plant and equipment by the owner.

Clause 18.6 provides for the acquisition of contractor's plant and equipment or assignment of the contractor's interests in such plant and equipment upon termination, however, only with the agreement of the contractor.

Clause 13.6 of the Model Contract also provides for the owner to take over the operation of the contractor's plant and equipment in circumstances where the contract is terminated other than for the default of the owner. Under that model the owner is only entitled to use such equipment until the owner could be reasonably expected to replace that equipment with its own and it is also required to pay proper compensation for the use of such equipment.

An alternative clause is provided in the alternative clauses to clause 13.6. Pursuant to that provision, upon the termination of the contract the owner has the right to purchase all or any of the contractor's plant and equipment. That alternative clause 13.6 also requires the

contractor to provide relevant information which would enable the owner to take over leasing or other arrangements which the contractor may have in place in relation to its plant and equipment.

Mechanisms are set out for determination of the price at which the contractor's plant and equipment will be compulsorily acquired.

It is suggested that if this alternative clause 13.6 is adopted the standard clause 18.6 be deleted as they cover acquisition of the contractor's plant and equipment in slightly different ways.

#### **14. Term and Suspension of Mining Services**

As noted at the outset the Model Contract as drafted is a contract for the provision of mining services for a specified period. Irrespective of the volume actually delivered the contract will come to an end at the expiration of the prescribed term.

Clause 18.1 provides that the contract will continue past the automatic termination date unless either party gives the other party three months written notice that the contract will come to an end. That written notice cannot be given more than three months prior to the expiry of the initial term.

Clause 18.2 also provides for the suspension of mining services during which period the contractor will be paid at agreed standby rates. Depending on the nature of the operations a suspension for a more sustained period may require other issues to be covered such as protection or storage of plant and equipment. Care needs to be taken that, where the operations do have such repercussion if the operations are suspended for any extended period, the contract deals with those issues and provides appropriate mechanisms and remuneration to the contractor.

#### **15. Assignment**

The owner clearly does not want its ability to deal with its assets to be fettered by the mining contract. In particular the owner would want to reserve to itself the right to sell the mine as a going concern. To this end the owner would always want to reserve to itself the right to assign the contract.

Clause 22.3 of the Model Contract contains a prohibition on the contractor assigning its rights under the agreement (except with the prior written approval of the owner) and clause 22.3(b) reserves to the owner the right to assign its interest under the contract provided the owner procures a covenant from the assignee that it will be bound by the provisions of the agreement. In this way the contractor's legitimate commercial interests are also protected.

## **16. Method of Measurement**

Except in very rare cases the contractor's entitlement to payment will be determined by the volume of material or ore it mines or delivers to a particular point. The method of measuring volume, unless precisely defined, can be the subject of much expensive dispute. There are as many different methods of measuring as there are types of contract and types of mining operations. Many operations are amenable to measurement by use of bank cubic metres while others are more appropriately measured by weight.

Schedule 10 of the Model Contract sets out a mechanism by which the tonnage of ore mined is measured at the point of delivery into the processing plant.

The alternative clauses available on the AMPLA web page have other methods of measurement, one being specific to coal which relies on weightometers attached to equipment and truck weighbridges. A further alternative is provided in the Alternative Clauses which measures by reference to the volume of stockpiles and the volume of voids.

Insofar as the mining operations also involve haulage, clauses need to be crafted to reflect the most appropriate method of measurement of distance and the points from which the distance is measured.

The method of measurement stipulated in each contract, and it is essential to stipulate a method of measurement, should reflect best operational practice and what is going to return the most accurate measurements. Further, it is important to ensure that all of the relevant criteria by which performance is measured and payment made are the subject of an appropriate specified method of measurement. Weight, volume and distance are reasonably obvious, however, in certain applications moisture content, specific gravity of material and particle size may be relevant. Thought needs to be given to each of these factors and any others that may impact on the provision of the services and the cost of the provision of the services and whether methods of measurement for these factors need to be prescribed.

## **17. Test Drive the Contract**

As noted earlier, the basic purpose of a contract is to facilitate the smooth, timely and cost effective delivery of services and the Model Contract is a suggested starting point for the delivery of mining services. However, before executing the contract the parties should be satisfied that the contract, whether it is based on the Model Contract or otherwise, will work in practice on a day to day basis. The best way of ensuring that is to run through as many practical examples as possible, largely relying on both parties' experience of where things have gone wrong in the past and what has worked in the past. At its most basic this involves running through theoretical cases from go to whoa and ensuring that each step of the process is covered by a provision of the contract. For example, what will happen under the proposed contract if the fundamental assumptions upon which prices are structured change or what

will happen if the fundamental commercial assumptions upon which both parties entered into the contract change? Does the contract adequately address these issues?

To a greater or lesser degree, depending on the particular contract, it would be fair to say that mining is something of a gamble in the sense that no-one can predict with certainty exactly how an ore body lies and what conditions might be encountered a hundred metres below the surface. Similarly, who is to say with any accuracy what the commercial environment will be four years into the five year term of the contract. That being the case the parties need to be satisfied that the contract is sufficiently precise to cover situations yet flexible enough to preserve both parties' legitimate commercial interests in the event of things not going as initially planned.

The more possible scenarios that are worked through under the model of the contract the more likely the contract will be able to handle a whole range of different eventualities.

## **18. Conclusion**

As noted at the outset and on the cover page to the Model Contract, the Model Contract is not meant to be a document applicable to all situations or which provides all the answers to any particular application. It is meant rather to be a guide which, in a lot of cases, can be adopted without much amendment but which, in other cases, will require considerable amendment or addition. Some of the additions and alternatives are set out in the optional and alternative clauses prepared by AMPLA. Each contract, however, must be tested and the parties satisfied that it will meet their requirements. The key elements are:

- (a) ensuring that the contract fits the purpose. Do not assume that any form of standard form contract, including the Model Contract, is appropriate to the operation in question. Identify the key goals of both parties and key elements by which those goals will be fairly delivered;
- (b) conduct yourself on the assumption that things will go wrong. Draft defensively and even on the assumption that the other party will do the wrong thing. Ensure that your interests are preserved in the event of the other party doing the wrong thing or matters not proceeding as originally anticipated;
- (c) test drive the contract with as many scenarios as possible to ensure that it works;
- (d) ensure that the contract mechanisms are consistent with the operation to be undertaken and, in certain cases, not only the company's operational procedures but also the company's accounting and software systems.

There should be no fear in attempting to make a contract as prescriptive and comprehensive as possible. Relationships between contracting parties collapse when they fall into disagreement, not necessarily when operations go awry. The less that a contractual relationship relies on goodwill of the parties and the more that it relies on specific provisions of the contract to determine parties' rights and obligations, the less likelihood of dispute.

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