

Mineral Resources (Peak Downs Mine) Amendment Bill 2008

Explanatory Notes

General Outline

Policy Objectives

The policy objectives of the Bill are to amend the *Mineral Resources Act 1989* to:

- Resolve a long-standing tenure dispute between the Central Queensland Coal Associates (CQC Associates) and BHP Mitsubishi Alliance Coal Operations Pty Ltd (BMA) and Cherwell Creek Coal Pty Ltd (Cherwell Creek) by:
 - Renewing Cherwell Creek's application for Exploration Permit for Coal 545 up to the date the legislation commences;
 - Ending Cherwell Creek's Exploration Permit for Coal 545 on the date the legislation commences; and
 - Rejecting Cherwell Creek's applications for Mineral Development Licenses 364 and 366 from the date the legislation commences;
- Secure the current and future operations of the Peak Downs Coal Mine by:
 - Making the area currently covered by Cherwell Creek's application for Mineral Development License 364 available to the holders of Mining Lease 1775 for the purposes of applications for mining leases to be lodged within two years;
 - Making the area of Special Lease 12/42239 which is not comprised within a mining tenement, or covered by an application for a mining tenement, available to the holders of Mining Lease 1775 for the purposes of an application for a mining lease to be lodged within one year; and

- Make it clear that compensation is not payable by the State to Cherwell Creek or any other person for anything done under the Bill; and
- Provide Cherwell Creek with a right to apply for compensation to be paid by the holders of Mining Lease 1775 for the loss of opportunity to commercialise the coal resource in the area currently subject to its application for mineral development license 364.

Reasons for the Bill

Cherwell Creek was granted Exploration Permit for Coal 545 in 1994. The source of dispute between BMA and Cherwell Creek is that a significant part of Exploration Permit for Coal 545 overlaps Special Lease 12/42239. Cherwell Creek has also more recently applied for Mineral Development License 366, which similarly overlaps Special Lease 12/42239.

The Central Queensland Coal Associates Agreement was entered into between the State and the CQC Associates on 1 January 1969. That agreement was authorised, and given the force of law, by the *Central Queensland Coal Associates Agreement Act 1968*. The Central Queensland Coal Associates Agreement provided for the compulsory acquisition of land and the granting of special leases to the CQC Associates for, among other things, infrastructure purposes for coal mining where the CQC Associates were unable to acquire land. Special Lease 12/42239 was subsequently granted under the then Land Act in 1979 for 'Industrial (Coal Mining) Purposes' for the Peak Downs Mine.

The Peak Downs Mine is located on Mining Lease 1775. Mining lease 1775 was granted in 1984 under the *Central Queensland Coal Associates Agreement Act 1968*, rather than the general mining legislation in place at the time. The Special Lease is partly within and partly outside Mining Lease 1775.

That part of the Special Lease which is outside Mining Lease 1775 on its western boundary is the location for infrastructure critical to the Peak Downs Mine. It is understood that this mining infrastructure includes spoil piles, environmental and tailings dams, haul roads and ramps; mechanical workshops, warehouses, power reticulation structures and a large coal reject stockpile. It is this area which is overlapped by Exploration Permit for Coal 545 and the application for Mineral Development Licence 366.

The dispute between Cherwell Creek and BMA has arisen because of this historical split between the mining tenure (for the mining operations) and

the land tenure (for the infrastructure) for the Peak Downs Mine, all of which predates the tenure regime under the Mineral Resources Act 1989.

Mining operations and infrastructure are both accommodated under mining leases granted under the *Mineral Resources Act 1989*. It is therefore unlikely that a dispute of this nature would ever occur in relation to tenure granted solely under the *Mineral Resources Act 1989*.

When the Mineral Resources Act 1989 was enacted, it included transitional provisions that expressly covered mining leases granted under the *Central Queensland Coal Associates Agreement Act 1968*. Any special leases granted under the then Land Act pursuant to the authority for that within the Central Queensland Coal Associates Agreement were similarly transitioned over when the *Land Act 1994* was enacted.

Unfortunately, the special leases were never protected to ensure that tenure could not be granted under the *Mineral Resources Act 1989* over them. It is not known whether this was deliberate or an oversight. However, this lack of protection has certainly proved to be a costly mistake in the current situation, as it has resulted in uncertainty and lengthy delay in the resolution of the dispute between BMA and Cherwell Creek.

The Peak Downs Coal Mine is a premium coking coal mine, producing nine million tonnes of coal per annum. The total coal reserve size is 1,915 million tonnes. The value of its exports last financial year was \$1.28 billion and its coal royalty payments were \$86.8 million. As at June 2007, the mine had a work force of 1,085 employees and contractors.

The continuing viable operation of the Peak Downs Mine is of considerable benefit to the local economy and to the State. It is therefore not acceptable for its current operations to be hampered by the tenure dispute with Cherwell Creek.

BMA is proposing a major expansion of the Peak Downs Mine. It is investigating the feasibility of developing and constructing a new Greenfield mine in the northern part of Mining Lease 1775, to be known as the Caval Ridge Mine. The Caval Ridge Mine could result in over 1200 construction-based jobs and 550 operational jobs and the construction of over \$1 billion worth of infrastructure. It could also result in up to a further 12 million tonnes of coal production per annum.

The Government accepts that the land currently held by Cherwell Creek under Exploration Permit for Coal 545 and its application for Mineral

Development License 364 is the optimal location for the infrastructure needed for the Caval Ridge Mine.

If BMA is unable to locate its expansion infrastructure off the mining lease and in this particular area, a significant part of which it owns freehold, the infrastructure would need to be placed within Mining Lease 1775. This would be problematic because it would require the placement of infrastructure on top of reserves of premium hard coking coal, thereby sterilising a significant amount of coal, and would significantly increase its operating costs.

Cherwell Creek's applications are being rejected because –

- Cherwell Creek has had over 13 years to prove up and develop any coal resource within the area of its exploration permit, but has been unable to do so;
- Cherwell Creek has only drilled in the reporting years 1994, 2004, 2005 and possibly 2007. It is not possible to confirm whether Cherwell Creek drilled in 2007 because its annual report is not yet required to be lodged;
- As far as the Department is currently aware, Cherwell Creek has only drilled in the area subject to the application for Mineral Development License 364. This means that Cherwell Creek applied for Mineral Development License 366 over an area it had never drilled;
- In the absence of any sizeable, economically viable coal resource, the most appropriate and economic use of the land subject to the application for Mineral Development License 366 is for the Peak Downs Mine's current infrastructure;
- Cherwell Creek has defined only a relatively small coal resource in the area subject to its application for Mineral Development License 364 which is at a very preliminary stage of assessment and which it is considered might only be marginally viable; and
- In the absence of any sizeable, economically viable coal resource, the most appropriate and economic use of the land subject to the application for Mineral Development License 364 is for infrastructure to support the Caval Ridge Mine.

BMA and Cherwell Creek have shown a propensity to litigate this dispute. Deciding Cherwell Creek's applications administratively would almost certainly lead to further litigation, causing further uncertainty and delay

and leaving BMA's current and future mining tenure problems unresolved. A legislative solution for this dispute is therefore required.

The land currently covered by Cherwell Creek's application for Mineral Development License 364 and by certain parts of Special Lease 12/42239 will be made available only to the holders of Mining Lease 1775 and only for the purposes of applications for mining leases over that land. This will enable BMA to secure that land for infrastructure. As BMA does not hold the prerequisite tenure to apply for mining leases under the *Mineral Resources Act 1989* for any of this land, a legislative solution is required.

To protect Cherwell Creek's interests as far as possible, it is being given a statutory right to apply to the Land Court for compensation to be paid by the holder of Mining Lease 1775 for the loss of the opportunity to commercialise the coal resource in the area currently subject to the application for MDL364. If Cherwell Creek can prove it would've been able to commercialise the coal resources, it will be entitled to compensation.

The Land Court will be required to taken into account prescribed considerations when determining whether compensation should be payable. These include the criteria set out in section 269(4) of the *Mineral Resources Act 1989* for the grant of a mining lease and the sorts of issues that any coal mining company would need to consider before deciding whether to proceed with the development and commissioning of a coal mine. The Land Court may also take into account anything else it considers relevant.

How objectives are achieved

To achieve the objectives, amendments are proposed to the *Mineral Resources Act 1989*.

Alternative method of achieving policy objectives

There are no other viable alternatives that would achieve all of the policy objectives. Legislation is considered the best mechanism to resolve all of the outstanding issues and to provide certainty.

Estimated cost for Government implementation

There will be no cost to Government as a result of the legislation.

Consistency with Fundamental Legislative Principles

If its outstanding tenure applications were determined administratively by the Minister or the Minister's delegate, Cherwell Creek would have no appeal rights under the *Mineral Resources Act 1989* in relation to these decisions.

This legislation will mean that Cherwell Creek will be deprived of those administrative law remedies to which it would otherwise be entitled. Those remedies would have enabled Cherwell Creek to challenge, by way of judicial review, any decisions of the Minister in favour of BMA. This would appear to be inconsistent with the intention behind section 4(2) of the *Legislative Standards Act 1992*, which provides that legislation should have sufficient regard to the rights of individuals. However, section 4(2) does not technically apply to Cherwell Creek because it is a company.

As BMA will obtain considerable benefit from the proposed legislation, Cherwell is being given a statutory entitlement to apply to the Land Court for compensation to be paid by the holders of ML 1775 for its loss of opportunity to commercialise the coal resource in the area currently subject to the application for MDLA364. Cherwell will only be awarded compensation if it can prove to the Land Court that it would have been able to commercialise the coal resource.

BMA will be liable to compensate Cherwell for the legislated decisions on its four outstanding applications in circumstances where, if those decisions were made by the Minister, BMA would have no liability to compensate Cherwell. This would appear to be inconsistent with the intention behind section 4(2) of the *Legislative Standards Act 1992*. However, section 4(2) does not technically apply to the holders of ML1775 because all members of the alliance are companies.

As Cherwell will be obtaining a right to claim compensation that it does not currently have and because there has been a lengthy history of protracted litigation between the two companies, Cherwell's appeal rights from the Land Court about its application for compensation will be limited to errors of law.

Consultation

While BMA and Cherwell Creek were both given the opportunity to provide submissions about Cherwell Creek's outstanding applications and how they should be dealt with by the Minister, neither party was consulted about the legislation.

There has been no consultation outside of Government about the legislation.

Notes on Provisions

1 Short title

Clause 1 states that this Act is the *Mineral Resources (Peak Downs Mine) Amendment Act 2008*.

2 Act amended

Clause 2 states that this Act amends the *Mineral Resources Act 1989*.

3 Insertion of new pt 18A

Clause 3 inserts a new part 18A into the *Mineral Resources Act 1989*. Part 18A contains sections 722A-722G.

Part 18A Provisions about particular mining tenements

Section 722A Definition for pt 18A

Section 722A contains definitions for terminology used in Part 18A of the *Mineral Resources Act 1989*.

Section 722B Period of operation of EPC545

Section 722B renews exploration permit for coal 545 for a period ending at the beginning of the commencement day and stops it being in force from that time, with no renewal.

Section 722C Rejection of particular applications for mining tenements

Section 722C rejects all applications for mining tenements by Cherwell Creek that relate to the prescribed land under sections 722D or 722E that were current immediately before the commencement day.

Section 722D Persons who may apply for, or be granted, a mining lease for land covered by MDLA364

Section 722D makes all or any of the area currently subject to Cherwell Creek's application for Mineral Development License 364 available only to the holders of mining lease 1775 for the purposes of applications for mining leases to be lodged within two years of the commencement day, or such extended period as the Minister allows.

Any extension granted by the Minister must be published by gazette notice.

Section 722E Persons who may apply for, or be granted, a mining lease for particular land covered by SL12/42239

Section 722E makes that area of Special Lease 12/42239 which is not comprised in a mining tenement and which was not the subject of an application for a mining tenement on 14 April 2008 available only to the holders of mining lease 1775 for the purposes of applications for mining leases to be lodged within one year of the commencement day, or such extended period as the Minister allows.

Any extension granted by the Minister must be published by gazette notice.

Section 722F No compensation payable

Section 722F provides that no compensation is payable by the State to Cherwell Creek or any other person as a result of the operation of Part 18A.

722G Compensation payment by prescribed persons

Section 722G provides Cherwell Creek with a right to apply to the Land Court for compensation to be paid by the holders of mining lease 1775 for the loss of Cherwell Creek's opportunity to commercialise the coal resource in the area currently subject to its application for mineral development license 364.

Cherwell Creek must file its application for compensation in the Land Court within 3 months of the commencement of Part 18A. The holders of mining lease 1775 will be parties to those proceedings.

Cherwell Creek will only be awarded compensation if it can prove to the Land Court that it would have been able to commercialise the coal resource. The Land Court must consider specified criteria when making its decision.

©The State of Queensland 2008