Mineral and Energy Resources (Financial Provisioning) Bill 2018

Explanatory Notes

FOR

Amendments to be moved during consideration in detail by the Member for Maiwar, Michael Berkman MP (Queensland Greens)

Policy objectives and the reasons for them

The Mineral and Energy Resources (Financial Provisioning) Bill 2018 (**the Bill**) is complex, and it is a welcome although long-overdue step forward. The Greens cannot support the substantial loopholes and carve-outs the government has included in the Bill.

These loopholes give big mining companies a free pass to leave behind toxic final voids, destroy jobs in mining rehabilitation and keep vital information secret from Queenslanders.

These amendments are designed to create jobs in mining rehabilitation, protect local communities, restore the environment, improve transparency and safeguard Queensland taxpayers against large future liabilities for rehabilitation.

The objectives of the amendments are to:

- Make sure no coal mine in Queensland can ever leave behind toxic final voids, waste rock dumps or tailings dams (known as “non-use management areas”).
- Abolish the loopholes which give existing mines automatic approval for non-use management areas and which exempts them from public notification and comment.
- Abolish the gag-clause which completely excludes the financial assurance scheme from the Right to Information Act against the advice of the Information Commissioner.

Good steady jobs in rehabilitation are one part of a jobs-rich transition to clean energy. These amendments are a major opportunity to create jobs rapidly while also securing great environmental and community outcomes. By adopting this simple two-page amendment the government could create more than 12,000 jobs over five years.

Creating jobs rehabilitating coal mines

Our first amendment would make sure that no coal mine, whether existing or new, can leave behind an unstable, toxic final void, waste rock dump or tailings dam. These areas are known in the Bill as “non-use management areas”. By itself, we estimate that this amendment would create 12,000 jobs over five years.

Coal accounts for the vast majority of Queensland’s large mines. The thermal coal sector in particular is in serious danger of collapsing with little warning as the world moves to clean energy.

Unlike other minerals, like copper, coal mining uses a technique called “strip mining” where land becomes available for rehabilitation right away. It’s cheaper and easier than rehabilitating mines for other commodities and creates thousands of jobs.

As Lock the Gate have pointed out point out in a recent report,[1] world’s best practice in the USA shows that filling in final voids is perfectly feasible and economically competitive.

In 1977 the USA introduced the *Surface Mining Control and Reclamation Act* (SMCRA) which applies only to coal mines. SMCRA makes sure coal mines cannot leave behind unstable toxic final voids by ensuring that land is returned to the “approximate original contour” as well as other safeguards.

Those US laws work for local communities and the environment, and they create thousands of jobs. US coal companies have complied with the law even while exporting millions of tonnes of coal per year. We believe that Queenslanders deserve the same high standards.

The Greens estimate that this amendment would create 12,000 jobs over 5 years as coal mines bring their progressive rehabilitation up to standard on the basis of this requirement. This estimate is based on Lock The Gate’s methodology detailed in the above mentioned report.

The Greens’ amendment would:

- Add an item in proposed s126D in the *Environment Protection Act 1994* (**EP Act**). Section 126D sets out the requirements for the schedule of a Progressive Rehabilitation and Closure Plan (**PRCP**). The schedule sets out the proposed outcomes from rehabilitation.
- The additional item specifies that if land is subject to coal mining (either exploration or production) then it must be rehabilitated to a stable condition - this is the general standard required by the EP Act.

[1] Lock the Gate, May 2018, Rehabilitation Jobs in Queensland
http://www.lockthegate.org.au/rehabilitation_jobs_in_queensland

- This means that coal mines cannot include a “non-use management area” in their PRCP schedule.

No free pass on final voids for existing mines

Our second amendment would scrap the free pass that the government is giving to all existing mines across all commodities to leave behind toxic final voids.

We are concerned that this special loophole allows mining companies to sneak toxic final voids in by the back door without public notification and input, and without proper assessment. These concerns were well ventilated in a recent ABC news story.[2]

Existing mines are likely to represent the vast majority of mines in Queensland for many years to come. Consequently, these transitional provisions of the Bill, which are designed to transition existing mines into the new system, are incredibly important in the final outcomes for Queensland communities, workers and our environment.

The Bill’s requirements for non-use management areas are already very weak. Crucially, they allow mining companies to claim that filling in final voids is simply too expensive to bother.[3] As noted above, for coal mines this is a complete fiction.

On top of this above concern, the Bill contains two loopholes which give existing mines a free pass on final voids (non-use management areas). Our amendments close both loopholes. These loopholes are:

- Firstly, there is no requirement to justify “non-use management areas” for almost all existing mines.
    - Under the Bill, the Department will be required to conduct an assessment of whether a proposed non-use management area meets the (already weak) criteria. This assessment must be based on a justification and detailed evidence.[4]
    - However, the government has inserted a loophole which exempts almost all existing mines from the requirement to give a justification and expert evidence to support their proposal for a non-use management area. This expert evidence would usually include groundwater studies, ecological assessments and safety procedures for the site.
    - Without any requirement for mining companies to justify leaving a final void or support that justification with expert evidence, the Department cannot make an

[2] Josh Robertson, ABC, 6 August 2018, Queensland mining rehabilitation laws allow loopholes for existing mines, advocates say.
[3] See cl 104 of the Bill, relating to proposed s126D(2)(b)(ii) of the *Environmental Protection Act 1994.* which states that a non-use management area can be approved if *“ failing to rehabilitate the land to a stable condition is justified, having regard to the costs of rehabilitation and the public interest in the resource activity being carried out”*
[4] See cl 104 of the Bill, relating to proposed s126C(1)(g) and (h) of the *Environmental Protection Act 1994.*

informed decision, and would likely be forced to approve the company's plans. Even more concerningly, an absence of justification would make any decision to approve a final void almost impossible to challenge in court.

- This loophole applies in a range of circumstances including where the Department considers that these requirements have been "adequately addressed" under (a) the environmental authority, (b) a plan of operations or (c) a "written agreement" (this term is not defined) between the mine owners and the Department.[5] This is likely to exclude most mines in Queensland and, by way of written agreement, this loophole could be applied to to virtually every mine.
- This outcome is clearly not acceptable, since plans of operations are difficult to access and are not subject to public consultation and "written agreements" are presumably completely confidential.
- The upshot is that an existing mine, for example. the Ebenezer mine near Ipswich featured in the above ABC story, could easily include a toxic final void in its plan of operations or a simple written agreement with the Department without ever informing the public. That would entitle the mine owners to avoid any requirement to justify or explain their plans to leave a final void. Locals at Ipswich would have no options to resist, and would not even find out about this plan until the PRCP is approved by the Department and published on the proposed register.
- The Greens' amendment closes this loophole by simply deleting the proposed s755(3) in cl 203 of the Bill.

- Secondly, there is no requirement for public notice and submission for almost all existing mines.
  - This loophole at proposed s755(4) in cl 203 of the Bill allows almost all existing mines to avoid public notification and public comment in on their proposed rehabilitation plans.
  - This means that any local communities who have a very strong stake in the future outcomes for mined land may not be able to participate in the vital consultation process. The community near the Ebenezer mine close to Ipswich, communities in the Bowen Basin and even the community at Walsh River near Cairns will not be able to have their say on the future of their local area.
  - This loophole applies whenever an environmental impact assessment process has been completed or where the plan of operations specifies the post-mining outcomes for the land in question. This is likely to be almost every single mine in Queensland.
  - The Greens' amendment closes this loophole by simply deleting the proposed s755(4) in cl 203 of the Bill.

[5] See cl 203 of the Bill, relating to proposed s755(3)(a)-(c) of the *Environmental Protection Act 1994.*

It is not clear how many mines stand to benefit from these two loopholes. In an attempt to clarify this issue, Mr Berkman wrote to the Environment Minister Leeanne Enoch on 21 June 2018 asking a series of detailed questions to determine how many existing mines would fit into the categories outlined above. The Minister responded more than one month later on 31 July 2018 noting that the Department is still collecting this information, but that because the Bill is currently before the Parliament she could not share any information at all.

The Minister's response means that the Parliament will be debating legislation without knowing what impact it would have if passed. This is absolutely unacceptable, especially given the government's stated commitment to giving communities a greater voice in the future of their local area.

Abolish the gag clause

Our final amendment would improve transparency of the new scheme for financial assurance by getting rid of the proposed blanket exclusion from the *Right to Information Act 2009* (**RTI Act**). In the Bill as drafted, the RTI Act is completely excluded from any documents "created or received" by the scheme manager, and the scheme manager themselves will be totally exempt from the RTI Act in relation to their functions as scheme manager.[6]

This gag clause is, to our knowledge, unique across Australia and is completely unjustified. The government is giving mining company documents the same level of protection as documents created by ASIO or counter-terrorism authorities.[7] It is giving mining companies and the new regulator about the same protection from scrutiny as the Parliament of Queensland or a judge of the Supreme Court.[8]

This amendment is not just about protecting transparency in an academic sense. It is about making a system that works to create jobs and protect the environment. Without access to information, locals are completely in the dark.

The Office of the Information Commissioner (**OIC**) who oversees the RTI Act was very critical of the exemption. On page 21-22 of the report of the Economics and Governance Committee (**the Committee Report)** on the Bill, the office of the OIC is quoted saying that:

> "...the approach taken in amending the RTI Act is inconsistent with the scheme of the legislation, the stated objective of the amendments, the extent of the proposed confidentiality provision in the Bill, the conclusions of the recent comprehensive review of

[6] See Part 8, Division 5 of the Bill.
[7] See Sch 1 of the RTI Act "security document" and "documents created under Terrorism (Preventative Detention) Act 2005"
[8] See Sch 2 Parts 1 and 2 of the RTI Act.

> the RTI Act tabled in Parliament by the Attorney-General in October 2017, and the Solomon Report [Review Report]."[9]

The Committee Report also points out that the OIC stated that:

> "a blanket exclusion for documents created, or received, by the scheme manager and the scheme managers (sic) functions appears unnecessary".

The government's response to these criticisms was extremely unconvincing. The need to protect commercially sensitive documents is well provided for in the existing extensive exemptions and exclusions under the RTI Act. There is no evidence or justification provided about why these existing carve-outs are inadequate.

Estimated cost for government implementation

There are no significant cost impacts from these amendments.

Consistency with Fundamental Legislative Principles (FLPs)

The amendments are consistent with fundamental legislative principles.

Mining companies will no doubt raise strenuous objections to our amendments on the basis that they are "retrospective". Such objections are incorrect. Where the Bill and the Greens' amendments change future rehabilitation obligations, those changes are strongly justified by the public interest in creating jobs in mining rehabilitation and protecting local communities and environments.

The obligation to return mined land to a stable condition already exists in the EP Act. The Bill as drafted clarifies how that obligation is implemented, including by inserting a definition of "stable".[10] The Greens are concerned that the Bill actually restricts the application of this existing obligation, and our amendments seek to ensure it applies to all mines.

Section 4(3) of the *Legislative Standards Act 1992* states that:

> Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation-
>
> ...
>
> (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; …

[9] Available at http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T481.pdf
[10] See cl98 of the Bill.

In *Principles of good legislation: OQPC guide to FLPs*, the Office of Queensland Parliamentary Counsel provides guidance on the meaning and application of this principle.[11] OQPC notes that there is no fixed definition of retrospectivity. OQPC quote this passage from *Statutory Interpretation in Australia:*

> All legislation impinges on existing rights and obligations. Conduct that could formerly been engaged in will have to be modified to fit in with the new law. [...] It cannot therefore be said that in this sense legislation is retrospective because this is true of all legislation. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation...[12]

In this case, neither the Bill nor the amendments apply retrospectively because they do not change the legal character of any act before the time of the commencement of the legislation.

There is an overwhelming public interest in favour of ensuring that mined land is returned to a stable and environmentally beneficial condition.

The Greens' amendments would be an improvement on the outcomes mining companies are currently considering and would create about 12,000 jobs in the process. It is not surprising that mining companies might object to this improvement, but the interests of the Queensland community must be put ahead of profits for big corporations.

Consultation

The Member has developed these amendments from stakeholder and community feedback, including through the Committee process.

Consistency with legislation of other jurisdictions

Each Australian jurisdiction has unique approaches to addressing the matters contained in these amendments.

[11] Office of Queensland Parliamentary Counsel, June 2013 *Principles of good legislation: OQPC guide to FLPs: Retrospectivity*, page 8 https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Retrospectivity.pdf
[12] Pearce & Geddes (2011) pp 323-324

Notes on provisions

Clause 1 amends Clause 104 of the Bill (Insertion of new ss126B-126D)

This amendment omits and replaces existing proposed s126D(3) by omitting existing lines 31 to 34 on page 80 and line 1 on page 81.

Existing proposed s126D(3) prohibits non-use management areas situated wholly or partly on a flood plain, meaning that the land in question must instead be rehabilitated to a stable condition.

The replacement s126D(3) retains this prohibition and adds a prohibition on coal mines (whether in the mining or exploration phase) leaving behind non-use management areas.

Clause 2 amends Clause 203 of the Bill (Insertion of new ch 13, pt 27)

This amendment omits existing proposed ss755(3) and (4) of the EP Act.

Omitting proposed s755(3) ensures that all existing mines will be required to justify “non-use management areas” instead of receiving automatic approval from the Department.

Omitting proposed s755(4) ensures that all existing mines will be required to give public notice and accept public submissions on any proposed PCRP instead of being able to keep this vital information secret from the community.

Clause 3 amends Clause 203 of the Bill (Insertion of new ch 13, pt 27)

This is a consequential amendment omitting the words “In addition,”.

Clause 4 amends Part 8, division 5 (Amendment of Right to Information Act 2009)

This amendment omits clauses 217 and 218 of the Bill.

Our final amendment would improve transparency of the new scheme for financial assurance by getting rid of the proposed blanket exclusion from the RTI Act.

Clause 5 amends the Long title

This is a consequential amendment to omit reference to the *Right to Information Act 2009.*