Carolyn Heffernan

From: Leary, Jay [jay.leary@freehills.com]
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Attachments: Streamlining Bill Memo 06 08 12.doc

Please find attached our submission in relation to the streamlining bill.

Kind regards
Jay

Jay Leary
Partner
Freehills

T +61 7 3258 6619 M +61 408 101 028 F +61 7 3258 6444
www.freehills.com

The Streamlining Bill

1 Background

The primary legislation in Queensland governing exploration and mining of minerals is the *Mineral Resources Act 1989* (Qld) (**MRA**). The *Mines Legislation (Streamlining) Amendment Bill 2012* (Qld) (**Streamlining Bill**) proposes to amend the MRA. Among other things, the Streamlining Bill implements part of the Streamlining Approvals Project. The Streamlining Approvals Project commenced in 2009 with the aim of improving the efficiency of the regulatory framework for the resources sector in Queensland.

The Bill also proposes amendments to establish common structure, terminology and assessment processes for resources activities required under the 'resources Acts'.[1] This will enable greater flexibility in departmental responses to the significant increases in applications for resources activities. The MRA is one of the 'resources Acts'.

Although there has been consultation at various stages during the Streamlining Approvals Project, there does not seem to have been consultation on the particular wording of the amendments in the Streamlining Bill.

This paper does not consider all of the proposed amendments. This paper focuses on two particular issues raised by interested parties as areas of concern:

(a) amendment to the wording of the prohibition on dealings with parts only of an exploration permit.

- Does the amended wording create potential problems for commercial arrangements which are currently common in relation to exploration permits?
- Furthermore, are there policy reasons to argue that the prohibition should be removed entirely?

(b) indicative approvals for transfers: As transfers of mining tenements require approval under the legislation, the legislation provides for indicative approval to be obtained in advance of a proposed transfer. The indicative approval remains "open" for a set period of time. This means that a complying transfer lodged within this timeframe will automatically be approved.

- Is the time period specified by the legislation still reasonable taking into account normal and reasonably expected considerations in commercial transactions.

[1] *Mineral Resources Act 1989, Petroleum and Gas (Production and Safety) Act 2004, Petroleum Act 1923, Greenhouse Gas Storage Act 2009* and *Geothermal Energy Act 2012* are collectively referred to as the "resources Acts" in the Explanatory Memorandum of the Streamlining Bill.

2 Prohibition on dealings with parts only of exploration tenements

2.1 Current position

At present, the MRA prohibits the partial assignment or registration of a partial assignment of an exploration permit for minerals (section 151). There are similar provisions in section 198 of the MRA in respect of mineral development licences and section 300 for mining leases.

Section 151 of the Act relates to the assignment of an exploration permit and provides:

> "(7) An assignment of an exploration permit shall not be in respect of part only of the land the subject of the exploration permit.
>
> (8) A purported assignment of an exploration permit or of an interest shall not be effective unless it is made in accordance with this section and approved as provided in subsection (5) and shall take effect on the day next following its approval by the Minister under subsection (5)."

Notwithstanding this, we understand that contractual arrangements granting interests in a part of an exploration permit (or other mining tenements) are quite common.

2.2 Relevant amendments proposed by the Streamlining Bill

The amendments

The Streamlining Bill proposes to replace all provisions in the resources Acts concerning matters such as dealings, approvals of dealings and registration of certain agreements and arrangements with common provisions applying to each of the resources Acts. In the Explanatory Notes to the Streamlining Bill these common provisions are referred to as the "new dealing provisions". The new dealing provisions establish a single process for all resources permits to deal with, among other things, business transactions and changes of ownership.

In broad terms, the new dealing provisions cover the following:

- terminology of "transfer", rather than "assignment" is always used;
- definition of "dealing" is included – covering transfer, mortgage (and release, transfer or surrender of mortgage), change of owner's name, (in certain instances) sublease (or transfer of a sublease);
- prohibition of dealings that have the effect of transferring a divided part of the area in a resources permit;
- registration required for all dealings;
- Ministerial (or mining registrar) approval required for certain transfers (called "assessable transfers");
- recording "associated agreements" (agreements relating to a resources permit). These **do not** include dealings or dealings prohibited due to the prohibition on transfers of divided parts. The regulations may also prescribe other agreements as "unsuitable to be recorded in the register". No statutory priority is specified for these registered associated agreements.

The amendments in the Streamlining Bill reflecting the implementation of the common new dealing provisions are:

(a) Sections 151, 198 and 300 (current prohibition on assignments of part only of land the subject of the relevant tenement) are omitted;

(b) Single new proposed section 318AAQ (new provision prohibiting a "dealing" that "has the effect of transferring a divided part of the area of the tenement"), which applies to any "mining tenement";

(c) Definition of a "dealing" in section 318AAP.

(d) Proposed section 318AAT(2) which states "However, a dealing with a mining tenement prohibited under section 318AAQ can not be registered and is of no effect".

(e) Associated agreements for a mining tenement may be recorded in the register against the mining tenement (section 318AAZC). Recording of an associated agreement does not give the agreement any more effect or validity than it would otherwise have or create an interest in the mining tenement (section 318AAZD).

Sections 318AAP, 318AAQ, 318AAT, 318AAZC and 318AAZD are extracted in full in **Attachment 1.**

Issues identified

Section 318AAQ only applies to a "dealing". This is a threshold issue. A "dealing" is defined to include, among other things, "a transfer of the mining tenement or of a share in the mining tenement" (s318AAP(1)(a)). In the **attached** case of *D'Aguilar Gold Limited v Gympie Eldorado Mining Pty Ltd* [2006] QSC 326, the commercial agreement between the parties used the exact words as they now appear in section 318AAQ. The agreement had the effect of giving D'Aguilar Gold the same rights of enjoyment and liabilities as if there had been a transfer by Gympie Eldorado Mining Pty Ltd of beneficial ownership of the portion of the relevant mining tenement (see paragraph 25 of the case). Given the use of the exact wording, there is an argument that these types of agreements will be covered by section 318AAQ and therefore prohibited.

2.3 Are there policy considerations supporting removal of the prohibition altogether?

The prohibition on assigning part of the land to which a mining tenement is subject has been part of the MRA since its enactment in 1989. It is possible, although we have not checked for the purposes of this paper, that it was part of the mining legislation in place prior to 1989.

The policy considerations for implementing this prohibition are not immediately clear on the face of the legislation. Nor is there any specific comment on the matter in the Explanatory Notes to the Streamlining Bill. However, guidance can be found by considering matters such as:

- the objectives of the MRA (section 2);
- matters that the Minister may or is required to take into account in considering applications for mining tenements; and
- other provisions relating to exploration permits and other mining tenements.

The Streamlining Bill does not propose amendments to the objectives in section 2. The objectives include the following:

> "(a) encourage and facilitate prospecting and exploring for and mining of minerals;
>
> (b) enhance knowledge of the mineral resources of the State;
>
> ….
>
> (f) provide an administrative framework to expedite and regulate prospecting and exploring for and mining of minerals."

In the D'Aguilar Case, Atkinson J noted [at 21] that the MRA prohibits a partial assignment or registration of partial assignment of an exploration permit. The MRA also ensures the exercise of State control over the administration of the exploration of minerals in Queensland. Her Honour made particular reference to the objective set out in s 2(f) of the MRA: "the principal objectives of this Act are to provide an administrative

framework to expedite and regulate prospecting and exploring for and mining of minerals."

Arguments supporting the prohibition

There is an argument that partial assignments are prohibited so the State can maintain control over the exploration and mining of minerals (of both exploration and mining tenements). This control can be seen in other provisions of the MRA. For example:

- An application to assign an exploration permit cannot be made within the first 12 months of the term of the exploration permit. This ensures that the original application was bona fide and that the applicant was in a financial and technical position to carry out the program of work proposed.
- Provisions in the MRA relating to applications for, and the grant of, an exploration permit require information on the work program for the area applied for to be submitted. The work program must be approved by the Minister.
- The MRA requires a staged relinquishment of the area under an exploration permit.

It would seem that prohibiting the partial assignment of exploration permits supports this policy – that exploration permits are assessed and granted on the basis of the activities proposed in the work program for the whole of the tenement. The policy may be that if they had been assessed as separate activities (i.e. a single tenement effectively becoming two tenements), the considerations and conclusions may have been different. For example:

- The work program previously approved may require amendment to accommodate the "splitting" of the tenement to become 2 work programs for the separate areas. While in many cases it may be straightforward to determine what has to be done in respect of each split area, this may not always be the case. Furthermore, the considerations which founded the Minister's approval of the original single work program may not be the same when viewing each new work program for the separate areas.
- The forced staged relinquishment of area under the exploration permit may be complicated by the splitting of the tenement. For example, the legislation would need to deal with how the relinquishment would be allocated between the 2 areas.

In other words, in order to give effect to an administrative framework which effectively regulates and controls exploration, a partial assignment would theoretically require the assessment of 2 new exploration permits rather than the mere assessment of the human, technical and financial resources of the transferee only.

Arguments against the prohibition

Conversely, there are good arguments that allowing parties to transfer part only of an exploration permit will be commercially attractive to exploration companies and therefore encourage mineral exploration and therefore the gathering of further knowledge about mineral resources in Queensland.

It is also arguable that the State can still maintain appropriate control over the administration of an effective framework through making a partial transfer an "assessable transfer" so that Ministerial approval must be obtained. Provision could also be included to explicitly recognise that the Minister can take into account other matters when making a decision on whether or not to approve a partial transfer. These matters might include any amendments to work programs and the application of the forced relinquishment of area to the two new areas.

2.4 Recommendations if prohibition to be retained

While it may be the case (given the recent addition of section 318AAP(2)) that the types of commercial agreements in question will not fall under the definition of "dealing", section 318AAQ should be amended so it is clear in the section that these types of commercial agreements will not be prohibited.

Section 318AAQ could be amended to exclude the words "has the effect of" and read "a dealing with a mining tenement that transfers a divided part of the area of the tenement is prohibited". Alternatively, a sub-section could be added which expressly states: "To remove any doubt, this section does not prohibit any transaction or commercial agreement which does not transfer legal ownership in a mining tenement or a share of a mining tenement."

We think the first option is preferable because it is arguable that the words "has the effect of" in section 318AAQ and the words "no effect" in section 318AAT creates circularity and makes the application of the sections unclear.

We note that as the policy objective of the Streamlining Bill is to have common provisions applying across all of the resources Acts, any amendment to the relevant wording in the MRA should be similarly reflected in amendments to the relevant wording in the other resources Acts.

3 Indicative approvals: duration and extensions

3.1 Current position

The MRA contains a regime whereby parties to a proposed transfer of a tenement can obtain a binding indication (i.e. an "indicative approval") from the Minister as to whether or not a proposed transaction will be approved and, if so, any conditions that may attach to approval. In the case of an exploration permit this is contained in section 151(4) of the MRA.

The legislation specifies that the indicative approval is operative for a period of "3 months from the date of the notice or such other period as is specified in the notice".

3.2 Relevant amendments proposed by the Streamlining Bill

The amendments

The Streamlining Bill keeps essentially the same regime, although the individual provisions currently have been omitted and replaced with a single provision as part of the "new dealing provisions" applicable across all resources Act (section 318AAX(6) and (7).

There are, however, the following differences:

- there is no longer discretion for the Minister to nominate a period other than 3 months in a notice of indicative approval. Section 318AAX(6) confirms the period of 3 months.
- there is provision in section 318AAX(7) for the 3 month period to be extended to 6 months. However the scope for this is extremely limited, applying only where, within 10 business days before expiration of the 3 month period, the applicant notifies that it has made but not received notice concerning its FIRB approval.

Sections 318AAX(6) and (7) are set out in full in **Attachment 1**.

Issues identified

In large transactions where there are pre-emptive rights or other conditions precedent, or where there are complex taxation and stamp duty issues, it is often found that 3 months is insufficient time to complete a transfer.

Under the current regime, parties have to re-apply if the 3 months expires.

This will continue under the new regime as the circumstances in which the extension under section 318AAX(7) is available are very limited.

It has been suggested that an extension should be automatically available, provided the application remains true and correct (regardless of the reason for the extension).

We think it would be more straightforward and clear on the face of the legislation to change the period from 3 months to 6 months. If the proposal above was implemented, applications for an extension would have to submitted and assessed (to some extent) and would only add, rather than reduce, red-tape.

3.3 Recommendations

The simplest and most straightforward approach would seem to be to change the reference in proposed section 318AAX(6)(c) to “3 months” to “6 months”.

Alternatively, section 318AAX(7) be amended to read as follows:

“(7) The approval is also taken to have been given if:

(a) subsection (6)(a) and (b) is satisfied; and

(b) within 10 business days before the expiration of 3 months after the giving of the indicative approval, the applicant gives the chief executive notice in the approved form of an extension under this subsection (7); and

(c) within 6 months after the giving of the indicative approval, subsection (6)(c)(i) and (ii) is satisfied.”

Attachment 1: relevant provisions of the Streamlining Bill

Section	Amendment
318AAP	(1) Each of the following is a ***dealing*** with a mining tenement— (a) a transfer of the mining tenement or of a share in the mining tenement; (b) a mortgage over the mining tenement or over a share in the mining tenement; (c) a release, transfer or surrender of a mortgage mentioned in paragraph (b); (d) a change to the mining tenement holder's name even if the holder continues to be the same person after the change; (e) if the mining tenement is a mining lease— (i) a sublease of the mining lease; (ii) a transfer of a sublease of the mining lease or of a share in a sublease of the mining lease. (2) To remove any doubt, it is declared that any transaction or commercial agreement not mentioned in subsection (1) is not a dealing with a mining tenement.
318AAQ	A dealing with a mining tenement, other than a dealing mentioned in section 318AAP(1)(e), that has the effect of transferring a divided part of the area of the mining tenement is prohibited. Examples of a divided part of the area of a mining tenement— • a particular part of the surface of the area • a particular strata beneath the surface of the area
318AAT	(1) Registration of a dealing with a mining tenement, other than an assessable transfer, may be sought by giving the chief executive a notice of the dealing in the approved form. (2) However, a dealing with a mining tenement prohibited under section 318AAQ can not be registered and is of no effect. (3) The approved form must be accompanied by the fee prescribed under a regulation. 4) Registration of an assessable transfer must be carried out by the chief executive Note— An application transfer is an assessable dealing and must be approved by the Minister or mining registrar under division 3 before registration of the transfer.
318AAZC	(1) An associated agreement for a mining tenement may be recorded in the register against the mining tenement. (2) Registration of an associated agreement may be sought by giving the chief executive a notice of the agreement in the approved form. (3) An approved form given to the chief executive under this section must be accompanied by the fee prescribed under a regulation.

(4) The chief executive is not required to examine, or to determine the validity of, an associated agreement recorded in the register under this section.

318AAZD The recording of an associated agreement under this part does not of itself—

(a) give the agreement any more effect or validity than it would otherwise have; or

(b) create an interest in the mining tenement against which it is recorded.

318AAX (7) The approval is also taken to have been given if—

(a) subsection (6)(a) and (b) is satisfied; and

(b) within 10 business days before the expiration of 3 months after the giving of the indicative approval, the applicant gives the chief executive—

(i) notice in the approved form that a proposed transferee has given a notice under the *Foreign Acquisitions and Takeovers Act 1975* (Cwlth) about a proposal that relates to the assessable transfer; and

(ii) evidence that the proposed transferee has given the notice under that Act; and

(iii) a statement from the proposed transferee that the proposed transferee has not received notice about an order or decision made under that Act about the proposal; and

(c) within 6 months after the giving of the indicative approval, subsection (6)(c)(i) and (ii) is satisfied.

(8) Despite subsections (6) and (7), the approval of the assessable transfer is taken not to have been given if—

(a) the request for indicative approval contained incorrect material information or omitted material information; and

(b) had the Minister or mining registrar been aware of the discrepancy, the Minister or mining registrar would not have given the indicative approval.
