COMMENTS

CHANGES TO QUEENSLAND COAL SEAM GAS REGIME

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In a previous edition of this journal,[1] Susan Johnston discussed the current legal framework relating to coal seam gas (CSG) in Queensland, and the proposals for change contained in the policy papers released by the Department of Natural Resources and Mines in 1997 and 2000. The Department has since issued a further policy discussion paper setting out a revised tenure regime. The proposed regime attempts to clarify parties' rights to CSG where overlapping tenure is granted by the *Mineral Resources Act* 1989 (Qld) and the proposed *Petroleum and Gas Act* 2002 (Qld). This paper outlines the essential features of the proposed new framework, together with the primary ways in which it differs from the previous proposals and the uncertainties as to how the regime will apply in practice.

1. ESSENTIAL FEATURES

The new regime intends to introduce a number of key concepts and principles which did not appear in the previous proposed regime. The essential features of the proposed regime are outlined below.

1.1 Rights under petroleum leases

Under the new regime, the intention is for rights to CSG to generally be granted by way of petroleum leases. A petroleum lease may "overlap" an existing coal mining lease. Importantly, if a petroleum lease is granted, rights to the "mineral hydrocarbon" (hydrocarbons in gaseous form may be classified as a mineral under the *Mineral Resources Act*) will not be granted to a mining lease for coal over the same area. On the other hand, if there is a pre-existing mining lease, the petroleum lease holder will have rights to produce CSG within the lease area even though the mining lease holder will have pre-eminent rights to any gas extracted or produced as part of their mining operation.

1.2 Rights to CSG for mining leases for coal

The actual rights which may be granted in relation to CSG have been spelt out under the new proposal. Firstly, the legislation is to be clarified to ensure that all holders of a mining lease for coal explicitly retain the incidental right to CSG. In addition, provided there is no pre-existing

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1 Johnston, S, "Whose Right? The Adequacy of the Law Governing Coal Seam Gas Development in Queensland" (2001) 20 AMPLJ 258.

petroleum lease over the area, all holders of a mining lease for coal will have the right to commercially dispose of or extract CSG released by or in connection with mining, including for safety purposes. The gas which may be commercially disposed of or extracted will be the gas required to be extracted or released as part of the mining operation from within the mining lease holders' approved 5 year Mineral Development Plan area (see below for further details).

If there is a pre-existing petroleum lease, and a mining lease is subsequently granted, the mining lease holder will be required to offer any gas which it collects to the petroleum lease holder for commercial disposal.

1.3 Coal miners to demonstrate use of hydrocarbon

Even if the Minister does grant the right to the mineral hydrocarbon to a mining lease holder, the new proposals emphasise the fact that it will be possible for this right to be removed if the Minister believes that the CSG resources are being "wasted". The burden of proving that the CSG resources are being utilised will therefore be significant.

The Department has indicated that s 308 of the *Mineral Resources Act* will be amended to enable the Minister to suspend or remove the right to the mineral hydrocarbon from any mining lease for coal. This will be done in circumstances where the Minister considers that the mining lease holder is not effectively extracting or utilising the CSG resources. The holder will need to show cause why the mineral hydrocarbon should not be removed from the lease if that mineral is not being produced.

Although the previous proposals also placed an onus on mining lease holders to account for their utilisation of CSG resources within the area of their mining lease, the new proposal seems somewhat stronger. Previously, it was intended that the Minister could ask the mining lease holder why any collected gas was not being utilised, and if the Minister believed the gas could be economically extracted, had the power to advertise for expressions of interest for the grant of a petroleum lease (over the mining lease) to a third party to extract such gas. If the Department's new proposals were implemented, the Minister would be entitled to remove the mining lease holder's right to utilise CSG resources altogether if the holder was believed to be squandering them.

It is understood that there are currently about 48 coal mining leases in Queensland which have rights to the mineral hydrocarbon attached.

1.4 5 Year Mineral Development Plan

Another key feature of the proposed regime is its proposed introduction of the requirement for mining leases for coal/oil shale under the *Mineral Resources Act* to have a "5 year Mineral Development Plan". The requirement for a mining lease holder to provide proposed development plans was alluded to in the revised proposals issued by the Department of Mines and Energy in January 2000.

The 5 year Plan will be required for all applications for mining leases with the mineral hydrocarbon and all applications for mining leases where there is an overlying petroleum tenure.

If a petroleum lease application is made, the holder of a mineral development licence within the area of the application will also be required to provide a Plan.

The Plan will need to outline the details of all current and proposed production and utilisation of the hydrocarbon being mined (including CSG) for the next 5 years, and any future plans for mining or production outside that area. Subject to variation by commercial agreement, the area covered by the Plan can only include gas from coal and related strata where pre-drainage or release of gas will occur from coal seams planned to be mined in the next 5 years. The size and nature of the proposed activities must be justified as both achievable and necessary to ensure safe mining.

The Plan must be approved before the lease can be granted, and be updated annually by the mining lease holder. The amended Plan will have to be approved by the Minister and copies provided by the holder to any overlying tenure holder. A new plan must also be submitted if any substantial change to activities is proposed.

Unfortunately, it is not clear what will be required of any of the tenure holders once the 5 year period expires, nor how the term of the Plan is extended beyond 5 years. For example, the new regime will permit holders of an overlapping petroleum lease to extract gas outside areas to be mined in the 5 year Plan. If, after the 5 year period expires, a mining lease holder intends to shift the focus of its operations to a different area which is at that time utilised by a petroleum lease holder, it is uncertain whether the CSG producer will be required to abandon their lease or what effect there will be upon the rights of the coal miner under its existing mining lease. Will, for example, the petroleum lease holder be required to vacate the area altogether at the end of the 5 year term, or perhaps progressively as the Plan is updated so that the mining lease holder maintains priority?

The proposed transitional provisions would require all holders of existing mineral development licences and mining leases covered by petroleum tenure to submit a Plan within 3 months of the commencement of the legislation. The Plan will replace the gas drainage plans presently required as a condition of some mining leases.

1.5 Co-operation Agreements

Entering into a Co-operation Agreement will also become a pre-requisite to the granting of an overlapping tenure if the proposed changes to the legislation are made. Parties with overlapping tenures will need to enter into such an agreement to define the access arrangements and operational interaction procedures of the two overlapping tenure holders (eg information exchange, well location, timing and completion issues).

If the parties agree on a Co-operation Agreement which is consistent with the objectives of the regime and the relevant legislation, the Agreement will automatically be deemed as acceptable. On the other hand, if the parties cannot reach agreement, there will be mediation and/or arbitration procedures (by the Land and Resources Tribunal) to resolve the matter. The Co-operation Agreement recommended by the arbitrator will then form part of the conditions of the tenure.

A new or revised Agreement will be required with each application for a new tenure. Either party may seek to update the Agreement if the proposed activities or material situation of the Agreement is significantly revised.

1.6 Mineable Coal Seams

The new system also seeks to impose more onerous obligations for petroleum tenure holders where their actions may jeopardise the future mineability of coal seams. The Department has proposed that lease holders be required to comply with certain regulations and protocols which apply to defined "mineable coal seams" and which will relate to information exchange, drill hole location and access issues. The suggestion is for definitions to be Basin specific and qualified by seam thickness, depth to seam and seam type. It is intended that the regulations could be changed over time by Order in Council as advances in technology and economics dictate.

1.7 Venting and Flaring of CSG

In order to prevent indiscriminate venting and flaring of CSG, the new regime would also require that a tenure holder demonstrate under its Mineral Development Plan or approved Development Plan (pursuant to the proposed *Petroleum and Gas Act* 2002) that the gas cannot be commercially utilised if it is intended to vent or flare the gas.

2. KEY DIFFERENCES FROM PREVIOUS PROPOSED REGIME

There are a number of significant changes brought about by the proposed regime which signal a substantial policy shift in favour of CSG producers and which erode some of the rights handed to coal miners under previous discussion papers. The primary differences are detailed below.

2.1 No additional protection for existing mining rights

Under the previous proposed regime, all pre-existing mining leases (ie. mining lease applications and granted mining leases pre 23 October 1996) were to be given CSG rights to the "centre of the earth". The new proposed regime, however, is intended to apply to all current and future petroleum, coal and oil shale tenures, and therefore does not draw any distinction between pre-existing rights and future rights.

2.2 No "coal CSG areas"

The previous discussion paper created the concept of "coal CSG areas", areas in which coal miners were to be given priority in terms of CSG rights. In relation to mining leases which were not pre-existing, coal miners were given priority in relation to CSG rights within coal CSG areas and to specified depths.

Petroleum title holders, on the other hand, could only apply to produce CSG within coal CSG areas and without the tenure holder's consent if there was no coal mining development proposed for the next 5 years. A petroleum lease would not be granted over those areas until conditions of

access to the surface area covered by the coal CSG area were agreed with the tenure holder or the Minister.

The concept of a coal CSG area does not appear at all in the new proposed regime.

In addition, the previous system required subsequent tenure holders to seek approval and access from existing tenure holders where their area of interest overlapped. The mooted new regime greatly diminishes these rules of priority and access. For example, if there is no subsisting petroleum tenure, a mining lease applicant requesting rights to hydrocarbon over an area will be required to wait until expressions of interest for a petroleum lease over the area are advertised. The competing petroleum lease applications will then be assessed against certain criteria. This is in stark contrast to the previous regime where, if there was no conflicting prior title, a mining lease would be granted to the "centre of the earth" without reference to the rights of any other interested parties.

2.3 Hydrocarbon not automatically granted

Although the option exists for mining leases to incorporate rights to hydrocarbon, the discussion paper clearly states that rights to the mineral "hydrocarbon" will not be routinely granted for a mining lease for coal. It is intended that they would, however, be granted in the following situations:

- if there is a mining lease or mining lease application covered by pre-existing authority to prospect – only with the permission of the ATP holder (this mirrors the previous proposals);

- if a mining lease is surrounded by an ATP (ie. a window – which was excluded at the time of grant of ATP) - on receipt of an application for the mineral hydrocarbon by a mining lease holder or an application for a petroleum lease from the authority to prospect holder, the other tenure holder will be invited to apply for a petroleum lease or the mineral hydrocarbon. If two applications are received, they will be assessed in relation to a number of criteria which are detailed below;

- if there is a mining lease or mining lease application not covered by any petroleum tenure – upon application for the mineral hydrocarbon, expressions of interest for a petroleum lease over the area will be advertised. Applications would then be assessed against certain criteria, including:
    - proposed production rates and timing of production;
    - proposed/confirmed market for gas;
    - proposed/confirmed transport to market;
    - relationship/synergies with related investments or holdings;
    - applicant's history of previous resource developments;
    - measures the applicants will make to accommodate overlying tenure holders;
    - impact of overlying tenure arrangements; and
    - economic benefit to the State.

> The plan is for the successful applicant to then be granted either the right to the mineral hydrocarbon under their mining lease or a petroleum lease.
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> This appears to completely reverse the situation under the previous proposed regime. If there was no conflicting prior title, a mining lease would be granted to the "centre of the earth", and there was no need to advertise for applicants for a petroleum lease. Applications for tenure were therefore dealt with on a "first come, first served" basis, rather than with consideration for subsequent competing interests.

Even if these requirements are met, the Department has indicated its intention for the Minister to not grant rights to the mineral hydrocarbon unless he or she is convinced that CSG resources exist in commercially viable quantities and that production of the mineral hydrocarbon within the mining lease is planned to an acceptable level and has an appropriate time of commencement.

The Department also proposes that the legislation be amended to provide that a mining lease will not be granted for the mineral hydrocarbon alone (ie. independent from a mining lease for coal). Independent gas mining is not intended under the *Mineral Resources Act*.

3. UNCERTAINTIES

The proposed new regime raises a number of questions as to how it will apply in practice if implemented. These include:

3.1 Importance of including "hydrocarbon" in mining lease

It is clear that it may be extremely important for a mining lease holder to apply for the mineral "hydrocarbon" to be added to their mining lease if they wish to secure rights to all CSG within the boundaries of the lease. However, as indicated, there will be a number of initial hurdles to overcome if the Department's proposals come into force. The Minister must be satisfied about certain matters relating to the production of the hydrocarbon because if he or she is not, the mineral may not be added to the lease and, even if it is, the lease holder's rights may subsequently be suspended or removed because of non-production.

3.2 Scope of Mineral Development Plans

There may be some concern for coal miners that, if these new plans are realised, the scope and length of their Mineral Development Plans may not adequately protect their mining operations. For example, a coal miner may have a mining lease over an area which is surrounded and overlapped by a petroleum lease. If the coal miner intends to vary the area of its mining activities (and amends its Mineral Development Plan accordingly), there may be some uncertainty as to what rights the coal miner has in relation to the new area if it is currently subject to a petroleum lease.

3.3 The impact on native title

The Department has suggested in the position paper that the proposed CSG regime will not provide any greater exposure for tenure holders in relation to native title than that which currently exists under the normal tenure process outside of the regime. Certainly, a person seeking the grant of a new tenure over land where native title is not extinguished will face the same native title issues they would currently face now.

However, the amending legislation to introduce the new regime will need to be carefully drafted if it itself is not to be considered a "future act" under the *Native Title Act* 1993 (Cth). Legislation is capable of being categorised as a future act if it "affects" native title by either extinguishing native title rights or by being wholly or partly inconsistent with the continued existence, enjoyment and exercise of native title rights. If the legislation itself was a future act, then it would face rigorous procedures under the Commonwealth *Native Title Act* before it could be enacted.

Any exposure or threatened exposure of the legislation to a native title challenge would seriously undermine the proposed new regime. At the time of writing, the native title position in Queensland in respect of mining activities is particularly uncertain, as the majority of Queensland's "mining specific" native title laws have recently been ruled invalid by the Federal Court, a decision which is presently the subject of appeals to the full Federal Court.

3.4 Tribunal rewriting agreements

The Department intends that the Land and Resources Tribunal would be involved in resolving parties' disputes if a commercial agreement could not be reached on access, information exchange or other issues. Although the Department foresees that, if the new regime were implemented, the Tribunal would be assisted by those with appropriate technical and commercial expertise, this would appear to be an onerous and difficult task for the Tribunal. Until a number of such Co-operation Agreements are in the marketplace, there would be a degree of uncertainty as to the terms the Tribunal might impose.

3.5 Incentives

The discussion paper flags that Queensland Treasury, in consultation with the Department, is considering possible "incentives" (perhaps by way of royalty reduction) which parties may be given for entering co-operative arrangements, but does not discuss the matter in any detail. This obviously will be a material issue which will require further consideration.

3.6 Unitisation

The discussion paper does not deal in any depth with the issue of adjoining mining leases and petroleum leases draining each other's CSG resources or what "unitisation" arrangements may need to be put in place. While it does suggest that the legislation will make provision for unitisation agreements between production tenures holders both within one Act and by production tenures under the different Acts, it does not discuss the nature of those agreements in any detail.

4. COMMENTS ON DISCUSSION PAPER

Submissions on the discussion paper closed in early April 2002. Those submissions are now being considered by an independent review panel, and will be used as a basis from which to develop appropriate legislative amendments.

The Department has indicated that the review panel will not be in a position to finalise their report and provide it to the Minister until mid-August. A decision has not yet been made on whether the report will be made more widely available and, if so, to whom and at what time.

THE PROPRIETARY NATURE OF OVERRIDING ROYALTIES IN PETROLEUM AGREEMENTS IN AUSTRALIA

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1. INTRODUCTION

It is a somewhat vexed question whether an overriding royalty in agreements concerning petroleum can be a proprietary interest. It is suggested that part of the problem lies in the differences between the parts: the overriding royalty and the interest in petroleum. What is the overriding royalty? Is it an incorporeal hereditament? If so, how does this interest relate to petroleum? If the overriding royalty is an incorporeal hereditament, we are considering a species whose genealogy extends back to Roman times in the form of the servitudes. From the time of William the Conqueror there was a gradual evolution and perfection of the land system and its incorporeal hereditaments. As time progressed some classes fell by the wayside and others decayed.

On the other side petroleum as a subject of legal interest is relatively new. There is a difficulty in fitting the overriding royalty interest into one of the members of the incorporeal hereditaments and then grafting that interest onto the petroleum subject matter. The cases demonstrate the difficulties that Courts have found in trying to reconcile these two. The results have not always been clear. In our submission, the characteristics of the relevant incorporeal hereditaments have been applied too rigorously to fit the nature of the overriding royalty. The result has been that the fit has been ill matched. The purpose of this essay is to show some of the traits of the most relevant incorporeal hereditaments and to show how they can fit reasonably well within the petroleum subject matter. We examine how Canada has recently dealt with this matter and suggest that Australian Courts should adopt a similar modern approach.

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