Queensland Government

Minister for Environment and the Great Barrier Reef
Minister for Science and Minister for the Arts

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Queensland Legislative Assembly
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By Leave ☐
MP: Mr Speaker
Clerk's Signature:

The Honourable Curtis Pitt MP
Speaker of the Legislative Assembly
Parliament House
George Street
BRISBANE QLD 4000

By Email: Speaker@parliament.qld.gov.au

Dear Mr ~~Speaker~~ Curtis,

I wish to draw to your attention a matter of privilege arising out of debate on the *Mineral and Energy Resources (Financial Provisioning) Bill* on 14 November 2018 by the Member for Maiwar, Michael Berkman MP.

I submit that in contributing to the debate, the Member for Maiwar has deliberately misled the House and is in contempt of the Queensland Parliament, in particular Standing Order 266 of the *Standing Rules and Orders of the Legislative Assembly*.

There are three elements to be proven in order to establish that a Member of the Legislative Assembly has committed the contempt of deliberately misleading the House:

1. The statement must have been misleading;
2. The Member making the statement must have known, at the time the statement was made, that it was incorrect; and
3. In making the statement, the Member intended to mislead the House.

Section 37 of the *Parliament of Queensland Act 2001* sets out the meaning of contempt of the Assembly thus:

> *(1) Contempt of the Assembly means a breach or disobedience of the powers, rights or immunities, or a contempt, of the Assembly or its members or committees.*
> *(2) Conduct, including words, is not contempt of the Assembly unless it amounts, or is intended or likely to amount, to an improper interference with—*
> *(a) the free exercise by the Assembly or a committee of its authority or functions; or*
> *(b) the free performance by a member of the member's duties as a member.*

Standing Order 266 of the *Standing Rules and Orders of the Legislative Assembly* sets out examples of what might constitute a contempt of the Queensland Parliament and, whilst not limiting the power of the House to the matters contained therein, includes a reference in sub-paragraph (2), to:

deliberately misleading the House or a committee (by way of submission, statement, evidence or petition).

As outlined, there are three elements to be proven in order to establish that a Member has committed the contempt of deliberately misleading the House. I will address each of these in turn.

1 The statement must have been misleading

On 14 November 2018 the Member for Maiwar, during his contribution to the debate of the *Mineral and Energy Resources (Financial Provisioning) Bill* stated:

> "Months ago I had made inquiries with the Minister for Environment about how many voids there are in Queensland as a consequence of past and current mining operations. Surely having this information to hand is essential for us as legislators when we are considering changes like those proposed in the bill. Minister Enoch replied to me **advising that she would not and could not provide this information** even after the bill had been introduced. Just today we find out, based on independent analysis, that 218 final voids will be unaffected by this reform."

This statement is recorded in the official record of proceedings and is misleading.

On Tuesday 6 March 2018, the Member for Maiwar lodged Question on Notice No. 83 in which he requested to know the number of final voids that have been approved as part of final landforms for coal mining activities. My tabled response to that question clearly states that "approximately 218 final voids are approved as part of final landforms." I have enclosed a copy of that response for your information.

On 21 June 2018, the Member wrote to me asking questions relating to transitional provisions in the Bill, which was still being considered by the Parliament at that time. The questions related to how many existing mines had committed to backfilling final voids, how many would be automatically transitioned into the new provisions that were then proposed by the Bill, and how many would not be automatically transitioned.

I replied to the Member's letter on 31 July 2018 and advised that information about transitional provisions was unable to be provided as the Bill was still before the Parliament. I have enclosed a copy of both these letters for your information.

2 The member making the statement must have known, at the time the statement was made, that it was incorrect

Given that the Member for Maiwar was in receipt of both my tabled response to Question on Notice No. 83 and my response to his letter in July 2018, I submit that he must have known that his statement to the Parliament that I "would not and could not" provide information about final voids was incorrect.

3 In making the statement, the Member intended to mislead the House

Mr Speaker, having established that the statement made by the Member for Maiwar was misleading, and that he knew it to be misleading, it must now be established that the Member for Maiwar intended to mislead the House.

I submit that, given the Member's strong views about the government's position contained in the Bill, and the amendments he was advocating for, he was intentionally confusing the two issues that were the subject of the Question on Notice in March 2018 and our correspondence in June/July 2018. I believe the Member was trying to present an inaccurate position that government was not aware of the number of final voids that were approved.

Considering the arguments and the fact that the Member for Maiwar has not taken any of the available opportunities to correct the record, I respectfully submit that this matter warrants the further attention of the House by referral to the Ethics Committee.

Please do not hesitate to contact me or my Acting Chief of Staff, Hannah Jackson, on 3719 7140 if you require any further information to assist in your deliberation of this matter.

Yours sincerely

Leeanne Enoch MP
Minister for Environment and the Great Barrier Reef
Minister for Science and Minister for the Arts

Enc (3)

MICHAEL BERKMAN MP
Queensland Greens Member for Maiwar

7 December 2018

Hon Curtis Pitt MP
Speaker of the Legislative Assembly
Parliament of Queensland
George St Brisbane 4000

By email: speaker@parliament.qld.gov.au

Mining Rehabilitation Bill Debate

Dear Mr Speaker,

Thank you for your letter of 23 November in relation to the complaint from the Minister for Environment and the Great Barrier Reef, Minister for Science and Minister for the Arts, the Hon Leeanne Enoch MP (**the Minister**).

The Minister's complaint relates to debate on the *Mineral and Energy Resources (Financial Provisioning) Bill* (**the Bill**) on 14 November 2018.

For the purpose of this response, the following broader excerpt from the record of proceedings is important in providing the full context of the comments with which the Minister has taken issue:[1]

> The companies and Labor have talked endlessly about how we cannot make existing mines clean up their own mess because that would amount to retrospectivity. That is complete rubbish. By bringing on this legislation Labor has admitted what we have said for years: the mining rehabilitation system in Queensland is fundamentally broken. That means we need to fix it, not lock in out-of-date approvals. There is nothing retrospective about saying to a company, 'Times have changed. The community will no longer accept massive holes in the ground that leach toxic chemicals and pollute local rivers.'
>
> The vast bulk of mines in Queensland in terms of area of land disturbed by mining are currently operating. Months ago I had made inquiries with the Minister for Environment about how many voids there are in Queensland as a consequence of past and current mining operations. Surely having this information to hand is essential for us as legislators when we are considering changes like those proposed in the bill. Minister Enoch replied to me **advising that she would not and could not provide this information** even after the bill had been introduced. Just today we find out, based on independent analysis, that 218 final voids will be unaffected by this reform. That is 218 final voids that industry will not be required to clean up.

The Minister alleges that my statement (in **bold** above) is misleading.

As you may recall, one of the fundamental concerns with this Bill was the extent to which it would apply the new rehabilitation requirements to existing and approved mines - frequently described in terms of whether

[1] Queensland Legislative Assembly Hansard Wednesday 14 November 2018, pp 3519-3520.

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the Bill would apply retrospectively. This is clear from the above excerpt, much of the public and Parliamentary debate on the Bill, and the amendments I proposed.[2]

My efforts over nine months from March to November 2018 were focussed on finding the answer to one simple but fundamental question -- How many final voids from currently operating or approved mines will be permitted to remain under the government's proposed mining rehabilitation reforms?

My Question on Notice of 6 March 2018 aimed to establish how many voids were approved under the former regime while my letter to the Minister of 21 June 2018 aimed to understand what impact the government's proposed reforms would have on those final voids.

It is important to stress that the Minister's answer to my Question on Notice did not answer the more fundamental question. The fact that 218 voids had been approved as part of final landforms as of April 2018 means little if the application of the transitional provisions of the Bill to the great variety of existing environmental authorities is not explained.

In her letter to me dated 31 July 2018, the Minister noted that her Department was still undertaking a "comprehensive review" of rehabilitation commitments including "identifying which of these commitments have been translated into conditions of the environmental authority for each mine". My reading of that response is that the government (as of 31 July 2018) had not yet completed the work required to answer my question.

The Minister also made clear that she did not intend to provide this information about how the transitional arrangements under the Bill would apply while the Bill was before Parliament. In other words, she refused to answer that fundamental question.

As a direct consequence, I drafted amendments addressing this question which would have ensured that final voids approved under the former regime would not be automatically exempt from the new regime. I circulated those amendments to government, opposition and cross-bench MPs, including the Minister. I have **attached** my letter to the Treasurer, copied to the Minister, dated 14 September 2018.

After many months of trying to understand the impact of the transitional provisions of the Bill, the government's amendments re-wrote several key provisions of the Bill, including significantly redrafting the clauses dealing with existing non-use management areas (i.e. final voids).

My intention in the entire passage from Hansard excerpted above, including the passage with which the Minister has taken issue, was to highlight that the debate was not informed by any detailed information on the real, quantifiable extent of non-use management areas, specifically final voids, that will likely be permitted under these reforms.

The Minister asserts in the complaint her belief that I was "trying to present an inaccurate position that government was not aware of the total number of final voids that were approved." This information is already on the record, and only as a consequence of my question on notice. The point of the above passage, taken as a whole, related to the Minister's unwillingness or inability to explain the consequence of this reform for existing and approved voids in Queensland, as articulated in her letter of 31 July 2018.

It was certainly not my intention to mislead the House. On detailed reflection, and taking into account the precise wording of both my question on notice of 6 March 2018 and my letter to the Minister of 21 June 2018,

[2] See explanatory notes tabled for proposed amendments, not all of which were ultimately moved: https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1896.pdf.

and the Minister's answer to each, a more complete statement might have included the additional underlined words:

> "Months ago I had made inquiries with the Minister for Environment about how many voids there are in Queensland as a consequence of past and current mining operations, and how many of these will be unaffected by the proposed mining rehabilitation reforms."

In light of the above explanation, and taken in context, I believe my contribution to the second reading debate on the Bill was truthful and was not deliberately misleading. Should you come to an alternative view, I am certainly willing to correct the record by including the additional underlined words set out above, and to apologise to the Minister for this inadvertence.

Please do not hesitate to contact my office on 07 3737 4100 if you wish to discuss this matter.

Kind regards,

Michael Berkman MP

MICHAEL BERKMAN MP
Queensland Greens Member for Maiwar

14 September 2018

The Hon Jackie Trad MP
Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships
1 William Street
BRISBANE QLD 4000
By email: treasurer@ministerial.qld.gov.au

CC: Minister for Environment and the Great Barrier Reef, The Hon Leeanne Enoch MP
By email: environment@ministerial.qld.gov.au

Create Jobs in Mining Rehabilitation - Greens amendments

Dear Treasurer,

I am writing to ask for the government's support for the Greens' amendments to the *Mineral and Energy Resources (Financial Provisioning) Bill 2018* (**the Bill**).

The Queensland Greens support the Bill as a welcome and long-overdue step forward, but we cannot support the substantial loopholes and carve-outs which the government has included. 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.

Our 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.

By adopting our amendments, the government could follow the example of the USA and bring Queensland up to long-established world's best practice by making sure coal mines cannot leave behind toxic final voids.

The boom and bust of corporate greed is leaving Queenslanders behind, and the community expects the government to stand up to big mining companies which have made huge profits from our resources. Billionaire coal companies don't deserve automatic approval to leave behind toxic final voids.

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

I have **attached** a copy of our amendments along with the explanatory notes.

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Summary of the Queensland Greens' amendments

Our amendments would:

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

Amendment 1 - 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 is responsible 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, and we have already seen this risk playing out internationally. In 2016, Peabody Energy, the world's largest coal mining company spent 12 months in Chapter 11 bankruptcy protection in the USA.

Unlike other minerals like copper, coal mining use 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.

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 as Americans enjoy.

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 additional item in proposed s126D in the *Environment Protection Act.* Section 126D sets out the requirements for the schedule of a Progressive Rehabilitation and Closure Plan (**PCRP**). 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 *Environmental Protection Act 1994.*
- This means that coal mines cannot include a "non-use management area" in their PCRP schedule.

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

Amendment 2 - 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 by 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 story dated 6 August 2018 from Josh Robertson, *Queensland mining rehabilitation laws allow loopholes for existing mines, advocates say*.

Existing mines are likely to represent the vast bulk of all mines in Queensland for many years to come. Therefore 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 rules on non-use management areas are already very weak. Crucially, they allow mining companies to claim that filling in final voids is simply too expensive.[2] 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.

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.[3]

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 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.[4]. This is likely to exclude most mines in Queensland and, by way of written agreement, this loophole could be applied to virtualy 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.

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[2] 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"*

[3] See cl 104 of the Bill, relating to proposed s126C(1)(g) and (h) of the *Environmental Protection Act 1994.*

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

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.

No requirement for public notice and submission for almost all existing mines

Similar to the above, a further 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.

It is not clear how many mines stand to benefit from these two loopholes. In an attempt to clarify this issue, I 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.

Amendment 3 - 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.[5]

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

[5] See Part 8, Division 5 of the Bill.

counter-terrorism authorities.[6] 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.[7]

The proposed 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**), 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 the RTI Act tabled in Parliament by the Attorney-General in October 2017, and the Solomon Report [Review Report]."

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.

I strongly urge the government to support the Greens' amendments.

Please do not hesitate to contact my office on 07 3737 4100 if I can be of assistance.

Kind regards,

Michael Berkman MP

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

Question on Notice

No. 83

Asked on Tuesday, 6 March 2018

MR M BERKMAN ASKED THE MINISTER FOR ENVIRONMENT AND THE GREAT BARRIER REEF, MINISTER FOR SCIENCE AND MINISTER FOR THE ARTS (HON L ENOCH)—

QUESTION:

Will the Minister advise (a) the number of final voids that have been approved as part of final landforms for coal mining activities authorised under Environmental Authorities issued under the Environmental Protection Act 1994, (b) the total spatial area covered by these voids and (c) the number of voids that require fencing or bunds?

ANSWER:

I thank the Honourable Member for the question.

Approximately 218 final voids are approved as part of final landforms for coal mining activities under the *Environmental Protection Act 1994*. This figure includes historical coal mining activities that were approved prior to the commencement of the *Environmental Protection Act* in 1994.

The total spatial area covered by these voids is listed in documents relevant to the approval and operation of each site, and these documents are publically available through the Department of Environment and Science.

Currently, Environmental Authorities require that options available for minimising final void numbers and sizes at end of mine life are described in final void investigation reports. These are required to be submitted to the Department of Environment and Science prior to closure. At a minimum, the highwalls of all final voids are required to be fenced or bunded.

During our first term, the Palaszczuk Government delivered amendments to the *Environmental Protection Act 1994* to introduce Chain of Responsibility laws which allow environmental and rehabilitation obligations (such as management of final voids) to be enforced against 'related persons' of companies in financial difficulty. These laws ensure the government has the power to act to ensure that the community doesn't bear the costs where companies seek to structure their affairs to avoid their environmental obligations.

In the Government's first term, we also embarked on a major program of reform of the financial assurance and mine rehabilitation regimes to better protect the environment and taxpayers. An element of that comprehensive program are measures to ensure mined land is rehabilitated progressively rather than toward the end of a mine's life.

In September 2017, the Government released the Mined Land Rehabilitation Policy which sets out the Government's expectations in regards to non-use management areas such as final voids. The Policy clearly states the Government's intention to restrict approvals of final voids in floodplains and includes restricted circumstances where voids outside floodplains may be accepted.

The Honourable Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships has also recently introduced legislation relevant to this matter.

Thank you for your interest in this important government priority.