

Surat Basin Rail (Long-term Lease) Bill 2011

Explanatory Notes

Short title

The short title of the Bill is the Surat Basin Rail (Long-term Lease) Bill 2011.

Policy objective and the reasons for them

The objective of the Bill is to protect the State's interests under the Surat Basin Rail (SBR) Lease and the SBR Operating Agreement.

On 4 December 2006, the Government granted an exclusive mandate for the SBR project pursuant to Appendix One of the *Public Private Partnership Policy* and *Value for Money Framework*. The *Public Private Partnership Policy* requires that the SBR project be developed through to financial close at no cost or risk to the State.

If the SBR project achieves financial close, the State intends to grant the Surat Basin Rail Joint Venture (SBRJV) a concession to construct and operate the SBR. The suite of concession agreements will include a Development Agreement and Licence for construction of the railway and an Operating Agreement and Lease for operation of the railway over the long term. These agreements will codify the rights of the parties and ensure the allocation of costs and risks is consistent with the *Public Private Partnership Policy*.

This Bill's purpose is to give certainty to the legal framework for the SBR project by exempting the SBR Lease from some laws which apply to all Queensland leases. Without the exemptions, the SBRJV will have additional rights inconsistent with the Operating Agreement and there will be uncertainty about the State's rights and obligations under the Operating Agreement and Lease.

Achievement of policy objectives

To achieve its objective, the Bill will exempt the SBR Lease from some provisions of the *Property Law Act 1974* (PLA) and the *Land Title Act 1994* (LTA).

Exemptions to the Property Law Act 1974

The Bill will achieve its objective by enabling the State to effectively manage conditions of assignment and termination of the Lease under the contractual regime set out in the Operating Agreement by removing the potential for the lessee to have recourse to an alternative and conflicting legal regime under section 121 and Part 8, Division 3 of the PLA.

Section 121 of the PLA imposes statutory restrictions on a lessor's ability to withhold consent to a proposed assignment by a lessee. Given the nature of the project and the lease term, the State considers that the contractual arrangements with the SBRJV ought to comprehensively govern the circumstances in which the SBRJV may assign the SBR Lease.

Part 8, Division 3 of the PLA is titled “Relief from forfeiture” and contains, amongst other things, directions for breach proceedings and an automatic entitlement for the lessee to seek relief from the courts when the lessor cancels the lease. It is intended that the SBR Operating Agreement will 'codify' the rights and obligations of the parties in relation to issues of default and termination.

Exemption to the Land Title Act 1994

The Bill ensures efficient administration of the SBR Lease by permitting adjustments to the boundaries of the Lease. Amendments to lease boundaries are presently prohibited by section 67(3)(a) of the LTA.

If in the future it is necessary to adjust the area of the Lease (for example, to allow construction of new infrastructure or to adjust the alignment of the existing railway), the parties would not be able to amend the Lease. Section 67(3)(a) of the LTA operates such that a new Lease would have to be negotiated and executed each time a change in the Lease boundaries is necessary or desirable. Negotiation of a new Lease would be less efficient and more costly than amending the existing Lease.

The exemption of section 67(3)(a) from applying to the SBR Lease will not impact on the rights of adjacent landholders or the acquisition powers available to the Coordinator-General to acquire land in the proposed State development area or under any other provisions within the SDPWO Act. The exemption also does not oblige the Coordinator-General to acquire

additional land for the Lease or exempt any future acquisition process from being administered in accordance with the *Acquisition of Land Act 1967*. The proposed exemption simply allows the State to amend the Lease without having to issue a new Lease if the boundaries vary in any way.

The proposal to exempt the Lease from section 67(3)(a) of the LTA is considered reasonable and appropriate to enable the State to manage administration of the Lease in an efficient and cost effective manner.

Alternative ways of achieving policy objectives

There are no non-legislative methods by which the objectives of the Bill can be achieved.

In determining the appropriate legislative option to achieve the objectives, consideration was given to enacting amendments to the PLA which would provide for the Minister to declare by regulation any long-term lease for an infrastructure asset to be exempt from section 121 and Part 8, Division 3 of the PLA. An amendment of this nature would need to be the subject of due policy consideration and consultation with stakeholders, taking account of a wider range of issues than those relevant to the SBR project. As such, this option was not considered to be achievable in the timeframes required to execute the SBR Operating Agreement and Lease.

Estimated cost for government implementation

There will be minimal budgetary implications for Government in relation to the implementation of the proposed exemptions under the Bill.

Monitoring and enforcement of the State's rights under the assignment and termination provisions within the Operating Agreement and Lease will be necessary to protect the State's interests over the course of the concession.

Any costs the State Government may incur in connection with the Bill will be outweighed by the benefits the State receives from the royalties from the mining and export of thermal coal reserves in the Surat Basin through the Port of Gladstone. The Environmental Impact Statement for the SBR project (released in 2009) estimated that the State will receive approximately \$300 million in royalties per year if the project's full transport capacity of 42 million tonnes per annum is utilised. The SBR will also generate employment and stimulate local economies during construction and operation.

The Bill is considered an appropriate course of action to reduce the State's risk associated with the operations phase of the project, provide the State and project proponent with greater certainty and enhance the potential economic gains for the State from the development of new rail infrastructure and mines in the Surat Basin.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles (FLPs) and the principles of natural justice. Potential breaches of FLPs are addressed below.

Clause 5 (Non-application of provisions of Land Title Act 1994 and Property Law Act 1974)

The principle of natural justice requires that a decision should not be made which deprives a person of some right, interest or legitimate expectation of a benefit without being given an adequate opportunity to be heard. If there is any suggestion Clause 5 of the Bill is inconsistent with this principle, then the countervailing fact is that the SBRJV will have a fully negotiated, assignment, default and termination regime in the Operating Agreement.

The Bill will have the effect of depriving the SBRJV as lessee of certain rights under the PLA, but the SBRJV will have negotiated acceptable alternative contractual rights.

The potential inconsistency of Clause 5 of the Bill with the FLPs is considered justified because:

- the SBRJV achieves its desired level of commercial confidentiality;
- the State's risk exposure is reduced;
- the uncertainty which would otherwise result from the application of the sections under the PLA and LTA to the SBR Lease is removed; and
- the SBRJV has the safeguard of a reasonable legal regime in the Operating Agreement.

Consultation

The Bill has been prepared in consultation with the Office of the Queensland Parliamentary Counsel (OQPC) and is supported by OQPC.

During the course of identifying the appropriate legislative methods to achieve the objectives and drafting the Bill, the Office of the Coordinator-General has consulted with the SBRJV and given consideration to the comments submitted by the SBRJV and their legal advisors.

The Office of the Coordinator-General has also consulted with relevant State agencies including the Department of Justice and Attorney-General, the Department of Transport and Main Roads, the Department of Environment and Resource Management, Treasury Department and the Department of the Premier and Cabinet.

As there are no broader ramifications for the community arising from the Bill, community consultation was not undertaken during the preparation of the Bill. However, community consultation has been undertaken on other aspects of the State's involvement with the SBR project, including the Coordinator-General's assessment of the Environmental Impact Statement under Part 4 of the *State Development and Public Works Organisation Act 1971* (SDPWO Act) and the proposal to declare the Surat Basin Infrastructure Corridor State Development Area under section 77 of the SDPWO Act.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland, and is uniform and complementary to other legislation within Queensland including the *Dalrymple Bay Coal Terminal (Long Term Lease) Act 2001*, the *Airport Assets (Restructuring and Disposal) Act 2008* and the *Transport Infrastructure Act 1994*.

Other jurisdictions, including South Australia and the Northern Territory have legislation analogous to the Bill, including the *Alice Springs to Darwin Railway Act 1997 (SA)* and the *Australasia Railway (Special Provisions) Act 1999 (NT)*.

Notes on provisions

Part 1

Clause 1 states that, when enacted, the Bill will be cited as the Surat Basin Rail (Long-term Lease) Bill 2011.

Part 2

Clause 2 states that the Bill is intended to commence on a day fixed by proclamation.

Part 3

Clause 3 provides the meaning of the Surat Basin rail corridor land.

Part 4

Clause 4 provides for the Minister responsible for this Act to declare a lease to be exempt if it meets certain criteria relating to the Surat Basin Rail.

Part 5

Clause 5 provides for the non-application of section 121 and Part 8, Division 3 under the *Property Law Act 1974* and section 67(3)(a) of the *Land Title Act 1994* to a lease declared to be exempt under Clause 4.

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