

Application for Modification of Project Approval 08_0111

To: Department of Planning NSW
From: Austar Coal Mine Pty Limited
Date: 9 March 2010

1 INTRODUCTION - EXECUTIVE OVERVIEW

This application, made to the NSW Minister for Planning (**Minister**) for a modification to the Project Approval issued by the Minister on 6 September 2009 (application number 08_0111) (**Project Approval**), is for two words to be removed from Condition 1 of Schedule 3 of the Project Approval to enable the proponent to enter into compensation agreements with landowners within the project area.

The need for the modification arises from the inconsistency between:

- (a) Austar Coal mine's access and compensation arrangements with landowners within the mine (which have been entered into in previous stages of the Mine project and which have been successful in managing relationships between the mine and landowners); and
- (b) the need (under the Project Approval as it is presently worded) that the Mine Subsidence Board (**MSB**) "*agree*" to subsidence impacts exceeding "*safe, serviceable and repairable*" criteria (in terms of the provisions of clause 1 of Schedule 3 of the Project Approval);

in order to enable the Austar Coal Access and Compensation Agreement (also known as "Sharing the Benefits") to operate according to their intended operation.

2 BACKGROUND – PROJECT APPROVAL AND ACCESS AND COMPENSATION AGREEMENT

- (a) Condition 1 of Schedule 3 of the Project Approval provides that the "*Proponent shall ensure that the project does not cause any exceedence of the key performance measures in Table 1*".
- (b) Table 1 stipulates that "*Built Features*" (defined in the Project Approval to include "*any building or work erected or constructed on land*") must not be impacted by subsidence arising from the development in excess of "*safe serviceable and repairable unless the owner and the MSB agree otherwise in writing*"
- (c) Condition 2(a) Schedule 3 of the Project Approval (the **Condition**) contemplates that the miner and the affected landowner may agree between one another how they will deal with the impacts of mining on the property.
- (d) Condition 2 imposes obligations on Austar Coal which do not apply if "*there is a written negotiated agreement with the landowner*" thus providing a mechanism for

Application for Modification of the Austar
Coal Mine Stage 3 Project Approval

the landowner and miner to negotiate a contractual relationship above the “safety net” rights of landowners under the Project Approval.

- (e) The Austar Access and Compensation Agreement (known as the “Sharing the Benefits Agreement”) (**Austar Agreement**) has been signed with a number of landowners in respect of Stage 2 (which is subject of a prior development consent). It provides a comprehensive arrangement between landowner and miner to deal with access and compensation arrangements.
- (f) The Austar Agreement is proposed to be offered to the landowners within the Stage 3 area. Austar Coal considers that the Austar Agreement provides a comprehensive and appropriate outcome in relation to compensation and other matters arising between landholder and miner in an underground mining context. Further, it is understood that there is broad political support for the achievement of private agreements between landowners and miners which avoid the need for resolution of landowner’s entitlements using adversarial processes.
- (g) The Austar Agreement satisfies the requirements of Condition 2 to substitute land acquisition commitments or rights arising from mining subsidence impacts with an agreement between landholder and miner (provided that a copy of each signed agreement is forwarded to the Department of Planning).
- (h) A summary of the effect of the Austar Agreement in relation to “*subsidence related impacts*” is attached as Annexure A:
- (i) The result of the Austar Agreement is that in return for the compensation amounts (and other benefits) the landowner releases Austar from compensation under the Mining Act and from acquisition obligations under the Project Approval. It would be (commercially) an absurd result for the landowner to be entitled to receive payment of significant compensation and other benefits in connection with the mining and then, having received those sums and benefits, be entitled to require the miner to purchase the property as well. This would amount to “double dipping”.
- (j) There is no requirement that “the written negotiated agreement” contemplated under condition 2 of the Project Approval be with MSB approval for it to operate to relieve Austar Coal of the obligation to acquire.
- (k) However, there is no waiver of breach of the condition (i.e. exceeding safe serviceable and repairable criteria) unless there is both the agreement in writing of the landowner and the MSB.
- (l) Accordingly, the result is of the current wording of the Project Approval is that the landowner can agree to the miner undertaking mining resulting in damage to the landowner’s improvements beyond safe serviceable and repairable criteria and that agreement operates to relieve the miner from the obligation to acquire. However, such an agreement does not operate as a waiver of the condition 1 and therefore, despite reaching agreement with the landowner (as contemplated by condition 2), Austar Coal could still be in breach of the Project Approval.

Application for Modification of the Austar
Coal Mine Stage 3 Project Approval

- (m) Under the Austar Stage 2 Modification granted by the Minister for Planning on 8 June 2008 (authorising 3 longwall panels) did not contain provisions equivalent to the conditions under the Stage 3 Project Approval which have the effect of requiring the MSB to consent to the agreement before the Austar Agreement can be fully effective in achieving its goal. This has allowed the Austar Agreement to be used between Stage 2 landowners and Austar Coal to great mutual satisfaction in the Stage 2 area.

3 MINE SUBSIDENCE BOARD'S (MSB'S) OBLIGATIONS IN RESPECT OF RESIDENCES

- (a) The MSC Act provides a scheme for levies to be collected from miners in NSW to create a fund which fund is to be used to remedy the effects of underground mining subsidence on improvements (as defined in the MSC Act – generally houses, related outbuildings and associated services and “*household effects*”).
- (b) Under the MSC Act, landowners are entitled to make claims for damages to “improvements” as defined. The relevant provision (section 12 MSC Act) appears below:

“(1) Claims may be made under this Act for payment from the Fund of:

- (a) compensation for any damage to improvements that arises from subsidence, except where the subsidence is due to operations carried on by the owner of the improvements,*
- (b) an amount to meet the proper and necessary expense incurred or to be incurred as a result of such damage in:*
- (i) building retaining walls or bolting together or underpinning or otherwise supporting, raising or repairing buildings and walls,*
- (ii) altering the approaches to or the levels of lands or buildings,*
- (iii) raising, lowering, diverting or making good roads, tramways, railways, pipelines, bridges, fences, sewers, drains or other improvements,*
- (c) an amount equivalent to the rent which would have been payable for such period as may be prescribed in respect of any buildings or works which by reason of such damage are untenable, under repair or in course of construction, or where such buildings or works or any part thereof are or is occupied by the owner thereof such sum in lieu of rent as the Board deems just,*
- (d) compensation for any damage to household or other effects that arises from subsidence, except where the subsidence is due to operations carried on by the owner of the household or other effects.”*

“Improvement includes any building or work erected or constructed on land; any formed road, street, path, walk or drive-way; any pipeline, water, sewer, telephone, gas or other service main, whether above or below the surface of the land.”

Application for Modification of the Austar
Coal Mine Stage 3 Project Approval

- (c) The MSB and associated all encompassing scheme of centralised underground mining subsidence compensation has been in existence for many decades. The scheme is funded by levies paid by coal miners in NSW.
- (d) Section 14 of the MSC Act provides that miners who pay their MSB Fund levies and comply with their mining leases *shall not be liable for any damage to improvements or household or other effects occasioned by subsidence.*
- (e) The scheme operates to pass liability for subsidence to improvements (as defined under MSC Act) from miners to the fund (paid for by miners) administered by the MSB.
- (f) The MSB is not relieved of obligations to pay compensation and other matters as provided by section 12 due to damage to “*improvements*” (owned by someone other than the mine) arising for mine related subsidence exceeding the board’s “*safe, serviceable and repairable*” criteria or any other criteria.
- (g) The Austar Agreement does not attempt to contract out of the statutory rights to compensation which exist under the mine subsidence compensation scheme. Nor does it attempt to interpose Austar Coal in the relationship between landowners and the MSB in relation to the any subsidence related compensation.

4 ENVIRONMENTAL IMPACTS

The modification sought will not have any environmental impacts. It is administrative in nature.

5 RELEVANT LEGISLATION

The Project Approval was issued under part 3A of the Environmental Planning and Assessment Act 1979 NSW (**EPA Act**).

It is proposed that the Project Approval be modified pursuant to the power of the Minister to do so under section 75W of the EPA Act.

Land Owners’ Consent

Regulation 8F of the Environmental Planning and Assessment Regulation NSW 2000 provides as follows:

The consent of the owner of land on which a project is to be carried out is required for a project application unless:

- (c) *the application relates to a mining or petroleum production project*


Land owners’ consent to the application is therefore not required for this application.

Application for Modification of the Austar
Coal Mine Stage 3 Project Approval

6 JUSTIFICATION

The inclusion of the words “and the MSB” in Table 1 in Schedule 3 interfere with the ability of the proponent of the Project to enter into individual agreements with landholders affected by the project in a manner which is contrary to public policy which is to encourage such private agreements between miners and affected landholders.

The modification of the condition sought will facilitate such agreements being entered into and render the Project Approval consistent with the MSC Act.



.....

Austar Coal Mine Pty Limited

9 March 2010

ATTACHMENTS:

Appendix 1 “Schedule of Land”

Annexure A – Austar Access and Compensation Agreement fundamental provisions

Annexure B – Project Approval – Austar Coal Mine Stage 3

Annexure C – Modification of Development Consent – Austar Coal Mine Stage 2

ANNEXURE A

AUSTAR ACCESS AND COMPENSATION AGREEMENT

SUMMARY OF PROVISIONS

The Agreement achieves the following broad objectives:

- (1) Provides the landowner with significant compensation in respect of the subsidence and other impacts of mining beneath the surface of their property and the cooperation which the landowners give in respect of mining operations. The compensation inherent in this “mining fee” is likely to significantly exceed the compensation for “compensable loss” (as defined) under Part 13 of the *Mining Act 1992* NSW (**Mining Act**) which would be assessed having regard for the legislated compensation entitlements of the landowners;
- (2) Does not interfere with the landowner’s rights to deal with the Mine Subsidence Board (**MSB**) in relation subsidence related impacts to “Improvements” as defined under the Mine Subsidence Compensation Act 1961 NSW (**MSC Act**) (which includes the residence and household effects);
- (3) Makes provision for Austar Coal to provide to the landowner detailed information about the mining operations;
- (4) Requires the parties to cooperate to develop a Property Subsidence Management Plan and do pre and post mining condition reports and for Austar Coal to rectify any damage to the land and its improvements (other than MSB Improvements) arising from subsidence;
- (5) Requires Austar Coal to provide assistance by way of information to the landowner in making claims for MSB Compensation including assistance with appeals or reviews of decisions made.
- (6) Releases Austar Coal from any obligation to acquire the property under any “Land Purchase Right” (any “*right of the Landholder to require Austar Coal to purchase the Property under any Law or pursuant to any Approval*”). These clauses make it clear that the agreement is intended to provide compensation in total for the landowner and that the landowner is not to require purchase as well as gain the benefit of the significant payments provided for under the Access Agreement. The extent of the compensation payments provided for is contemplated to take account of all these rights.

NOTE: Condition 2(a) Schedule 3 of the Project Approval only relieves Austar Coal of its obligations to acquire in respect of a “current” agreement. Therefore, under the terms of the Project Approval it is more accurate to describe the effect of the Access Agreement as a “suspension” which operates whilst ever

Application for Modification of the Austar
Coal Mine Stage 3 Project Approval

the parties perform their obligations under the Access Agreement. The result is that, under the terms of the Austar Agreement, if Austar Coal were to cease performing its obligations under the Austar Agreement then the landowner could terminate for breach whereupon the Austar Agreement would no longer be a “current” agreement and the landowner’s rights under condition 2(a) Schedule 3 would be restored.

Neither the Austar Agreement nor the MSC Act prevents the landowner receiving the compensation amounts (Access Fees and Mining Fees) under the Austar Agreement and then seeking recovery for damage to “Improvements” (as defined above) under the MSC Act. The amounts provided for under the Austar Agreement are in addition to any rights of the landowner to recover compensation from the MSB.

NOTE: This is an overview of the effect of the document. It does not purport to set out in full all conditions or to state the precise effect of the agreement.

**APPENDIX 1
SCHEDULE OF LAND**

Lot	DP	Lot	DP
10	DP1000136	11	DP69968
11	DP1000136	13	DP69968
521	DP1003186	10	DP69968
522	DP1003186	12	DP705614
1	DP1016843	2	DP714067
581	DP1017350	3	DP714067
21	DP1034264	4	DP714067
2	DP1036300	1	DP738718
3	DP1036300	1	DP738726
62	DP1039031	2	DP738726
61	DP1039031	3	DP745656
341	DP1044033	2	DP747207
342	DP1044033	140	DP755215
21	DP1052169	26	DP755215
22	DP1052169	32	DP755215
91	DP1064579	118	DP755215
21	DP1079917	118	DP755215
22	DP1079917	140	DP755215
210	DP1083970	117	DP755215
10	DP1093269	140	DP755215
11	DP1093269		DP755215
1	DP115675	4	DP755225
3	DP124547	120	DP755225
1	DP124547	15	DP755225
1	DP170894	14	DP755225
1	DP171040	13	DP755225
1	DP185087	12	DP755225
1	DP240664	75	DP755225
3	DP240664	2	DP755225
8	DP240664	19	DP755225
2	DP240664	249	DP755225
4	DP240664	49	DP755225
7	DP240664	48	DP755225
10	DP240664	50	DP755225
9	DP240664	63	DP755225
2	DP243366	98	DP755254
104	DP255530	100	DP755254
100	DP255530	99	DP755254
4	DP571638	96	DP755254
3	DP575428	54	DP755254
1	DP575428	72	DP755254
2	DP575428	75	DP755254
2	DP595102	72	DP755254
52	DP599170	1	DP775718
51	DP599170	2	DP775718
2	DP614784	51	DP794214
1	DP69968	1	DP798955
2	DP69968	101	DP803246
5	DP69968	973	DP804896
9	DP69968	352	DP808936
351	DP808936	1	DP852328
60	DP814379	1001	DP856790
61	DP814379	1002	DP856790
2	DP819222	110	DP859794
1	DP819222	111	DP859794
2	DP828916	11	DP866231
1	DP828916	13	DP866231
1	DP841360	12	DP866231
2	DP841360	1	DP87087
31	DP847374	2	DP873717

Lot	DP	Lot	DP
32	DP847374	1	DP873717
31	DP849031	1	DP950221
30	DP849031	1	DP996145
42	DP850188	9	DP999962
41	DP850188		

Mining Leases

CL728
CML2
ML1347
ML1157
ML1345
ML1388
MLA199
ML9
ML16
ML23
ML35
ML56
ML57
ML120
MPL23
MPL45
MPL89
MPL204
MPL217
MPL233
PLL150
PML2