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No. of 2013

Mining (Ok Tedi Tenth Supplemental Agreement) Bill 2013.

ARRANGEMENT OF CLAUSES.

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4. Shareholders of OTML.
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7. Taxation.
8. No limitation of proceedings.
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A BILL

For

AN ACT

Entitled

Mining (Ok Tedi Tenth Supplemental Agreement) Bill 2013.

Being an Act to provide for the shareholding of shares in Ok Tedi Mining Limited for the long term benefit of the people of Papua New Guinea, and particularly for the people of the Western Province and for related purposes,

MADE by the National Parliament to come into operation upon certification.

1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

(1) This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C (qualified rights) of the *Constitution*, namely –

- (a) the right to freedom from arbitrary search of person or property and entry of premises, conferred by Section 44 of the *Constitution*; and
- (b) the right to freedom from conscience, thought and religion and the practice of a person's religion and beliefs, including freedom to manifest and propagate a person's religion and beliefs in such a way as not to interfere with the freedom of others, conferred by Section 45 of the *Constitution*; and
- (c) the right to freedom of expression and publication conferred by Section 46 of the *Constitution*; and
- (d) the right peacefully to assemble and associate and to form or belong to, or not to belong to, political parties, industrial organizations and other associations conferred by Section 47 of the *Constitution*; and
- (e) the right to freedom of choice of employment in any calling for which a person has the qualifications (if any) lawfully required conferred by Section 48 of the *Constitution*,

is a law that is made pursuant to Section 38 of the *Constitution* –

- (f) taking account of the National Goals and Directive Principles (including, in particular, the goals that Papua New Guinea should, amongst other things, be economically independent and its economy basically self-reliant and that Papua New Guinea's natural resources and environment should, amongst other things, be conserved and used for the collective benefit of all Papua New Guineans) and the Basic Social Obligations (including, in particular, the obligations to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the

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interests not only of the present generation but also of future generations), for the purpose of giving effect to the public interest in public safety, public order, public welfare, the protection of children and persons under disability (whether legal or practical) and the development of underprivileged or less-advanced groups or areas; and

- (g) in order to protect the exercise of the rights and freedom of others; and
- (h) to make provision for cases where the exercise of one such right may conflict with the exercise of another.

(2) Insofar as this Act involves a compulsory taking of possession of property or a compulsory acquisition of an interest in or right over property within the meaning of Section 53 of the ***Constitution***, such taking or acquisition only applies to or is in relation to the property of a person who is not a citizen for the purposes of Section 53(7) of the ***Constitution***.

(3) This Act, to the extent that it creates or otherwise gives rise to rights, privileges, obligations or duties that are not the same as between citizens, is intended to be a law for the special benefit, welfare, protection and advancement of members of underprivileged and less advanced groups and residents of less advanced areas for the purposes of Section 55 of the ***Constitution***.

(4) For the purposes of any Organic Law from time to time and for the time being implementing Part VIA of the ***Constitution***, it is hereby declared that each of the following Acts relates, in its entirety, to a matter of urgent national interest:

- (a) the ***Mining (Ok Tedi Agreement) Act*** (Chapter 363); and
- (b) the ***Mining (Ok Tedi Supplemental Agreement) Act*** (Chapter 363A); and
- (c) the ***Mining (Ok Tedi Second Supplemental Agreement) Act*** (Chapter 363B); and
- (d) the ***Mining (Ok Tedi Third Supplemental Agreement) Act*** (Chapter 363C); and
- (e) the ***Mining (Ok Tedi Fourth Supplemental Agreement) Act*** (Chapter 363D); and
- (f) the ***Mining (Ok Tedi Fifth Supplemental Agreement) Act*** (Chapter 363E); and
- (g) the ***Mining (Ok Tedi Sixth Supplemental Agreement) Act 1986***; and
- (h) the ***Mining (Ok Tedi Agreements) (Amendment) Act 1986***; and
- (i) the ***Mining (Ok Tedi Seventh Supplemental Agreement) Act 1986***; and
- (j) the ***Mining (Restated Eighth Supplemental Agreement) Act 1995***; and
- (k) the ***Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001***; and
- (l) this Act.

2. INTERPRETATION.

In this Act, unless the contrary intention appears –

“Affiliate” in relation to a corporation means any corporation which is related to that corporation within the meaning of the ***Companies Act 1997***;

“agreement” means an agreement between one or more persons which may be oral or written and includes a deed;

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- “BHP Billiton Party” means BHP Billiton and its Affiliates (except OTML and its subsidiaries) and its and their directors, officers, employees and agents and former directors, officers, employees and agents;
- “BHP Billiton” means BHP Billiton Limited (ABN 49 004 028 077), a company incorporated in the State of Victoria in the Commonwealth of Australia;
- “BHP Minerals” means BHP Minerals Holdings Proprietary Limited (ABN 43 005 744 025), a company incorporated in the State of Victoria in the Commonwealth of Australia;
- “charge” has the meaning set out in the ***Companies Act 1997***;
- “Charge” means the Equitable Mortgage of Shares agreement between PNGSDP and Insinger Trust (Singapore) Limited dated 7 February 2002 as amended from time to time;
- “Commissioner General” means the Commissioner General of Internal Revenue appointed under Section 6 of the ***Income Tax Act 1959***;
- “company” has the meaning set out in the ***Companies Act 1997***;
- “constitution” has the meaning set out in the ***Companies Act 1997***;
- “director” has the meaning set out in the ***Companies Act 1997***;
- “Fifth Restated Shareholders Agreement” means an agreement of that title dated 28 January 2011 between the State, MROT2, OTML and PNGSDP;
- “MROT2” means Mineral Resources Ok Tedi No.2 Limited, a company incorporated in Papua New Guinea;
- “Ok Tedi mine” means the open cut copper mine of that name in the Star Mountains in the Western Province of Papua New Guinea;
- “OTDF” means Ok Tedi Development Foundation Limited, a company incorporated in Papua New Guinea;
- “OTML” means Ok Tedi Mining Limited, a company incorporated in Papua New Guinea;
- “PNGSDP” means PNG Sustainable Development Program Limited, a company limited by guarantee incorporated in the Republic of Singapore;
- “Proceedings” means any civil, administrative or criminal action to enforce a penalty or recover costs, expenses, damages or compensation, and includes any inquiry, commission of inquiry or investigation of any kind;
- “Registrar” has the meaning set out in the ***Companies Act 1997***;
- “share register” has the meaning set out in the ***Companies Act 1997***;
- “share” has the meaning set out in the ***Companies Act 1997***;
- “shareholder” has the meaning set out in the ***Companies Act 1997***;
- “Subsidiaries” means –
- (a) PNG Microfinance Limited, a company incorporated in Papua New Guinea; and
 - (b) PNG Energy Developments Limited, a company incorporated in Papua New Guinea; and
 - (c) Western Power Sustainable Power Limited, a company incorporated in Papua New Guinea; and
 - (d) Cloudy Bay Sustainable Forestry Limited, a company incorporated in Papua New Guinea; and

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- (e) Star Mountains Institute of Technology Limited, a company incorporated in Papua New Guinea;

“subsidiary” has the meaning set out in the *Companies Act 1997*.

3. EFFECT IN RELATION TO LAWS OF PAPUA NEW GUINEA.

The provisions of this Act shall apply notwithstanding anything to the contrary in any other law in force in the country, and to the extent of any inconsistency between this Act and the *Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001*, this Act shall prevail.

4. SHAREHOLDERS OF OTML.

- (1) On the coming into operation of this Act –
- (a) all ordinary shares held by PNGSDP in the share capital of OTML shall be cancelled and cease to exist; and
 - (b) 122,200,000 new, fully paid ordinary shares in the share capital of OTML free of any encumbrance, charge or equitable interest shall be issued to the State.
- (2) The share register of OTML is amended on and from the coming into operation of this Act to reflect the shareholding of the State in OTML as set out in Subsection (1).
- (3) The register of companies required to be kept pursuant to section 395 of the *Companies Act 1997* is amended on and from the coming into operation of this Act to reflect the shareholders of OTML as set out in Subsection (1).
- (4) Nothing in Subsection (1) restricts the rights, liabilities or powers of –
- (a) MROT2 or the State as shareholders of OTML including, without limiting the foregoing, the right to receive dividends, the right to vote on resolutions and the right to sell or otherwise dispose of their shares in OTML; or
 - (b) OTML as a company registered under the *Companies Act 1997* including, without limiting the foregoing, the power to issue new shares or otherwise restructure its share capital following the coming into operation of this Act in accordance with the *Companies Act 1997*.
- (5) All references to PNGSDP in the constitution of OTML and in the Fifth Restated Shareholders Agreement shall, on and from the coming into operation of this Act, be read and construed as a reference to the State.
- (6) On and from the coming into operation of this Act, the Charge is void and of no legal effect and shall not create any interest of any nature whatsoever over any share in OTML.

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5. COMPENSATION.

(1) The Prime Minister, acting on the advice of the National Executive Council, may, by notice in the National Gazette, declare whether compensation will be payable to any person in respect of the effects of this Act and, if so, the amount of compensation payable and the terms on which compensation will be payable and this declaration is to be done in the deliberate judgment of the Prime Minister, acting on the advice of the National Executive Council.

(2) A declaration under Subsection (1) is, for all purposes, conclusive evidence as to whether compensation is payable to the persons, the subject of the declaration, in respect of the effects of this Act, the amount of such compensation, the persons to whom compensation will be paid and the terms on which compensation will be paid.

(3) The amount of compensation, if any, declared by the Prime Minister, acting on the advice of the National Executive Council, pursuant to Subsection (1) shall be paid by the State to the person so declared in accordance with the terms set out in such declaration.

(4) Notwithstanding any other section of this Act, nothing in this Act imposes any obligation on the State or any other person to pay compensation in respect of the effects of this Act other than pursuant to a declaration made under Subsection (1).

6. OPERATION OF PNGSDP

Notwithstanding anything to the contrary in any Act, the State has all necessary powers to restructure PNGSDP and its operations to ensure that PNGSDP applies its funds for the exclusive benefit of the people of Western Province.

7. TAXATION.

Notwithstanding anything to the contrary in any Act, nothing in this Act shall impose or create any obligation or liability on any person to pay any amount pursuant to the –

- (a) *Goods and Services Tax Act 2003*; or
- (b) *Income Tax Act 1959*; or
- (c) *Stamp Duties Act* (Chapter 117).

8. NO LIMITATION OF PROCEEDINGS.

Notwithstanding anything to the contrary in any Act, a provision in an agreement including, without limiting the foregoing, an agreement which has the force of law by virtue of an Act, in which a person is expressed to waive, release, discharge or otherwise limit that person's chose in action or other right to initiate, pursue or enforce Proceedings against or in relation to a BHP Billiton Party in connection with any matter relating to or arising from that BHP Billiton Party's involvement in or dealings with OTML or the Ok Tedi mine shall be null and void to the extent of such waiver, release, discharge or other limitation.

9. ACT BINDS THE STATE.

This Act binds the State.

Explanatory Memorandum for the Mining (OK Tedi Tenth Supplemental Agreement) Bill 2013

Background

- Since the commencement of the OK Tedi mine in 1967, the operation of the Ok Tedi mine has been regulated in accordance with an agreement which is then given effect in an Act of Parliament. This Act the *Mining (OK Tedi Tenth Supplementary Agreement) Act 2013* is the tenth Act in a series of Acts.
- This Act deals only with the restructure of the shareholding in OTML. Other matters of an administrative matter in relation to the operation of the mine will be determined in a further Act of Parliament.

Section 1 – Compliance with the Constitutional requirements

- Section 1 clarifies that to the extent that the Act restricts or regulates a qualified right it is done pursuant to section 38 of the Constitution taking into account the National Goals and Directive Principles and protects the rights and freedoms of others.

Section 2 – Interpretation

- Section 2 defines certain words used in the Act.

Section 3 – Effect in relation to laws of Papua New Guinea

- Section 3 clarifies that the provision of this Act will apply notwithstanding any other contrary provisions in any other Act. If there is any inconsistency between this Act and the Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001 the *Mining (OK Tedi Mine) Tenth Supplementary Act 2013* will apply.

Section 4 – Shareholders of OTML

- On the commencement date all ordinary shares held by PNGSDP in the share capital of OTML shall be cancelled and cease to exist. 122 200 000 new fully paid shares in the share capital of OTML will be issued to the State. These shares are free of any encumbrances, charges or equitable interests.
- This will remove an existing share charge over PNGSDPs shares in OTML. An agreement between PNGSDP and Insinger Trust (Singapore) Limited fixed a charge over the shares PNGSDP held in OTML. The effect of this agreement was that PNGSDP provided an indemnity to BHP Biliton and its Directors for any damages awarded as a result of litigation commenced by landowners for environmental harm

as a result of the mining operation. The proposed Bill will remove this indemnity.

- The share register of OTML will be amended to reflect the share changes on and from the date of commencement.

Section 5 – Compensation

- The Prime Minister, acting on the advice of NEC, may by notice in the National Gazette, declare whether compensation will be paid to any persons in respect of the operation of this Act. The terms and conditions of any compensation will be determined by the Prime Minister on the advice of the NEC. This will give the Prime Minister, on the advice of NEC, a wide discretion to determine whether any compensation is paid and to whom.

Section 6 – Operation of PNGSDP

- Section 6 would also provide that the State has all necessary powers to restructure PNGSDP and its operations to ensure that PNGSDP applies its funds for the benefit of the people of Western Province.
- The proposed provision in the Bill would allow the State to change the composition and appointment of Directors and ensure that any funds that PNGSDP may have are expended by the OK Tedi Foundation for the exclusive benefit of the people of Western Province.

Section 7 - Taxation

- Section 7 provides that this Act will not create any obligations or liabilities under the *Goods and Services Tax Act 2003*, *Income Tax Act 1953* or the *Stamp Duties Act*.

Section 8 – No limitation of proceedings

- Section 8 provides that notwithstanding any agreement or Act of Parliament, any person who has any choice in action or right to pursue or enforce legal proceedings against or in relation to BHP in connection with the operation of the Ok Tedi mine will now have their full rights restored to them. The previous Supplementary Agreement and Community Mine Continuation Agreements provided an undertaking that affected communities would not bring any legal action or enforce any previous actions against BHP in connection with OK Tedi mine. The effect of section 7 of the Act, is that individuals will have all their legal rights restored and are free to pursue any new or former actions.

Section 9 – Act binds the State

- Section 9 clarifies that this Act binds the State.