

18 September 2017

Our ref (VK/M&R)

Committee Secretary
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Dear Committee Members

Mineral, Water and Other Legislation Amendment Bill 2017

Thank you for the opportunity to provide comments on the Mining, Water and Other Legislation Amendment Bill 2017 (the **Bill**).

The Queensland Law Society (**QLS**) appreciates being consulted on this important legislation. QLS had the benefit of meeting with representatives of the Department of Natural Resources and Mines (the **Department**) and representatives of the Department of Environment and Heritage Protection to discuss the consultation draft prior to the introduction of the Bill to Parliament, and we are grateful for that opportunity.

This response has been compiled with the assistance of the members of the QLS Mining & Resources Law committee whose members have substantial practice expertise in this area.

Due to competing commitments, we advise that it has not been possible for the Society to conduct an exhaustive review within the allocated timeframe for making submissions. It is possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

QLS is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

We wish to highlight some aspects of the Bill for the Committee's consideration:

1. Statutory Negotiation and Alternative Dispute Resolution Process for Conduct and Compensation Agreements

The Bill proposes a new course of dispute resolution mechanisms to the *Mineral and Energy Resources (Common Provisions) Act 2014 (MERC Act)* to assist parties who are negotiating to enter into a conduct and compensation agreement (**CCA**) or make good agreement (**MGA**).

As currently drafted, the Bill seeks to extract the conference with an authorised officer from the statutory negotiation period. Proposed subdivision 2A introduces the **conference election notice** (s 83A(2)) and the **ADR election notice** (s 88(2)). Proposed subdivision 3A separates arbitration into its own pathway, introducing the **arbitration election notice** in s 91A(2).

The Society does not agree with the proposition in s 91C that a party will not be permitted to have legal representation in an arbitration unless both parties agree to the party being represented. The matters in dispute and the resulting decision of the arbitrator will likely be of enormous significance to both parties and involve the determination of legal issues. It is inappropriate that a party (or both parties) might be disallowed legal representation, particularly given the limited opportunity to seek review of or appeal against the arbitrator's decision.

2. Implications for a prescribed ADR and arbitration institute

QLS is a 'prescribed arbitration institute' pursuant to the MERC Act. The Bill proposes, at s 88(6) that if a party does not accept the type of ADR or ADR facilitator proposed in an ADR election notice, the party who gave the notice must then obtain a decision from a prescribed ADR institute about the matter not accepted.

Due to the complexity of some of the disputes which may arise, we suggest that the prescribed ADR institutes would benefit from legislative guidance as to the purpose of the decision and the matters that must be taken into account when arriving at that decision.

3. Changes to treatment of professional costs

There are potential implications for stakeholders as a result of the proposed changes to treatment of professional costs incurred in negotiation for a CCA.

The Society acknowledges the Department's intention to divorce professional costs associated with the provision of legal, accounting and valuation advice which are reasonably and necessarily incurred in relation to the negotiation of a CCA or MGA, from other heads of compensation associated with "on the ground" activities.

We understand that the decoupling of these costs from other compensatable effects is intended to ensure that a landholder is recompensed for these costs (on the basis that they are reasonable and were necessary to the negotiation of the matter) in the event that an agreement between the parties is not reached. The Society also acknowledges the introduction of agronomy services to the suite of professional costs for which a resource holder may become liable.

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It is the view of QLS that the proposed change to the definition of *compensatable effects*, and the introduction of new s 91 to the MERC Act, could change the way in which an eligible claimant's costs, in circumstances where agreement is reached, are treated by the parties.

QLS is concerned that:

1. by reading proposed new s 91(1) with (2) of the MERC Act, an eligible claimant will need to show that it was necessary and reasonable to incur the costs in the first instance (i.e. to engage a lawyer), before any such costs can be recovered;
2. as s 91(2) does not limit the obligation on the authority holder to pay costs that are reasonably and necessarily incurred, it is arguable that if the eligible claimant can establish that incurring the costs (i.e. engaging the lawyer) was "reasonable and necessary", then they are entitled to a full indemnity;
3. it is proposed that costs not be limited to legal, accounting and valuation costs. While noting the express limitation regarding costs incurred by an agronomist, it seems that there is scope for an eligible claimant to possibly seek more than under the current legislation; and
4. there will be some uncertainty as to when the resource authority's liability for costs incurred in seeking to enter into a CCA or deferral agreement crystallises.

Overall, the Society considers that the proposed changes to treatment of an eligible claimant's costs could give rise to arguable concerns for parties on both sides of the negotiations, and might lead to more, rather than less, disputes in this space.

4. Changes to compensation negotiation between miners and landowners, and Land Court referral (for mining claims and mining leases)

QLS supports the removal of extraneous referrals to the Land Court. This includes the removal of an automatic referral of compensation determinations to the Court by the chief executive three months after an existing mining lease was to expire.

QLS supports the proposed amendment to s 93 of the Mineral Resources Act 1989 (the **MRA**), which will give the Minister the discretion to refuse an application for renewal of the mining lease (**ML**) if compensation has not been determined within three months after the expiry of the lease, and an application for determination to the Land Court has not been made by an interested party.

5. Changes to the definition of compensatable effect

Section 81 of the MERC Act establishes the general liability of resource authority holders to compensate the owners and occupiers of public and private land.

Currently, s 81(1) of the MERC Act provides:

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*A resource authority holder is liable to compensate each owner and occupier of private land or public land that is in the authorised area of, or is access land for, the resource authority (each an **eligible claimant**) for any compensatable effect the eligible claimant suffers caused by authorised activities carried out by the holder or a person authorised by the holder.*

Further, s 81(4) of the MERCP Act currently provides:

compensatable effect, means any or all of the following-

(a) all or any of the following **relating to the eligible claimant's land-**

...

(emphasis ours)

Proposed new s 81(1) of the MERCP Act provides:

*A resource authority holder is liable to compensate the following persons (each an **eligible claimant**) for each compensatable effect suffered by the eligible claimant because of the holder—*

(a) an owner or occupier of private land that is—

- (i) in the authorised area of the resource authority; or
- (ii) access land for the resource authority;

(b) an owner or occupier of public land that is—

- (i) in the authorised area of the resource authority; or
- (ii) access land for the resource authority.

Proposed new s 81(4) of the MERCP Act provides:

compensatable effect, suffered by an eligible claimant because of a resource authority holder, means-

(a) any of the following caused by the holder, or a person authorised by the holder, **carrying out authorised activities on the eligible claimant's land-**

...

(emphasis ours)

QLS is concerned that the proposed changes to the definition of *compensatable effect* may result in an unintended change to the nature of resource authority holders' liability to compensate public and private landholders.

Under the current regime, there is some debate as to whether it is the legislature's intention that the liability of resource authority holders extends to encompass liability for the effects and impacts suffered by eligible claimants arising from activities undertaken off their properties.

Under the new draft as proposed, it is clear that a resource authority holder's liability to compensate will only extend to those owners and occupiers of properties on which the activities are undertaken. Resource authority holders will not owe a liability to compensate owners of properties nearby to their activities, at least under the MERCCP Act.

6. Overlap Arbitration

The definition of "overlapping area" is in s 104 of the MERCCP Act. That contains many limbs. A Petroleum Act 1923 petroleum tenure does not fall within the definition of "petroleum resource authority", a "column 1 resource authority" or a "column 2 resource authority". That means that there is technically no "overlapping area" (as defined in the MERCCP Act) to trigger the requirement for the joint interaction management plan.

We submit that an opportunity is missed to simplify the definition of "overlapping area". We also question whether further amendments are required to fully integrate a petroleum resource authority granted under the Petroleum Act 1923 into the arbitration process contemplated in s 175 of the MERCCP Act.

7. Apply safety provisions

CMSH Act transitional provision

A transitional provision is inserted into the CMSH Act to allow parties to continue under the existing safety arrangements until a joint interaction management plan is made in respect of the overlap with petroleum tenure granted under the Petroleum Act 1923 (**Petroleum Act**).

Again we query whether additional drafting is required to align to the definitions of "petroleum authority" and "overlapping area" in the MERCCP Act.

For example, the proposed s 306 of the CMSH Act states that the "section applies in relation to coal mining operations carried out in an overlapping area if a petroleum authority relating to the overlapping area is an authority to prospect or a petroleum lease under the 1923 Act."

The definition of "overlapping area" is defined by reference to the MERCCP Act. As per our comments above the definitions of "overlapping area" and "petroleum resource" do not include a resource tenure granted under the Petroleum Act.

Further, "petroleum authority" is not defined in the CMSH Act. Is that intended to refer back to the new definition in the *Petroleum and Gas (Production and Safety) Act 2004* (**PG Act**)?

Amendment of definition of operating plant

Section 670 of the PG Act contains a comprehensive definition of "operating plant". Operating plant includes all of the authorised activities for a petroleum authority. The Bill proposes

amendments that include an authority to prospect (**ATP**) or Petroleum Lease (**PL**) granted under the Petroleum Act in the definition of “petroleum authority”.

As set out above, this has implications for parties required to engage with operators of operating plant for the purposes of a joint interaction management plan.

Releasing required information

A holder of a mining tenement is now taken to have authorised the chief executive to publish all information that the mining tenement holder has lodged under the MR Act in respect of its activities pursuant to the tenement.

For example, pursuant to s 176 of the MR Act the exploration holder is required to report the discovery of any mineral of commercial value and other particulars that the Minister requires.

The “confidentiality period” is not defined. Further there is no confidentiality period that applies if the information is in respect of an area no longer subject to the mining tenement. This means that where an exploration permit ends in favour of a ML, there is no confidentiality period that applies to that information.

We submit that the confidentiality period should apply unless the relevant area is no longer subject to any form of mining tenure held by the disclosing entity.

8. Make Good Agreements – clauses 137-143

Amendments to the Water Act 2000 (the Water Act)

QLS generally welcomes the amendments to the Water Act, as they further clarify differences between conference and ADR processes and fill process gaps.

The drafting in clause 258 of the Bill clarifies that both the conference or ADR election are not intended to be determinative (by specifically excluding arbitration).

The amendments set out the requirements for the conference election and ADR election notices. These changes are consistent with the existing notice requirements other than to the extent that further information required in the notice may be prescribed by regulation (see amended ss 426(4)(b) and (5)(e) of the Water Act). The Society questions whether there is any real need for that flexibility to add further requirements by adding that layer of drafting complexity into the process.

The insertion of the new s 433A allows the parties who have participated unsuccessfully in either a conference or other ADR, to seek arbitration as a determinative method as an alternative to the Land Court. Participating in the arbitration prevents the parties from applying to the Land Court for the resolution of matters the subject of the arbitration.

We suggest that the process for accepting the arbitration notice does not address the method for either accepting or refusing the arbitration notice (which would provide certainty as to whether parties have the Land Court as an option available to them in the event there is disagreement as to whether arbitration was or wasn't “accepted”).

We also suggest that the proposed process should be simplified and streamlined so that:

1. parties can elect either a conference or ADR; and
2. If the parties elect to participate in ADR, allow the parties to agree whether or not to engage in determinative arbitration at first instance, rather than imposing a non-determinative ADR method first.

The parties could then apply to the Land Court after first engaging in either the conference or ADR (other than by arbitration).

9. Bore Monitoring Amendments - clauses 79, 100, 102-104, 115-117

Amendments to MR Act

Transfer of water monitoring authorities

We suggest that this round of amendments also consider the opportunity to address the following issue in relation to the transfer of a water monitoring authority:

The holder of a mineral development licence (**MDL**) or an ML may apply for a water monitoring authority for land outside the area of the lease or licence (s 334ZT(1) MR Act). An application may be made or granted for one or more MDLs or MLs held by the same applicant (s 334ZT(2) MR Act).

Section 334ZZE(4) provides that where as a result of a dealing with the MDLs or MLs, not all of those MDLs or MLs are transferred to the same person, the *transferor* remains the holder of the water monitoring authority (that cannot be transferred other than by operation of that s 334ZZE(5)).

Given that the water monitoring authority continues in force until there is no longer any MDL or ML to which the authority relates, this presents a commercially unsatisfactory outcome whereby the transferor continues to be responsible for a water monitoring authority and must comply with the conditions (including paying rent), in which it essentially has no further interest. In addition, the transferees do not obtain the benefit of the authority which means, that any benefits of the assessments of activity impacts via particular bores will be lost.

In that situation, presumably the transferee would need to obtain a new and separate water monitoring authority in order to carry on assessing the impacts in the manner undertaken under the alienated water monitoring authority. In that case, it is unclear whether water monitoring authorities can overlap, and if so, which authority holder would then be responsible for specific bores/authority conditions.

A common sense approaches might be to insert a mechanism to cancel the water monitoring authority and apply for substitute authorities so that, similar to a water licence, the authority can either be substituted for two in each of the transferees names, or otherwise cancelled so that the transferor can finalise its interests in a project completely.

Transfer of water monitoring bores

In relation to s 334ZO(3), care should be taken when referring to the “owner” of land. For example, we suggest that the bore should be able to be transferred to either an “owner” or else someone who has an interest in the land (if approved by the chief executive), to cover, for example, transfer to a grazier who has control over a reserve by a permit to occupy or a lease.

Section 334ZZO(2)(a), 334ZZP(2), 334ZZT(2) and s 334ZZU(2) should to be amended to clarify which “owner” is referred to, i.e. whether it is the owner of the land or the water monitoring bore.

Amendments to the Petroleum and Gas Production and Safety Act 2004

Although not the subject of proposed amendments, consideration should be given to the application of s 288, allowing the transfer of a bore to the landowner. The “landowner” is defined as the owner of the land, and the definition of “owner” provides that where the land has more than one owner (based on the categories provided), a reference to the owner of land is a reference to each of its owners.

For example, where there is a reserve of which the local council is the trustee and over that reserve is a State lease to another party, a reference to the “landowner” will mean each of them. Transferring a bore to each of the owners, we understand is not the intent of the section, but rather to either of them.

Again, thank you for the opportunity to review the Bill. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Vanessa Krulin on 07 3842 5872 or v.krulin@qls.com.au.

Yours faithfully



Christopher Coyne
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