

Your Ref:

Our Ref: Business Law Section

4 June 2010

The Hon Stephen Robertson MP
Minister for Natural Resources, Mines and Energy and Minister for Trade
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Dear Minister

REPRESENTATION RIGHTS AND ACCESS TO LAND UNDER THE *GEOTHERMAL ENERGY BILL 2010*

I write to raise the concern of the Queensland Law Society about aspects of the *Geothermal Energy Bill 2010* (the Bill) which you introduced into Parliament on 19 May 2010.

Legal representation at mediations under the Bill

Of particular concern to the Society is the restriction of rights of legal representation for parties to a mediation under Chapter 7 Part 1 of the Bill.

Proposed section 308 of the Bill provides:

308 Who may attend mediation

- (1) Apart from the authorised officer, anyone given notice of the mediation may attend it.
- (2) A party may be represented by an agent only if the authorised officer agrees.
- (3) However, a party can not be represented by a lawyer unless the parties agree and the authorised officer is satisfied there is no disadvantage to a party.

The restriction on the rights of legal representation at mediation proceedings contained in section 308(3) in the view of the Society is unwarranted and operates to actively disadvantage individuals negotiating with corporate geothermal tenure holders.

Initially the scheme of the Bill places a geothermal tenure holder in a superior position to that of a land owner as section 216 of the Bill provides that the unsuccessful outcome of a mediation does not prevent the geothermal tenure holder from conducting advanced activities with respect to private land.

On a more fundamental level, geothermal tenure holders are inherently in a superior negotiating position to land owners as they will have at their disposal resources and officers with technical skill that will not be available to land owners. Moreover, with respect to compensation arrangements, substantial rights will be determined through the mediation process and for many land owners the outcome will have a particular impact on their financial arrangements as well as being of interest to their mortgagees. Given the serious nature of the matters to be addressed by the Bill's compensation regime the Society submits

that the inequality of bargaining position must be addressed by access to legal representation when concluding arrangements with geothermal tenure holders.

With respect to the proposed section 308(3), the drafting may permit a tenure holder to attend a mediation through their general counsel or any other legally qualified officers as they may not be 'represented by a lawyer' but rather present through the tenure holder's employed officer. It is clearly inequitable for a tenure holder to be represented by in-house counsel, or any other technical specialist, and for a land owner to be denied their own professional representation. There is a serious issue of inequality of bargaining position between the parties which is entrenched by the provision.

While the drafting of the provision in question does not absolutely preclude legal representation, it does make legal representation contingent on two factors:

- The agreement of both parties; and
- The assessment of the authorised officer that there is no disadvantage.

One unfortunate result of the drafting is that it empowers a party to refuse legal representation to the other party in order to gain a superior negotiating position in a mediation. Such a position can not be remedied, even if the authorised officer apprehends that there is serious disadvantage to one party without legal representation. This essentially provides for a power of veto of legal representation being held by the party with the strongest position entering the mediation.

This, surely, was not the intention of provision.

The Society is strongly of the view that in order to redress any apparent disadvantage to any party in mediated matters, all parties should have the right to choose whether they want legal representation. It is important from an access to justice perspective, as well as in the interests of fair adjudication outcomes, that parties to mediations under the Bill do so knowing fully their legal rights and entitlements, especially in reaching agreement about fair levels of compensation under Chapter 6 Part 8 of the Bill.

In order for the process not to give rise to unconscionable outcomes; weak, vulnerable or impecunious parties deserve to be fully informed of their rights, the consequences of entering a compensation agreement and to be represented by a legal practitioner.

To remedy this disparity in the legislation we suggest that section 308(3) is amended to provide:

- (3) However, a party may be represented by an Australian Legal Practitioner.

Manner of access to private land

The Bill in Chapter 6 Part 5 gives a geothermal tenure holder access rights to private land within and outside the geothermal tenure in certain circumstances.

While the Bill stipulates notice and agreement requirements for effecting entry to land, it does not require a geothermal tenure holder to enter and carry out activities in a manner which has regard to any legitimate business of the land holder.

While the compensation process is relevant to addressing disruption and loss suffered by a land owner on account of a geothermal tenure holder's activities we submit that a further requirement for a tenure holder to conduct those activities in a manner which is as least disruptive as a possible to any legitimate use of the land is necessary. This is especially the case when the impact of the geothermal tenure holder's activities on the land is more significant than was contemplated in the initial agreement or assessment of fair compensation. Given the restrictions placed upon a land owner's right to seek review of compensation in proposed section 254 of the Bill it is a matter of equity and good conscience that a geothermal tenure holder should attempt to limit their impact upon any private land.

I would be pleased to meet with you or your representatives about this matter and would ask that you contact our Principal Policy Solicitor, Mr Matt Dunn on 3842 5889 or via email m.dunn@qls.com.au.

For your information I have also provided a copy of this letter to the Premier, the Attorney-General and the Opposition.

Yours sincerely

Peter Eardley
President