

Your ref:
Our ref: Mining and Resources Law Committee

21 January 2013

The Research Director
Agriculture, Resources and Environment Committee
Parliament House
George Street
BRISBANE QLD 4000

arec@parliament.qld.gov.au

Dear Research Director

Mining and Other Legislation Amendment Bill 2012

Thank you for providing the Queensland Law Society the opportunity to provide comments on the *Mining and Other Legislation Amendment Bill 2012* (the Bill).

The Society notes that there has been no public consultation on the text of the Bill prior to it being introduced into the House, but acknowledges that aspects of the policy underlying parts of the Bill have been considered through the Land Access Framework Review process.

Given the timing of the period for making submissions on the Bill it has not been possible to conduct an exhaustive review of the Bill. We have limited our comments to a consideration of whether one part of the Bill's drafting achieves its stated objective.

This submission has been prepared with the assistance of the Society's Mining and Resources Law Committee.

Definition of Occupier

The Society believes the stated objective of the amendments may not be achieved by the amendments proposed. This is because the current drafting may not extend to freehold owners who give another a right to occupy a place by a means other than a registered lease.

One stated objective of the Bill is to amend the *Mineral Resources Act 1989* (Qld), *Petroleum and Gas (Production and Safety) Act 2004* (Qld), *Petroleum Act 1923* (Qld), *Geothermal Energy Act 2010* (Qld), and *Greenhouse Gas Storage Act 2009* (Qld) to remove potential ambiguity in relation to the definition of occupier.

The current definition of *occupier* is a key term in determining who must be engaged in the land access process. However there are differing views on the interpretation of the current definition which leads to uncertainty for both resource companies and land owners/occupiers.

The Explanatory Notes to the Bill set out the rationale for the change and how the change should be achieved at page 5:

An amendment to the "occupier" definition contained in the *Petroleum and Gas (Production and Safety) Act 2004* was passed as part of the *Mines Legislation (Streamlining) Amendment Act 2012* that sought to redress a legislative inconsistency between the *Petroleum and Gas (Production and Safety) Act 2004* and all other resources Acts and brought the definition of occupier into line with all other resources legislation.

The passing of this amendment has resulted in public concerns being expressed about the scope of the definition of "occupier" as amended. This is particularly as it relates to the ability of landholders to access compensation from resource companies where multiple parties are involved in land management and formal business arrangements such as where Family Trusts, Corporations and Partnerships exist.

To remove any doubt and provide certainty to landholders and resource companies, The [sic] Bill amends the definition of "occupier" in the *Mineral Resources Act 1989*, *Petroleum and Gas (Production and Safety) Act 2004*, *Petroleum Act 1923*, *Geothermal Energy Act 2010*, and *Greenhouse Gas Storage Act 2009* to:

- provide that an "owner" (freehold title or leaseholder) or person with a "right to occupy under an Act or lease registered under the *Land Title Act 1994*" is able to confer a right to occupy to another person or entity (e.g. children, other family members, family trust) and that this right be recognised as a legitimate "occupier" under the definition and compensation provisions of the Acts; and
- ensure that the definition would enable the recognition of legitimate business arrangements such as Family Trusts, Partnerships, and Companies associated with managing rural businesses on both leasehold and freehold land.

The Bill proposes to amend the definition contained in the *Mineral Resources Act 1989* (MRA) (for example), in clause 78(5), by omitting the words "Act, or, for freehold land" and substituting "Act or". The definition will then become:

occupier, of a place, means a person—

(a) who, under an Act or a lease registered under the *Land Title Act 1994*, has a right to occupy the place, other than under a mining interest, petroleum tenure, licence under the *Petroleum and Gas (Production and Safety) Act*, GHG authority or geothermal tenure; or

(b) to whom an occupier under paragraph (a) has given the right to occupy the place.

The Society notes that the changes foreshadowed in the Explanatory Notes relating to a person with a right to occupy a place under an Act or a registered lease have been implemented. It appears, however, that the amendment relating to an 'owner', as anticipated by the Explanatory Notes, has been omitted.

The Society is unaware of any statutory right which is accorded to a freehold land owner to occupy a place. The Governor in Council is given the right to grant a fee simple interest under s.14 of the *Land Act 1994* but the Society understands that the right to exclusive possession of

land comes from the common law to the fee simple estate holder¹. The High Court described the extent of an estate in fee simple in the decision of *Fejo v Northern Territory of Australia* [1998] HCA 58 at 43:

An estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership of the land" and confers "the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination". It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title.

Therefore, we believe that the amendments proposed may not extend to freehold owners who give another a right to occupy a place which is not by way of registered lease.

In any event, to ensure that the intent of the amendment is clearly achieved, we recommend that the words 'owner; or' are added to paragraph (b) of the definition. This would make the resultant definition:

occupier, of a place, means a person—

(a) who, under an Act or a lease registered under the *Land Title Act 1994*, has a right to occupy the place, other than under a mining interest, petroleum tenure, licence under the Petroleum and Gas (Production and Safety) Act, GHG authority or geothermal tenure; or

(b) to whom an:

(i) **owner; or**

(ii) occupier under paragraph (a),

has given the right to occupy the place.

We believe that this amendment will ensure the objective promoted in the Explanatory Notes is achieved.

Practically identifying occupiers of land

The Society understands from its members who practise in the area, that in many circumstances it may be the owner who is best placed to identify the relevant parties with whom a mining tenement holder should engage.

The Society has proposed to Government that in addition to a further consideration of the definition, a two stage process for the identification of occupiers may prove most practical. This could include a 'reasonably known' test initially and then a mechanism to engage with those occupiers later identified with the assistance of the owner. The initial 'reasonably known' element would be those persons whose existence, or at least the existence of their tenure, can be ascertained from the public record or are known to the mining tenement holder.

¹ S.137 of the *Land Act 1994* deals with when a right to occupation and possession of land commences in some circumstances but it does not give a general statutory right to occupation or possession of freehold land.

The Society and its Mining and Resources Law Committee has expressed its willingness to engage with the Department and other stakeholders on finding a workable solution to these issues.

Thank you again for providing the Society with the opportunity to comment on this Bill. Please contact our Principal Policy Solicitor, Mr Matt Dunn, on (07) 3842 5889 or m.dunn@qls.com.au for further information.

Yours faithfully

Annette Bradfield
President