24 November 2016

Our ref (VK/M&R Committee)

The Honourable Yvette D’Ath
Attorney General and Minister for Justice, Minister for Training and Skills
GPO Box 149
Brisbane QLD 4001

Attention: Ms Sharon Sargent
By Email: PolicyADG@justice.qld.gov.au

Dear Attorney-General

Land Court (Transitional) Regulation 2016

I refer to your letter of 31 October 2016 in respect of the draft Land Court (Transitional) Regulation 2016.

Thank you for the opportunity to comment on the draft.

As you no doubt know, the Queensland Law Society (QLS) is the peak professional body for the State’s legal practitioners. We lead a profession of more than 9,500 members throughout Queensland. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession.

Our members have been concerned in respect of recent jurisdictional issues facing the Land Court under the Land Court Act 2000 (Qld) in respect of mining lease objection matters, and similar matters referred to the Court under various statutes where the Court is charged with making recommendations to government Ministers. This has included the ability of the Court to award costs in such matters if it deemed appropriate to do so.

The proposed Transitional Regulation will largely address those concerns (albeit in an interim manner only). The proposed regulation is therefore supported.

As you are aware, the decision is BHP Billiton Mitsui Coal Pty Ltd v Isdale\(^1\) has caused a level of uncertainty as to which provisions of the Land Court Act that refer to “proceedings” apply to matters where the Court makes recommendations, such as in respect of mining lease objection matters where the Court makes a recommendation to a Minister after the conduct of a hearing (identified as matters that come to the Court pursuant to “recommendatory

\(^1\) [2015] QSC 107
provisions" in the draft regulation). This has caused significant procedural uncertainty in a number of matters that have been before the Land Court since the BHP decision.

As you note in your letter, sections 97 and 98 in the Land Court Act, providing power to make transitional regulations, were inserted in response to the BHP decision. The Transitional Regulation will clarify that a number of important procedural provisions and powers of the Court will apply to the conduct of recommendatory matters heard by the Court, and this will deliver much needed certainty for the conduct of such proceedings.

QLS does note though that this is only an interim measure. Section 97 of the Land Court Act provides that a transitional regulation under that section will expire 1 year after the commencement of the section. I understand that section 97 commenced on 23 July 2016, meaning that the Transitional Regulation will expire on 23 July 2017 – that is, in approximately 8 months time.

These jurisdictional and procedural issues are important and will ultimately require a long term legislative solution that extends beyond 23 July 2017. I note your letter states that the Land Court President is giving consideration to the implications of the BHP decision for the Land Court Rules as part of a review of the Court’s processes. QLS commends this action and is willing to be involved in assisting with any such review through consultation and comment on any proposed changes arising out of the process the President is undertaking.

QLS however also notes that some of the issues addressed by the Transitional Regulation may not be able to be accommodated on a long term basis through changes to the Land Court Rules alone, and amendments to the Land Court Act itself may be required. It is strongly hoped that any such amendments can be developed during the period that the Transitional Regulation is in operation and commence on or before the expiry of the Transitional Regulation, to allow for a "seamless" progression of matters before the Court.

If this is not done, then there will be a risk that come 23 July 2017 matters before the Court, including existing matters on foot, will again fall into a state of uncertainty and to the Court’s jurisdiction and powers. This should be avoided, and the QLS again offers to be involved in consulting with your department in respect of any long term amendments that might be made to the Land Court Act, to assist in the development of long term reforms.

Finally, it is noted that the draft Transitional Regulation currently provides that the majority of the regulation will commence with effect on 23 July 2016 (which is the date that section 97 of the Act commenced). It is unclear if this is intended to mean that the regulation is to apply retrospectively to matters that may have been heard, and possibly concluded, since 23 July 2016.

If the commencement date of the regulation is going to be a date that has passed, such as 23 July, QLS suggests that careful thought should be given to any transitional provisions that need to be included in the regulation specifying to what extent it is intended to have any retrospective effect – for example, articulating to what extent is it meant to apply retrospectively to matters heard, and perhaps ruled on, since 23 July (if at all), and to what extent the regulation will apply to existing matters before the Court that remain on foot at the date the Transitional Regulation is notified.

There can be many unforeseen consequences of legislation or subordinate legislation which has a retrospective application, and QLS would welcome further consultation on this aspect.
If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Vanessa Krulin on 3842 5872 or v.krulin@qls.com.au.

Yours faithfully

[Signature]

Mr Bill Potts
President