Queensland Law Society

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Office of the President

6 July 2020

Our ref: M&R-LP

Committee Secretary
Natural Resources, Agricultural Industry Development and Environment Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary,

Environmental Protection and Other Legislation Amendment Bill 2020

Thank you for the opportunity to provide feedback on the Environmental Protection and Other Legislation Amendment Bill 2020 (the **Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 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.

This response has been compiled with the assistance of the QLS Mining and Resources Law Committee, whose members have substantial expertise in this area.

Due to competing deadlines, QLS has not undertaken an exhaustive review of the Bill at this time. There may therefore be aspects of the Bill and unintended consequences of its drafting which are not addressed in this submission. QLS would welcome the opportunity to provide further detail on this submission and other aspects of the Bill, at a public hearing.

Implementation Working Group

QLS understands that in line with the introduction of the Bill, the Queensland Government announced the establishment of an industry implementation working group to assist in implementing changes proposed by the Bill, including those which will make amendments to the residual risk framework.

Given the significance of these legislative reforms, and also for the reasons outlined below, QLS submits that close collaboration and communication through this group will be vital to ensure changes are introduced in a measured, clear and manageable way for all stakeholders.

The composition of the industry implementation working group is unclear, other than it will include *"companies and peak bodies"*[1]. QLS submits the working group should include a wide range of stakeholders, such as those consulted in the preparation of this Bill as well as resource industry groups, land holder representatives and environmental peak bodies.

Establishment of a Rehabilitation Commissioner

This Bill seeks to establish a Rehabilitation Commissioner (the **Commissioner**). QLS understands the Commissioner will have a role in providing advice on best practice rehabilitation and management for the mining sector, as well as public reporting on performance and trends in rehabilitation and management outcomes.

QLS understands the Queensland Government is seeking to establish this role to ensure greater public confidence that best practice management and public reporting is evidence-based and scientifically sound. Further it is intended that the Commissioner will have sufficient independence in reporting to enhance this public confidence.

While the QLS supports these policy objectives, it is concerned that the role of the Commissioner may ultimately duplicate the functions of the regulator (the **Department of Environment and Science** or **DES**). As has been seen with the establishment of other industry-specific commission roles,[2] duplication of responsibility can lead to poor regulatory outcomes, as well as stakeholder confusion and erosion of public will.

QLS considers that protections should be put in place to ensure high-level coordination between the Commissioner and DES, including strict delineation of responsibilities and allocation of resources to ensure appropriate system interoperability.

Residual Risk Assessment Guideline

The Bill proposes to insert a new section 262(1)(d)(ii) into the *Environmental Protection Act 1994* (the **EP Act**), that will require all resource environmental authority holders to provide a post-surrender management report with their surrender application.

Section 264A of the amended legislation sets out the compliance obligations of the post-surrender management report, including a risk assessment of the land that complies with a guideline. The guideline will not be subject to tabling and disallowance requirements.[3]

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[1] Hon. LM Enoch, Minister for Environment and the Great Barrier Reef, Minister for Science and Minister for the Arts, Hansard, 18 June 2020, p. 1389 < https://www.parliament.qld.gov.au/documents/hansard/2020/2020_06_18_WEEKLY.pdf>.

[2] See, for example, the role of the GasFields Commission Queensland and the findings of the Queensland Audit Office dated 18 February 2020 (https://www.qao.qld.gov.au/sites/default/files/2020-02/Managing%20coal%20seam%20gas%20activities%20%28Report%2012%E2%80%942019%E2%80%9320%29.pdf)

[3] Environmental Protection and Other Legislation Amendment Bill 2020, Explanatory Notes, pg. 8 < https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T958.pdf>.

QLS expresses its concern at an increasing trend by the Queensland Government of delegating significant legislative functions to non-legislative instruments such as guidelines and operational policies. QLS submits that, where at all possible, substantive requirements (such as the requirements for a post-surrender management report) should be included in principal legislative instruments.

In the absence of tabling the guidelines and providing for disallowance, QLS recommends comprehensive consultation on the draft guideline be undertaken, to ensure that stakeholders have the opportunity to comment on the proposed approach and that all feedback is fully taken into account.

This will produce the best outcome for both regulators and industry, enabling the production of a guideline that will provide adequate certainty and effectively assist parties to ensure they meet their compliance obligations under section 264A.

New Plans of Operation for Petroleum Lease Holders

The proposed amendments to section 291 of the EP Act include a requirement that a holder have a current plan of operations in order to carry out petroleum activities under a petroleum lease.

The Explanatory Notes outline that a plan of operations continues for a period of time, known as the 'plan period', and that there may be environmental authority holders who are undertaking petroleum activities pursuant to a plan of operations where the plan period has already ended.

The proposed amendments to section 291 will require the submission of a replacement plan of operations, to be relied on for a new (and current) plan period, upon commencement.[4]

Legislation must have sufficient regard to rights and liberties of individuals (*Legislative Standards Act 1992*, section 4(2)(a)). The Explanatory Notes set out that the changes proposed to section 291 may involve a possible breach of this fundamental legislative principle, but considers that a breach is justified in these circumstances:

> *"Any breach of this fundamental legislative principle is considered justified because the intention in requiring a plan of operations was to ensure the administering authority has information demonstrating how the operator intends to meet the conditions of its environmental authority. This intention can only be fully delivered if the plan of operations remains current for the duration of the operations. Upon introduction of the Bill, any relevant environmental authority holders acting under an expired plan of operations, that will need a new plan of operations upon commencement, will be made aware of the proposed changes to the legislation and will have time to prepare a new plan of operations before commencement."*

If this requirement is likely to materially impact the rights and obligations of environmental authority holders, QLS submits that the regulator must work closely with affected entities to ensure that they have adequate time and are provided adequate guidance to meet this new obligation.

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[4] Ibid, pg 5-6.

Amendment of the Mineral and Energy Resources (Financial Provisioning) Act 2018

The Bill proposes to insert a new Part 3A into the *Mineral and Energy Resources (Financial Provisioning) Act 2018* (the **MERFP Act**), regarding the administration of the residual risks fund.

Under this part, a new section 76C will require the scheme manager to make decisions in relation to authorising payment of costs and expenses from the residual risks fund. The proposed new section 76D relates to the making of guidelines about the administration of the residual risks fund.

As currently drafted it is within the discretion of the scheme manager as to whether or not guidelines will be made. To ensure that there is appropriate transparency and clarity provided in association with the administration of the residual risk fund, QLS recommends that section 76D(1) be amended to read:

> *"(1) The scheme manager ~~may~~ **must** make guidelines about the administration of the residual risks fund."*

Further clarity required - scheme fund and administration

QLS has previously raised concerns with respect to a need for further clarity in relation to the scheme fund and its administration.[5] These concerns remain.

The discretionary aspects of the powers afforded to the scheme manager under Part 3, Division 1 of the MERFP Act are exceptionally broad, particularly when considering that the scheme manager's powers pursuant to section 22 are expressed as a non-exhaustive list.

This includes uncertainty in relation to making decisions about risk category allocation.[6]

The scheme manager makes decisions about risk category allocations for each authority. In each case, the scheme manager is entitled to consider the "*financial soundness*" of the holder when making its decision. "*Financial soundness*" is not defined.

QLS submits that this is an area of uncertainty, which cannot be rectified by the publication of guidelines or another subordinate legislative instrument (as the proper meaning of that term in the Act must prevail). Without a legislative definition, uncertainty will remain, as it is possible that the scheme manager's discretion to determine whether a holder is financially sound could be inconsistently applied.

QLS recommends that the Bill be amended to include objective measurements for "*financial soundness*", against which a decision of the scheme manager can be reviewed. It is critical that the objective measures for determining "*financial soundness*" be included in the MERFP Act to address the existing uncertainty in the legislation.

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[5] Queensland Law Society, Submission No 9, Queensland Parliament Economics and Governance Committee, *Inquiry on Mineral and Energy Resources (Financial Provisioning) Bill 2018*, (8 March 2018), 2, (https://www.parliament.qld.gov.au/documents/committees/EGC/2018/MineralEnergyRes-FinProv2018/submissions/009.pdf).

[6] Ibid, 3.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Luke Murphy
President