Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

7 January 2020

Our ref: LP - MC

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Justice and Other Legislation Amendment Bill 2019

Thank you for the opportunity to provide comments on the Justice and Other Legislation Amendment Bill 2019 (**the Bill**). Thank you also for the short extension of time until today to deliver our submission.

Queensland Law Society (**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.

The Bill proposes to amend 33 acts and 4 regulations, all which cover a wide range of issues and different areas of practice.

Due to the short timeframe permitted to provide a submission to the inquiry, including the Christmas period, and notwithstanding our prior advocacy on some of these amendments, we have been unable to conduct an exhaustive review of all of the clauses in the Bill. It may be that there are unintended consequences arising from the amendments and further, if we have not commented on an aspect of the Bill, it does not indicate assent or support for the amendment. In the time available, we make the following comments about certain proposed amendments.

Anti-Discrimination Act 1991

We do not have any concerns, at this time, with the proposed amendments to this Act save for the requirement in proposed section 16A(4A) that an "in-time" matter is not able to proceed in the Tribunal until a decision has been made on a related out of time matter. The use of the word "must" in this proposed section means that the parties and the Commission do not have the flexibility to proceed with the "in-time" claim in circumstances where this is in the interests

of the parties and/or, for example, where the out of time claim will take a while to determine. We submit that the proposed section be amended to give the commissioner the discretion to progress a matter to the Tribunal in appropriate circumstances.

Amendment of the Civil Proceedings Act 2011

We refer to the proposed amendment to section 59(4)(b) of the *Civil Proceedings Act 2011* (**CPA**). QLS has considered the proposed amendment and notes the apparent policy decision to maintain consistency with past legislation dealing with interest on costs. In particular, it is understood that the intent is that if costs are paid within 21 days of "ascertainment" (whether by way of a fixed costs order, assessment or agreement) no interest is payable, otherwise interest is payable from the date of the money order.

It is our view that the amendment proposed will create ambiguity having regard to the definitions in the CPA regarding a "money order" and a "money order debt", particularly when considered in conjunction with rule 740(1) and (2) of the *Uniform Civil Procedure Rules 1999* (**UCPR**). These definitions did not exist under the former legislation and therefore we believe the proposed sub-section needs to be further refined in keeping with the context of the CPA and the policy intent.

The Society is concerned not to waste legal resources and the Court's valuable time in having to deal with issues which may arise as to the meaning of the proposed sub-section. In this regard, we understand from our members that there have been issues with some registrars being unsure as to how interest should be calculated when it comes to execution on costs orders.

On further consideration, reflecting our understanding of the policy decision and to remove any doubt, we believe sub-section 59(4)(a) should be amended (to deal with fixed costs orders), and new sub-sections (4)(b) and (5) should be inserted, as follows:

"(a) if the money order includes an amount for damages or an amount for costs and the relevant amount is paid within 21 days of the date of the order, interest on the amount is not payable unless the court otherwise orders; or

(b) if the money order includes an order for costs but does not include an amount for costs:

(i) the amount certified in a certificate of a costs assessor under rule 737(2) of the *Uniform Civil Procedure Rules 1999*, or the amount agreed for the costs, is a money order debt for the purposes of this section; and

(ii) interest on the costs is not payable if the costs are paid within 21 days after service of the certificate of a costs assessor or after the agreement, unless the court otherwise orders.

(5) For the purposes of this section, an order of the registrar or judgment within the meaning of rules 740(1) and (2) of the *Uniform Civil Procedure Rules 1999* is not a money order or a money order debt."

Commercial Arbitration Act 2013

The proposed change to section 27H of the *Commercial Arbitration Act* 2013 (**CAA**) has been considered by members of the Litigation Rules and Alternative Dispute Resolution Committees.

It appears that this change may have been brought about as a result of a drafting error identified by his Honour Justice Jackson in the decision of the Supreme Court of Queensland in *Wilmar Sugar Pty Ltd v Burdekin District Cane Growers Ltd* [2017] QSC 003 (**the Wilmar decision**). We note that NSW has already made the proposed change to the equivalent subparagraph (a).

However, we respectfully submit that in making this change, further clarity is required around the current subparagraph (b) and in particular, the reference to "that purpose". In this regard, in the Wilmar decision, at [32] Jackson J held:

> [32]… Where the considerations that render it desirable in the public interest for the confidential information to be disclosed do outweigh the public interest in preserving confidentiality of arbitral proceedings, the court is to limit the disclosure to what is not more than is reasonable for that purpose.

Therefore, in order to clarify the "purpose" in subparagraph (b), we propose that an additional amendment is required so that subparagraph (b) reads to the effect:

> **27H The Court may prohibit disclosure of confidential information in certain circumstances**
>
> (1) The Court may make an order prohibiting a party from disclosing confidential information in relation to the arbitral proceedings if the Court is satisfied, in the circumstances of the particular case, that—
>
> …
>
> *(b) the considerations that render it desirable in the public interest for the confidential information to be disclosed outweigh the public interest in preserving the confidentiality of arbitral proceedings, and the disclosure is more than is reasonable.*

We note similar provisions regarding disclosure exists in section 27I(1)(a) of the CAA. We submit that the issues raised by Jackson J are also relevant in respect of this provision and as such, the Bill ought to be updated to amend section 27I as recommended above.

Criminal Code

QLS welcomes the proposed amendments to section 159A (Time held in presentence custody to be deducted) of the *Penalties and Sentences Act 1992* and the amendment to section 651 (Court may decide summary offences if a person is charged on indictment) of the Code (Clause 53).

We also note the proposed amendment to section 552BB of the *Criminal Code* (Clause 51), which would increase to $80,000.00 the value of property offences which must be determined in the Magistrates Court. Some of our members have noted that the right to elect trial by jury should be retained for indictable offences as a matter of general policy.

Dangerous Prisoners (Sexual Offenders) Act 2003

We are concerned that these amendments lack clarity and therefore, may cause uncertainty. Clause 62 amends the definition of 'prisoner' to include a person detained under the *Youth Justice Act 1992* (**YJA**).

The *Dangerous Prisoners (Sexual Offenders) Act* (**DP Act**) has not previously explicitly referred to the YJA. As currently drafted, the proposed amendment may capture young persons detained under the YJA for serious sexual offences. However, the relationship of the DP Act to the YJA is unclear. Previous versions of the DP Act have not included reference to the YJA and it remains somewhat untested as to whether the legislation applies to juveniles.

If the changes are intended to extend the DP Act to juveniles, there remains an important policy question about whether it should do so. QLS queries the appropriateness of such legislation being utilised for a certain class of juvenile offender as a matter of general principle.

District Court of Queensland Act 1967

QLS has previously recommended that section 68(3)(c) of the *District Court of Queensland Act 1967* (**DCQ Act**) be clarified, and that similar provisions should be inserted into the *Magistrates Court Act 1921* and the *Queensland Civil and Administrative Tribunal Act 2009* (**Magistrates Court Act** and **QCAT Act**, respectively).

The effect of the proposed amendments in clauses 69, 149, 184 and 185 of the Bill is to clarify that the amount of money claimed by a plaintiff as interest will not be included in the total amount of the claim for the purposes of deciding which court a matter should be commenced in.

Proposed section 68(3)(c)(i) of the DCQ Act deals with interest that a party is entitled to as a right or pursuant to a contract. In our view, such interest is distinguishable from discretionary interest and is properly part of the claim (and may, in some cases, be a significant component). As such we query whether it should be excluded when determining jurisdiction. The explanatory notes do not offer any assistance in understanding the policy rationale here.

Our main concern with the proposed amendment, however, is the lack of clarification with respect to matters that have already been commenced, but not yet decided, by the Court. Transitional provisions should be included in the Bill and, for the sake of clarity and certainty, we consider that the amendments should only apply to new matters filed.

We make these same comments with respect to the amendments to the *Magistrates Court Act 1921* and the *Queensland Civil and Administrative Tribunal Act 2009*.

Drugs Misuse Act 1986

The amendments to the *informer* provisions in sections 119 and 120 of the *Drugs Misuse Act* add some clarity (Clause 72). However, they do not appear to provide any means for the Court to inquire into the informer's identity - where it is in the interests of justice to do so.

Land Court Act 2000

The proposed amendments to the *Land Court Act 2000* have been considered by the QLS Mining and Resources Law and Litigation Rules Committees.

Clause 92 of the Bill proposes to replace the existing section 22, which provides for directions to be made about procedural matters that are not addressed by the Land Court rules. The proposed new section 22, will allow for directions of general application (made by the President) and directions applicable to particular "proceedings" to be inconsistent with the Land Court rules and to prevail over the rules to the extent of the inconsistency.

In relation to the amendment to section 22(1), some members raised concerns that the change of language from "a particular case before the court" to a "proceeding" might have unintended consequences and, in particular, might impact on the ability for the Land Court to issue directions when it is performing functions and exercising powers under recommendatory provisions (**recommendatory matters**).

In respect of the amendment to section 22(2), QLS understands that this may be intended in part, to provide necessary flexibility to deal with recommendatory matters. The preference of the QLS would be for any problems or deficiencies with the Land Court Rules to be addressed by amendments to the rules, rather than through the making of directions. A query has also been made as to whether provision should be made for whether an order or direction under section 22(1) prevails to the extent of any inconsistency over a general direction under section 22(2), or visa versa.

Magistrates Courts Act 1921

Please see our comments above under the heading "*District Court of Queensland Act 1967*".

Peace and Good Behaviour Act 1982

Clause 158 of the Bill would appear to broaden the scope of 'Restricted premises orders' to a wider range of conduct than was intended by the legislation's original intent. We are concerned that this may have unintended consequences.

Property Law Act 1974

QLS is broadly supportive of a proposal that allows the exercise of power of sale by a mortgagee without the need for the mortgagee to obtain a court order in relation to disclaimed property but suggests that the drafting of subsections 84A(1) and (2) could be simplified. Some of our members were concerned that the qualifying wording contained in (b) and (c) of each of these sections was unclear.

It appears that the intent of these subsections is to ensure that a mortgagee can exercise the mortgagee's power of sale in relation to disclaimed land, in circumstances where:

- an application has been made to a Court under section 133(9) of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) or sections 568E or 568F of the *Corporations Act 2001* (Cth) (**Corporations Act**); and
- the Court has refused the application, meaning that the Court has determined that the property should not be vested in the applicant or another person who might otherwise have qualified under these provisions to claim the property (other than the mortgagee).

Presumably the power will also be available where no one has lodged an application seeking an order under s133(9) of the Bankruptcy Act, provided that the mortgagee follows the procedural requirements in subsections (4) and (5).

It is not clear on their face whether the sections are intended to refer to applications by the mortgagee or to applications by other parties under the Bankruptcy Act or the Corporations Act, but given the underlying intention we expect that it is the latter and we suggest that this should be clarified.

QLS suggests that it may be possible to simplify (1) by combining (b) and (c) into a single qualifier to the effect of:

> "if any person other than the mortgagee has lodged an application for an order under section 133(9), that application has been withdrawn or has been dismissed by the Court."

A similar amendment could be made to subsections 84A(2)(b) and (c).

It may also be possible to combine 84A (1) and (2) into a single section containing a combined qualification using a modified version of the wording suggested above or alternatively along the lines of:

> "provided that no orders have been made under section 133(9) of the Bankruptcy Act 1966 (Cth) or sections 568E or 568F of the Corporations Act 2001 (Cth) in favour of persons other than a mortgagee claiming an interest in the property which are inconsistent with or prevent that mortgagee from proceeding with the exercise of its power of sale."

Queensland Civil and Administrative Tribunal Act 2009

The Bill seeks to amend section 183 of the QCAT Act to remove the requirement of the Minister to advertise for applications for senior and ordinary members of QCAT. Regardless of whether a current member or senior member is reappointed or not, our view is these positions should be advertised to ensure transparency and diversity of appointments.

We note that this issue was raised at the Public Briefing for this inquiry and it was submitted that this process will still be a public process. We would welcome further information from the Attorney-General on this point.

Please also see our comments above under the heading "*District Court of Queensland Act 1967*".

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