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Office of the President

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Our ref (VKWD-Advocacy General)

Committee Secretary
Agriculture and Environment Committee
Parliament House
George Street
Brisbane Qld 4000

By Email: aec@parliament.qld.gov.au

Dear Agriculture and Environment Committee

Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2017

Thank you for the opportunity to provide comments on the confidential consultation draft of the Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2017.

Queensland Law Society (**QLS**) appreciates being consulted on this important reform.

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

QLS is the peak professional body for the State's legal practitioners. We lead a profession of nearly 11,000 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.

In carrying out its central ethos of advocating for good law and good lawyers, the Society endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise, proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

QLS has a number of concerns in relation to the Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2017 (**SWR Bill**) as outlined below.

Lack of clarity as to scope of proposed framework - what land can be a private protected area?

The Explanatory Notes describe in a number of places (on pages 1, 3 and 6 principally) that special wildlife reserves are to be created to “allow for the protection of lands of **outstanding conservation value**” (emphasis added).

It is noted that the proposed new s 21B of the SWR Bill outlines the management principles of special wildlife reserves, which refer to concepts of preserving the area's natural condition, cultural resources, exceptional scientific values and ensures that use of the area is ‘nature-based and ecologically sustainable’.

However, the drafting in the SWR Bill in relation to declaring a special wildlife reserve does not, directly or indirectly, actually reflect this intended purpose to which the Explanatory Notes refer. The closest the SWR Bill comes is in proposed s 43A(8), definition of “State interest”, which means “*an interest the Minister considers to be an economic, environmental or community interest of the State*”.

QLS is concerned that the scope of the definition of “State interest” does not relate to wildlife nor to “outstanding conservation value”. The drafting effectively allows for the Minister's (essentially unfettered) determination of what might be considered an [any] “economic, environmental community interest”.

This neutral language gives the Minister a broader, rather than a narrower power, to determine when a “special wildlife reserve” should be declared. The Explanatory Notes are misleading in suggesting that the SWR Bill has anything to do with wildlife or “outstanding conservation value” when that is not actually what the SWR Bill permits.

Further, land use planning principles require that land is utilised for its highest and best use. Having regard to the long term nature of the creation of a special wildlife reserve, the Minister should be required to consider the highest and best use of any subject land before making a proposal. That assessment should also consider future wider community interests, such as future transport corridors, mineral and petroleum exploration, quarry and forestry material, residential development, and so on, to ensure that the land's best and highest use is as a protected reserve, in perpetuity.

Recommendation: include a requirement for a trigger for a declaration that a “special wildlife reserve” is made for an area with wildlife or outstanding conservation value including guidance as to what comprises outstanding conservation value, having regard to the highest and best use of the land.

The “consent” of other affected parties

The Explanatory Notes say on page 7:

“other materially affected parties will have had to provide their consent to the proposal to proceed to declaration.”

This is inconsistent with the drafting of the SWR Bill which provides in s 43B(2) (and in s 43E(3) to similar effect) that if:

“the rights or interests of a person mentioned in section 43A(5) will be materially affected by the conservation agreement, the Minister must not enter into the conservation agreement without the person’s written consent” [emphasis added].

Section 43A(5)(d) requires that notification of a proposal to declare an area as a special wildlife reserve be given to “each holder of a mining interest, geothermal tenure or GHG authority to which land in the proposed reserve area is subject”. With respect to resources tenement holders, ss 43B(2) and 43E(3) are superfluous and ineffectual. The SWR Bill has the purpose and effect of preventing further resources activities (whether mining, petroleum, geothermal or carbon capture and storage) in a declared special wildlife reserve – see *Nature Conservation Act 1992* (the **Nature Conservation Act**) ss 14 and 15, the proposed s 21B and the provisions for previous use authorities under proposed s 43H.

Proposed s 43H is particularly relevant to, for example, exploration activities for minerals under an Exploration Permit (**EP**) or for petroleum under an Authority to Prospect (**ATP**).

Exploration is, by its nature, periodic and/or sporadic. The process for which the SWR Bill provides has these significant effects on such exploration interests.

- No use can be made by the resource tenement holder of the land to which the declaration applies unless that use started before the declaration was made, and then only where that use continues thereafter and is also authorised under a “previous use authority” under s 43H. The resource tenement holder can, for example, complete a drilling program if specifically authorised under s 43H, but it cannot start a new one.
- Further, and more seriously, it will not be possible for a new form of tenure to be granted under a resources Act (see amendments to Nature Conservation Act s 27(1)). For example, an EP holder who has discovered mineral deposits, or an ATP holder who has discovered petroleum reserves or resources, cannot obtain a production permit no matter what stage under the exploration tenement, or application for a production tenement, it has reached. The door is closed completely, permanently and without consent.

The Explanatory Note is misleading when it suggests that under s 43B(2) the “person’s written consent” is required as such a person “will be materially affected by the conservation agreement”, for two reasons.

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1. The person will not be affected by the conservation agreement. It will be affected by the declaration. It is the declaration, not the conservation agreement, that prevents further or additional use of the exploration tenement or grant of a subsequent production tenement.
2. Sections 43B(2) and 3E(3) do not, in fact, protect any interests of pre-existing resource tenement holders in the grant of further tenements, for example production tenements.

These examples are not exclusive. Similar comments may be made about the effect of declaration on production of minerals or petroleum under a production tenement. For example, under a production tenement which exists at the date of declaration of the wildlife reserve:

- a “previous use authority” under s 43H can be granted only for a use that was current “immediately before the declaration”; for example, for a mining lease a new pit cannot be commenced, and for a petroleum lease a new gas well cannot be drilled after the declaration, even if the activities otherwise hold all required approvals;
- under s 43H(5)(b), the use can at maximum only be carried out for another three years in any case.

Definition of “materially affected” and how these provisions affect a person with “an interest in land”, within the meaning of proposed section 43A(5)(a)

It is unclear:

- what “materially affected” means in ss 43B and 43E; and
- how these provisions will affect mortgagees, lessees, easement holders and others with an interest in the land.

The effect of these provisions is critical because if an assessment is made (presumably by the Minister) that a person’s interests are not materially affected by the proposed conservation agreement, it would seem that there is no obligation on the Minister to obtain their consent.

It is noted that such a person must receive written notice about the proposal under s 43A(5)(a), but a person with an interest which is not deemed to be “materially affected” then has no other rights in relation to this process and essentially can be disregarded.

The declaration of a special wildlife reserve could have significant impacts on the value of a person’s interest in the land, particularly if the person considers that their interest is materially affected and there is no capacity to object or test the assessment of the Minister that the interest is not “materially affected” within the meaning of proposed s 43B(2).

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For example, the declaration could restrict or prevent an existing commercial use of the property which could significantly affect the value of a mortgagee's security over the property and the mortgagor's ability to repay a loan.

QLS also queries how:

1. the "consent" framework will affect interest holders such as mortgagees and lessees of the property, as sections 43A and 43B seem to deal particularly with resource tenement holders but not other interest holders.
2. the previous use authority framework will operate with respect to a lease containing an option to renew. An option to renew is exercisable at the election of the lessee and it is an enforceable right against the lessor. Is an option to renew considered part of the "allowable term" under s 43H(5) of the SWR Bill? If not, it would appear that the previous use authority will interfere with an option to renew clause which adversely affects a person's existing rights.
3. section 43F will operate in practice if a landholder and Minister agree that a licence or lease should be granted, in circumstances where that licence or lease could affect a person with another interest in the land. The drafting does not contemplate the impact that this grant might have or how the third party's interests might be affected.

Recommendations:

- *provide that a special wildlife reserve cannot be declared without the full and free consent of all affected parties, including resource tenement holders, and allow exercise of rights and tenure progression for tenures existing as at declaration*
- *clarify what "materially affected" means in ss 43B and 43E*
- *clarify the impact that this process will have on interest holders such as mortgagees and lessees of the property, as ss 43A and 43B seem to deal particularly with resource tenement holders but not other interest holders*
- *clarify how the previous use authority framework will operate with respect to a lease containing an option to renew*
- *clarify how s 43F is intended to operate with respect to third party interests*
- *insert a process to protect a third party's interest. A balanced process would include the elements of:*
 - *notification to interest holders (as required under ss 43A(5) and 43A(6))*
 - *a right on the part of the interest holder to make a submission / objection to the proposal*
 - *the Minister to make a decision and provide written reasons in response to any submission / objection*
 - *a right to appeal by the interest holder*

Compulsory acquisition without compensation

For the reasons set out above, the SWR Bill does breach fundamental legislative principles, notwithstanding what is suggested in the Explanatory Notes.

Under the *Legislative Standards Act 1992*:

- s 4(1), **fundamental legislative principles** are “the principles relating to legislation that underlie a parliamentary democracy based on the rule of law”;
- s 4(2), the principles “include requiring that legislation has sufficient regard to ... rights and liberties of individuals”; and
- s 4(3)(i), where the “legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides for the compulsory acquisition of property only with fair compensation”.

The holders of:

- resources exploration tenements current as at declaration of the special wildlife reserve have rights to explore for the relevant resource;
- resources exploration tenements with production tenure applications current as at declaration of the special wildlife reserve have rights to have the application considered; and
- resources production tenements have rights to produce the relevant resource,

each according to the terms of the tenement, other approvals and the law at that point in time.

As discussed earlier, the SWR Bill, if enacted, and the subsequent declaration of a special wildlife reserve have the effect of indirectly acquiring rights of existing resource tenement holders to the extent that those rights can no longer be exercised after declaration of the special wildlife reserve.

The Explanatory Notes suggest that there is no breach of fundamental legislative principles in the SWR Bill. If the reasoning is that no compulsory acquisition occurs, either because the resource tenement holder continues to hold the same tenement that it did before, or because compulsory acquisition requires that the State gain something that the resource tenement holder loses, QLS would disagree.

Such a position would be incorrect for these reasons:

- The resources tenement holder may no longer be able to exercise the rights under its tenement that it could exercise before the declaration.
- The State does in fact gain, by reference to what the resource tenement holder loses. At the very least, the State gains these things: preservation of the “economic, environmental or community interests of the State” by reference to which the declaration is made (or, as is more broadly stated in the Explanatory Notes, preservation of the “outstanding conservation value” of the land); and in any case,

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removal of the obligation to consider any application for a further tenement, for example a production tenement in respect of a relevant exploration tenement.

Finally, compulsory acquisition occurs in respect of an area that is declared as a special wildlife reserve by this mechanism:

- land that is declared as a special wildlife reserve will be a “protected area” as defined in the schedule 2, dictionary (as amended) in the *Mineral Resources Act 1989 (MR Act)*;
- that protected area ceases to be “land” as defined in schedule 2, dictionary (as amended) of the MR Act; and
- as the resources tenement holder’s rights to conduct activities under an exploration or production tenement are expressed to relate to “land”, rights cannot be exercised in respect of it, and it is effectively (whether or not directly) excised from the existing resource tenement authority.

Similar conditions arise in respect of other types of resource authority, for example petroleum, geothermal energy and carbon capture and storage.

Recommendation: provide for just terms compensation for direct and indirect compulsory acquisition effected by the SWR Act and declarations made under it.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitors, Wendy Devine on [REDACTED] or [REDACTED] or Vanessa Krulin on [REDACTED] or [REDACTED]

Yours faithfully



Christine Smyth
President