Environmental Defenders Office of Northern Queensland Inc.

8 August 2012

VIA EMAIL (arec@parliament.qld.gov.au)
Agriculture, Resources and Environment Committee
Queensland Parliament
Parliament House
Brisbane QLD 4000

Re: Mines Legislation (Streamlining) Amendment Bill 2012 – Submissions of Environmental Defenders Office of Northern Queensland Inc.

Dear Sir/Madam,

The Environmental Defenders' Office of Northern Queensland Inc. ("EDO-NQ") is a not-for-profit, non-government, community legal centre specialising in public interest environmental law. Like other EDOs located in each of Australia's states and territories, EDO-NQ provides specialised legal representation, advice and information to individuals and communities regarding environmental law matters of public interest. We also take an active role in environmental law reform and policy formulation, and offer community legal education programs designed to facilitate public participation in environmental decision making.

EDO-NQ is based in Cairns and provides service to the public from Sarina north to the Torres Strait and west to the state border. The *Mines Legislation (Streamlining) Amendment Bill 2012* ("Bill") has clear and significant impacts on EDO-NQ's service area. EDO-NQ has provided assistance to numerous individuals and community groups regarding mineral and other resource development proposals in the area.

EDO-NQ welcomes the opportunity to lodge submissions with the Agriculture, Resources and Environment Committee ("Committee") regarding the Bill.

I. GENERAL COMMENTS.

A. Lack Of Adequate Opportunity To Review And Comment On The Bill

First and foremost, the time frame established for public review and comment upon the provisions of the Bill has been unreasonably short and has deprived EDO-NQ and members of the public of a meaningful opportunity to consider and comment upon the Bill's provisions. EDO-NQ notes that the Bill was only introduced in Parliament on 2 August 2012, and referred to the Committee the same day. The closing date for submissions is 5:00 pm on 8 August 2012. This means the public has had, at most, a little over three (3) working days to review, digest and prepare comments regarding the 439-page Bill (and the 153-page Explanatory Note that accompanies it). Likewise, the Bill amends provisions of 17 pieces of legislation, introducing a level of

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complexity that is exacerbated by the lack of time allotted the public to review the Bill and prepare submissions.

In addition, at the outset, the Explanatory Note advises that:

> The purpose of the Bill is to provide the legislative changes necessary to:
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> * * *
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> • implement part of the Streamlining Approvals . . . .[1]

The Streamlining Approvals Project, the Explanatory Note advises, commenced in 2009 and has produced three reports: (1) a 2009 Streamlining Approvals Project Mining and Petroleum Tenure Approval Process report (the "Streamlining Report"); (2) a 2010 Supporting Resource Sector Growth report (the "Industry Report"); and (3) On The Right Track 2011 (a progress report on the Streamlining Approvals Project).[2] In other words, the 439-page Bill implements, in part, recommendations set forth in yet three (3) other reports, which requires yet more reading and analysis to determine the extent to which the Bill's provisions are consistent with those recommendations and reports. Finally, EDO-NQ notes that finding copies of these reports required some hours of searching the Internet since the reports were not readily available on the relevant departments' websites and were not linked to Parliament's notice announcing introduction of the Bill.

Given the size of the Bill and the volume of relevant material requiring review and analysis, it is respectfully submitted that the provision of four (4) days' notice for submissions on the Bill violates the spirit, if not the specific wording, of the Fundamental Legislative Principles ("FLP") defined in section 4 of the Legislative *Standards Act 1992* (Qld).

For example, s 4(3)(b) of the *Legislative Standards Act 1992* (Qld) provides that legislation must, in order to be consistent with FLP, be "consistent with principles of natural justice". The principles of "natural justice" are further explained in *Fundamental Legislative Principles: The OQPC Handbook* as:

> First principle—The principles require that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present the person's case to the decision-maker.
>
> Second principle—The decision-maker must be unbiased.

[1] Explanatory Note, p 1.

[2] Ibid, pp 1-2.

> Third principle—The principles require procedural fairness, involving a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case.[3]

The lack of adequate time to review and comment on the Bill, EDO-NQ submits, conflicts with both the first and third principles of FLP.

In fact, the Explanatory Note to the Bill appears to concede difficulties with satisfying the FLP. The Explanatory Note concedes, in relevant part:

> The Bill has been drafted with regard to [FLP] and is ***generally consistent*** with these provisions. ***However, the Bill includes a number of provisions that may be regarded as breaching fundamental legislative principles***.[4]

EDO-NQ agrees with this concession. While the Explanatory Note attempts to justify the Bill's deviations from FLP in its discussion of the relevant provisions, EDO-NQ submits that, where FLP may be regarded as breached by the provisions of a Bill, persons affected by that breach must be given an adequate opportunity to address that breach. Four days is simply not adequate. EDO-NQ urges the Committee to provide additional time and opportunity for the public to make submissions regarding the Bill.

B. Exclusion Of Other Stakeholders

Compounding the lack of meaningful opportunity for the public to review and comment upon the Bill is the fact that the Bill is admittedly the product of years of close consultation between the Government and the mineral industry – not only with respect to streamlining proposals but also with respect to provisions related to the CSG/LNG sector and compulsory acquisition. This is made clear in the Explanatory Note, discussing industry groups consulted with by the Government in the lead-up to the Bill's introduction.[5]

Government consultation with other stakeholders – landholders, farmers, graziers, local government and communities – is noticeably absent. EDO-NQ urges the Committee to take action to enable at least some consultation with such stakeholders to take place before the Bill is acted upon by Parliament.

C. Failure To Provide For Protecting Restricted Areas

The *Resource Legislation (Balance, Certainty and Efficiency) Bill 2011*, which has now lapsed, contained provisions essentially prohibiting some forms of mineral development (e.g., mining and gas development) within 2 km of urban areas and communities with over 1000 people if the applications did not have the consent of

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[3] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, s 2.3.1 p 25 (January 2008).

[4] Ibid, p 9.

[5] See Explanatory Note, pp 12-13.

the local government. Open cut mines were also to have been prohibited under this Urban Restricted Areas plan.

EDO-NQ notes that such provisions are omitted from the Bill. The Committee should review the provisions in last year's *Resource Legislation* bill and incorporate – and strengthen – such provisions in order to empower rural communities to choose to maintain their way of life, while not preventing mining and gas activities in nearby areas that had consent of the local government. Local government in rural areas is quite capable of deciding – based on shared local values – whether to consent to mineral development in close proximity to population centres. The Committee should endorse such powers and incorporate restricted areas provisions in the current Bill.

II. SPECIFIC COMMENTS

A. Streamlining

1. Online Service Delivery Platform

Generally speaking, EDO-NQ supports a key goal of the Streamlining Approvals Project that is incorporated in several of the Bill's amendments, namely the "introduction of an online service delivery platform, by which industry can transact with Government in a seamless online environment".[6] According to the Explanatory Note, this platform = *MyMines Online* – will permit authenticated customer access and will provide "additional transparency for assessment processes, reducing enquiries and providing certainty on assessment status problems".[7] EDO-NQ supports measures that increase efficiency, reduce costs to both the regulated community and government, and provide greater transparency and certainty in the regulatory process.

However, there is an element missing from the online delivery platform that EDO-NQ urges the Committee to address in further amendments to the Bill, namely providing the general public with access to all or part of the online platform. At present, the system appears to be accessible only by industry. The public – including landowners, farmers, graziers and other members of the community likely to be impacted by mineral developments – desperately need timely and accurate information regarding such developments. That information and access should be readily deliverable by the online platform contemplated in the Bill and the Streamlining Approvals Project's recommendations. EDO-NQ notes that local governments are required to provide online access to development applications and other planning matters; there is no reason why similar access cannot be provided for the mineral development sector.

[6] Explanatory Note, p 2.

[7] Ibid, p 2.

B. Compulsory Acquisition

As the Explanatory Note makes clear, the Bill contains numerous provisions that limit the government's liability to compensate resource holders for the value of mineral or energy resources extinguished through resumption of land. The Bill provides that "allowance cannot be made for the value of the mineral or energy resource known to be on or below the surface of the land".[8] This, the Explanatory Note blandly observes, "is a potential FLP issue".[9] The proposed amendments are far more than that, in EDO-NQ's opinion. The proposal to deny compensation to mineral resource holders constitutes a fundamental violation of the principle that the government is obligated to provide just compensation for property interests that it takes for a public purpose, via resumption or any other means.

Moreover, the Government's position with regard to this issue is specious. According to the Explanatory Note:

> The Government's position is that if the resource tenure holders were permitted to claim compensation on the lost opportunity to develop the resource on or below the surface of the land then it would potentially lead to the State, local governments and other infrastructure proponents paying large compensation amounts to acquire land where there is resource tenure and identified resources (particularly production lease). This could effect [sic] the feasibility of some linear infrastructure projects, such as a railway across resource regions.[10]

This observation is as true as it is irrelevant. Any taking by the government will cost the government money – potentially a great deal of money depending on the value of the property taken. Nonetheless, it is a fundamental and long-established tenet of Anglo-Saxon law that the government cannot take private property for a public purpose without providing just compensation to the property's owner. This tenet is enshrined in s 51(xxxi) of the Constitution of Australia and recognized by the courts of this nation.[11] To the extent provisions of the Bill propose to allow the resumption of land without compensating the holders of resource interests under the land, it violates these fundamental tenets of the law.

Moreover, the Government's suggestion that resource holders do not have compensable property rights is untenable on its face. With regard to this suggestion, the Explanatory Note states:

> Resource tenure holders (other than production lease holders such as mining lease holders) do not have the right to develop resources on or below the surface of the

[8] Explanatory Note, p 10.

[9] Ibid.

[10] Ibid.

[11] *See, e.g., Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1; *PJ Magennis Pty Ltd v Commonwealth* (1949); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513; *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51.

> land. As such, this amendment does not significantly limit their rights to claim compensation. Rather, it provides clarity in assessing the compensation claim, particularly as they relate to exploration tenures.[12]

This statement ignores the often substantial economic investment that resource holders have made in obtaining their mineral tenements. There are numerous, and expensive, administrative and regulatory hurdles to be overcome in order to obtain such interests – including making proper applications, negotiating and complying with conditions of government authorities, negotiations for access with landholders, and undertaking environmental assessments and impact studies. Resource tenure holders that have incurred these costs have a reasonable expectation that they will be allowed, upon proper application and compliance with relevant laws and regulations, to develop those resources. Moreover, while there is no guarantee that resource holders have a right to develop the resources, it is EDO-NQ's experience that holders are rarely denied the right to develop the resources. The Government's assertions to the contrary simply do not withstand any serious scrutiny.

Further, the Explanatory Note suggests that the issue is not as consequential as it otherwise appears because:

> [A] constructing authority cannot simply extinguish resource interests at its discretion. The constructing authority will need to clearly demonstrate that it is necessary to extinguish the resource interest for the purpose of its take due to an inherent conflict. In these cases a resource interest holder would have the opportunity as part of the formal compulsory acquisition process to state its objection. The relevant Minister for the taking of the land needs to consider this objection.[13]

EDO=NQ is not persuaded that this is a sufficient check on the State's power to arbitrarily declare that property interests have not been extinguished by resumption. For one thing, the constructing authority's decision is in conflict with the State's interest in avoiding or limiting compensation liability. For another, it is not clear what review rights resource holders have to contest the constructing authority's, or Minister's, decision. Ultimately the determination of whether, and to what extent, resumption extinguishes a property interest should be decided by the Judicial – not the Executive – branch.

Accordingly, EDO-NQ urges the Committee to remove or substantially modify those provisions of the Bill that purport to allow mineral resource holders' property interests to be extinguished via resumption without triggering an obligation to properly compensate those resource holders. These provisions include ss 10AAA to 10AAD of the *Mineral Resources Act 1989* (Qld), ss 124A to 124C of the *Petroleum Act 1923* (Qld) and ss 30AA to 30D of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld). In particular, EDO-NQ is concerned with those provisions of the Bill that amend legislation to provide that:

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[12] Explanatory Note, p 10.

[1313] *Explanatory* Note, p 11.

> In assessing any compensation to be paid to the holder of a [mineral] interest in relation to the taking of the land, allowance can not be made for the value of [minerals] known or supposed to be on or below the surface of, or mined from, the land.[14]

C. Other Provisions Of The Bill

In addition to the foregoing, fairly broad concerns with large elements of the Bill, EDO-NQ has concerns with the following, more specific amendments to legislation proposed in the Bill.

1. *Petroleum and Gas (Production and Safety) Act 2004*: Section 422A

This section obliges licence holders to obtain and hold a relevant environmental authority for the duration of the licence. The Committee should amend this particular provision to include language to the effect that licence holders must also "comply with the terms and conditions of any relevant environmental authority for the duration of the licence", and comply with any enforcement order issued in relation to the environmental authority.

2. *Petroleum and Gas (Production and Safety) Act 2004*: Section 670

As stated in the Explanatory Note, the Bill amends s 670 to:

> [E]xclude pipelines transporting produced water under a pipeline licence from the definition of operating plant. This is to reflect that the safety and health aspects associated with the operation of the produced water pipelines are not regulated under the *Petroleum and Gas (Production and Safety) Act 2004*.[15]

Later, in dealing with amendments to the *Work Health and Safety Act 2011* (Qld), the Explanatory Note indicates that this legislation "will also not apply to specific individual operating plant identified in sections 670(2) and (5)" of the *Petroleum and Gas (Production and Safety) Act 2004.*[16]

EDO-NQ is concerned that it appears that the Bill has removed produced water pipelines from the scope of operating plant subject to the health and safety requirements of the *Petroleum and Gas (Production and Safety) Act 2004* defined in s 670 of that legislation, but has also excluded such plant from the safety and health requirements of the *Work Health and Safety Act 2011* by excluding plant specified in s 670 from its application. EDO-NQ assumes that the intent of Parliament is not to

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[14] *See* amendments to: s 350D(2) of the *Geothermal Energy Act 2010*; s 369D(2) of the *Greenhouse Gas Storage Act 2009*; s 10AAD(2) of *the Mineral Resources Act 1989;* s 123C(2) of the *Petroleum Act 1923;* and s 30AD(2) of the *Petroleum and Gas (Production and Safety) Act 2004*.

[15] Explanatory Note, p 56.

[16] Ibid, pp 60-61.

leave activities associated with the operation of produced water pipelines entirely from health and safety regulation and urges the Committee to clarify this issue.

3. *Mineral Resources Act 1989*: Section 63

Section 63 of the *Mineral Resources Act 1989* (Qld) is proposed to be amended to accommodate the establishment of the *MyMines Online* or similar online service delivery platform and the need to resolve conflicting priorities of mining applications received on the same day. The proposed amendment would leave priority determinations for such applications to the mining registrar after "considering the relative merits of each application".[17] According to the Explanatory Note, this amendment is necessary to allow "fairness between applications lodged online (at anytime of the day) and paper applications that can only be lodged during office hours".[18] However, this particular provision is noted as raising FLP concerns. EDO-NQ agrees that such concerns are indeed raised – and FLP issues violated – by giving the registrar ill-defined powers to determine the "relative merit" of applications received.

To the extent FLP concerns are raised, EDO-NQ believes that the Committee should amend the Bill to eliminate them. This the Committee can do simply by removing the registrar's power to determine priority and adopting a much simpler system whereby priority is determined by online date/time stamping compared to date/time stamping for a physical filing of application. To the extent that there are concerns with online applications received after the close of trading hours, this can easily be resolved by simply deeming any application received online after trading hours as being lodged at the beginning of the next business day.

To the extent the Bill contains other such provisions (e.g, amendments to ss 105 and 251 of the *Mineral Resources Act 1989*), EDO-NQ offers the same comments.

CONCLUSION

Again, EDO-NQ appreciates the opportunity – no matter how attenuated – to submit comments on the proposed Bill and urges the Committee to give its comments serious consideration.

Faithfully yours,
EDO-NQ

PATRICK PEARLMAN
Principal Solicitor

[17] Ibid, p 88.

[18] Ibid.