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Office of the President

8 March 2018

Our ref (VK-M&R)

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane QLD 4000

Dear Committee Secretary

Mineral and Energy Resources (Financial Provisioning) Bill 2018

Thank you for the opportunity to provide comments on the Mineral and Energy Resources (Financial Provisioning) Bill 2018 (the **Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important legislation.

Inadequate timeframes for consultation

QLS notes that the Bill was introduced on 15 February 2018 with submission due by midday on 9 March 2018.

When an election is called, all bills lapse. It is impossible to know whether previous legislation will be introduced in substantially the same form, even if the previous government is returned by the electorate. Whilst the parliamentary website indicates that the 2017 version of the bill and the 2018 Bill are “substantially the same”, we note that there are in fact some key differences. Without a document identifying these differences, QLS is required to carry out a line by line analysis of the 2018 Bill (202 pages) to determine where the differences might be.

A further complication is that the Government has introduced 16 bills in the first week of Parliament, many of which we have previously commented on but which may differ from the earlier versions. The comparison exercise for so many bills, with short submission timeframes for many, has hindered our ability to conduct a comprehensive review of this and other bills.

In light of these challenges, we have again limited our comments to specific aspects of the Bill. By omitting to comment on the full scope of provisions in the 2018 Bill, QLS does not express its endorsement of these.

QLS reiterates the importance of timely consultation in respect of all legislation, but particularly for matters and proposed changes as significant as those contemplated by the Bill.

Mineral and Energy Resources (Financial Provisioning) Bill 2018

The nature of the scheme

QLS notes that the Bill is substantially broader in its scope and application than the 2017 version. This expansion is demonstrated particularly in the 2018 Bill by the clarified use for which the funds will be collected, as well as the scope of the research for which the State may receive funding.

The proposed new financial provisioning scheme is intended to provide for the holders of environmental authorities for resources activities to pay a contribution or to give surety for the estimated rehabilitation cost for the authorities.

The scheme fund and provisions related to it appear to concern only security which is required under the *Environmental Protection Act 1994* (the **EP Act**), and not security that would otherwise be required under the other applicable legislative regimes (such as the *Mineral Resources Act 1974* (the **MR Act**), and the *Petroleum and Gas Act (Production and Safety) 2004* (the **P&G Act**)).

QLS considers that the Bill should clearly state whether it is intended that only one security is to be provided.

The scheme manager

The Bill proposes the establishment of the position of scheme manager under Part 2, Division 1. The scheme manager is to have powers including, but not limited to, those which are set out under section 22.

QLS is concerned that the discretionary aspects of the powers afforded to the scheme manager under Part 3, Division 1 of the Bill are exceptionally broad (particularly when considering that the scheme manager's powers pursuant to section 22 are expressed as a non-exhaustive list).

QLS submits that additional detail is needed regarding the appropriate exercise of the proposed powers by the scheme manager. We note the change in the 2018 Bill from its predecessor, whereby the amended drafting now requires the scheme manager to consider the scheme manager guidelines. QLS welcomes this requirement as it infers that decisions made by the scheme manager in the exercise of these powers will be governed by guiding principles to ensure consistency in their application and to afford affected parties with adequate certainty of how a project will be classified by the scheme. However, we note that as drafted section 70 permits, but does not require, the scheme manager to create guidelines in relation to the making of risk category allocation decisions. This appears to be an inconsistency. We recommend that section 70 is amended as follows:

"70 Guidelines

(1) *The scheme manager ~~may~~ **must** make guidelines about the operation of the scheme, including, for example, about -...."*

The guidelines are particularly important given the broader scope of the Bill in comparison to the earlier version.

Mineral and Energy Resources (Financial Provisioning) Bill 2018

The scheme fund

The Bill proposes the creation of the Financial Provisioning Fund (the **scheme fund**).

Section 24(7)(e) provides that the scheme fund is to include *“amounts earned as interest on the cash surety account deposited into the scheme fund by the scheme manager”*.

This is potentially discriminatory against holders providing surety in cash, particularly as the surety is reviewed annually and is likely to increase at least in line with CPI. The holder is thus exposed to double jeopardy – it loses the interest on the cash surety, and at the end it is likely to be required to provide additional cash for the cost of living increases that should, at least in part, be offset by the interest earned by the fund on the cash security.

Risk category allocation

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 may create uncertainty, which cannot be rectified by the publication of guidelines or other subordinate legislative instrument (as the proper meaning of that term in the Act must prevail). In the absence of a definition or comprehensive guidance material, it is possible that the scheme manager’s discretion to determine whether a holder is financially sound will 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.

Multiple holders

Section 27(5) of the Bill provides that, when in making a risk category allocation, *“the scheme manager may consider the financial soundness of any or all of the holders”*.

The term *“holders”* refers to the holders of the relevant environmental authority. If two or more persons hold the related resources authority, they will all be named in the environmental authority as holders.

The Society is concerned that the Bill, as drafted, does not adequately contemplate the potentially complex corporate structures that can be associated with ownership and operation of resource projects.

The Society submits that the scheme manager should be required to consider the financial soundness of the holders together, when making a risk category allocation for an authority. Further, we are concerned by the potential implications of section 27(5)(c), which will apply in circumstances where there is more than one authority holder and requires the scheme manager to apply the authority to only one of the holders.

Mineral and Energy Resources (Financial Provisioning) Bill 2018

Change of control

Section 32(1)(ii) of the Bill requires the scheme manager to consider a review of a risk category allocation where:

- an entity applies under the *Mineral and Energy Resources (Common Provisions) Act 2014* (the **MERCP Act**), section 19 for approval to register a prescribed dealing (under section 17 of the MERCP Act) that is either an assessable or non-assessable transfer of all or part of a resource authority (in either case, the 'changed holder');
- an entity starts or stops controlling a holder of the authority (the 'changed holder') under the *Corporations Act 2001*, section 50AA; or
- a holder of the authority (also the 'changed holder') stops or starts being a subsidiary of a corporation under the *Corporations Act*, section 46.

Change in control is not dealt with under other resources legislation.

While further detail is to come regarding this section, the QLS is concerned about the potential ramifications for holders that are listed entities. The practical effects of this section, like several other parts of the Bill, cannot be fully considered until such time that QLS is able to review the scheme manager guidelines.

Decisions of the scheme manager

The administering authority may request funds from the scheme manager for payment of costs and expenses incurred under the EP Act regime, under the MR Act to carry out rehabilitation activities in respect of an abandoned mine, or for research that may contribute to the rehabilitation of land on which resources activities have been carried out.

Section 65(2) of the Bill requires the scheme manager to authorise payment of the costs and expenses "*unless payment would adversely affect the financial viability of the scheme fund*".

QLS submits that the scheme manager should have the ability to reject a request for payment which has been made other than in accordance with the relevant Act.

Adequacy of the scheme

As drafted, the Bill requires the scheme manager to investigate the actuarial sustainability of the scheme, and to provide recommendations to the Minister regarding issues associated with the rates of contribution to the scheme fund, as well as the characteristics and operation of the scheme. The 2017 version of the bill required the scheme manager to appoint an appropriately qualified actuary to report about the sustainability of the scheme. The 2018 Bill makes this a discretionary requirement, stating that the scheme manager 'may ask' for this.

QLS recommends that section 73(2) of the Bill be amended as follows:

*"For subsection (1), the scheme manager ~~may~~ **must** ask an appropriately qualified actuary to give the scheme manager a report about the actuarial sustainability of the scheme"*

Mineral and Energy Resources (Financial Provisioning) Bill 2018

QLS considers powers of investigation and oversight of the scheme and the scheme manager should be given to the Queensland Audit Office, to ensure appropriate and independent management of the scheme.

Appeal and review of scheme manager's decisions

The Bill does not provide for an appeal process for decisions made by the scheme manager. While a dissatisfied person can seek judicial review of an initial risk category allocation decision, a changed holder review allocation decision or an annual review allocation decision, the effect of section 75(2) of the Bill is that a decision cannot be challenged or appealed against in any way unless it is affected by jurisdictional error.

QLS submits that the grounds of review for scheme manager's decisions should not be limited in this way, and that there should be a process for appeal or internal review of these decisions.

QLS would welcome the opportunity to discuss the Bill in greater detail, as well as to assist in the development of the scheme manager guidelines.

If you have any further enquiries or would like to discuss the content of our submission, please do not hesitate to contact Senior Policy Solicitor, [REDACTED], on [REDACTED] or by email to [REDACTED]

Yours faithfully



Ken Taylor
President