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Finance and
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The Research Director
Finance and Administration Committee
Parliament House
George Street
Brisbane QLD 4000

By Post and Email to: fac@parliament.qld.gov.au

Our ref 327 - 8

Dear Sir/ Madam

Call of Submissions – Inquiry into the *Payroll Tax Rebate, Revenue and Other Legislation Amendment Bill 2015*

Thank you for providing Queensland Law Society (**the Society**) with the opportunity to comment on the *Payroll Tax Rebate, Revenue and Other Legislation Amendment Bill 2015* (**Bill**).This submission has been compiled with input from the Society's Revenue Law Committee and Mining and Resources Committee.

The submissions are divided into two sections:

- Section 1 concerns Part 3 of the Bill i.e. the proposed amendments to the *Duties Act 2001*; and
- Section 2 concerns Part 4 of the Bill i.e. the proposed amendments to the *Environmental Protection Act 1994*.

SECTION 1: AMENDMENT OF *DUTIES ACT 2001*

General comments

1. The following submissions apply to the proposed insertion of a new Chapter 2, Part 8A into the *Duties Act 2001* (**Duties Act**). Therefore, any section references in these submissions are a referral to the amendments proposed to the Duties Act pursuant to the Bill.

2. At the outset, the Society would like to commend the Legislative Assembly and the Finance and Administration Committee (**FAC**) for the Bill as it is largely consistent with the public ruling DA000.12.1 (**Public Ruling**), which issued in June 2013 and outlined transfer duty exemption available for farm-in transactions in the resources sector.

3. However, the Society does have some concerns that certain aspects of the arrangements outlined in the Public Ruling are out of step with industry practice and that the Bill may create some practical complications for taxpayers. Appearing below is an outline of the Society's issues and concerns.

Compliance is overly complicated

4. The Bill provides for very rigorous, complex and prescriptive processes and requirements, which the Society thinks will make technical non-compliance a serious concern for taxpayers. Of particular concern is the fact farm-in arrangements are ordinarily entered into at the very early stage of exploration activities when funds available for expenditure are at a premium and the investment of those funds is made at considerable risk. Parties to farm-in arrangements should not be required to incur the costs of detailed legal and other tax advice to protect against technical non-compliance, which would prevent access to the concession. Therefore, where possible, the Society thinks the Bill should allow for greater flexibility and that it should be less stringent in its compliance requirements.

5. For example, it would not be uncommon for a farmee to undertake certain tasks or achieve certain milestones, such as producing a bankable feasibility study, in order to become entitled to the transfer of an interest in the exploration authority. Where all the work done or money spent meets the definition of 'exploration amount', it would be reasonable for such an arrangement to qualify for the concession proposed under the Bill. However, the Bill requires that a farm-in agreement specifically provides for the spending of a 'stated amount' to become

entitled to a transfer of an interest. Further, it is unclear if a stated amount in a farm-in agreement can be a 'minimum' or something other than an exact amount.

6. As a general proposition, the Society thinks that 'results driven' farm-in agreements should benefit equally from the concessions. Consequently, the Society recommends that the reference in the Bill to 'stated amount' be amended to extend the application of the exemption to adopting words such as, for example, *'[spending] an amount to achieve a stated milestone or task'*, or *'a minimum amount to achieve a particular milestone or task or a stated amount.'*

7. The Society recommends guidance is taken from stamp duty legislation in other jurisdictions, namely Western Australia, South Australia and the Northern Territory where the approach to farm-in agreements and the associated administrative obligations are much more practical. For example, refer to sections 13 and 135 of the *Duties Act 2008* (WA), section 71D of the *Stamp Duties Act* (SA) and section 4AB(4) of the Northern Territory *Stamp Duty Act.*

<u>Farm-in Agreement</u>

8. Section 84G of the Bill provides that a Farm-in Agreement is an agreement for the transfer of dutiable property mentioned in section 9(1)(b).

9. There is an old ruling issued by the then New South Wales Chief Commissioner of Stamp Duties where he proffers a view that a farm-in agreement where the farmee has a right to withdraw is not in fact assessable as an agreement for sale (transfer). In that revenue ruling (SD052) the NSW Chief Commissioner of Stamp Duties stated as follows:

   'In any case where the agreement operates merely to give the "farminee" an entitlement to obtain a participating interest on payment of stated sums of money, and that person may elect to withdraw simply by the giving of due notice, the assessment of stamp duty will be based on the view that no property rights have been created and that there is no binding obligation to make payments to secure any property rights. Accordingly, nominal duty will attach to the agreement, based on whether it is executed under hand or under seal.'

10. In the context of the proposed amendments to the Duties Act, it is unclear whether section 84G(1) of the Bill is a deeming provision or is a purported statement of the law. That section says:

    '(1) A farm-in agreement is an agreement for the transfer of dutiable property mentioned in section 9(1)(b).'

11. If the NSW Chief Commissioner is correct then a farm-in agreement of the nature described is likely to be the grant of a new right under section 9(1)(f) (akin to an option) and not an agreement for transfer. Therefore, for clarity, it would be preferred that section 84G(1) provide that the farm-in agreement is not also a 'new right'. The Society suggests that the following words be added to that section to accommodate this:

   'and is not an acquisition of a new right as mentioned in section 9(1)(f).'

12. The concern for taxpayers is that section 84G(2) of the Bill provides for the deletion of the *'no double duty – general provision in the Duties Act'* (i.e. section 21 of the Duties Act). Consequently, without clear confirmation that farm-in agreements are not new rights, taxpayers risk assessments both under Part 8A and also pursuant to section 9(1)(f).

13. As a general proposition, the Society notes that farm-in agreements are ordinarily entered into at an early stage of exploration activities, when the funds available for expenditure are at a premium, and investment of those funds is made at a considerable level of risk. It therefore follows that under a farm-in agreement, smaller exploration companies are generally the benefactors of exploration investment from larger well-resourced and technically capable entities (who most commonly assume the role of farmee under the farm-in agreement). It is therefore in the interests of a smaller exploration company to secure investment by a farmee as early in the exploration project as possible.

14. Finally, the Society also believes that the definition of "farmor" pursuant to section 84A of the Bill, could lead to companies having little incentive to pursue early investment opportunities in exploration activities. The reason being, the definition requires that an exploration authority under the Duties Act has been granted, even if the person is not yet registered as the holder. According to the Explanatory Notes, where the farmor has applied for, but not been granted, an exploration authority at the time of entry into the farm-in agreement, it will not qualify for the concession (even if the application is subsequently granted). Therefore by limiting the concession in this way, investment into exploration projects by potential farmees is likely to be deferred (and the farmor will forego valuable input from the farmee in respect of the planning phase of the exploration activities).

Hybrid Agreements

15. The Society notes that in the Explanatory Notes to the Bill, a farm-in agreement must be either an upfront farm-in agreement or a deferred farm-in agreement. Hybrid type agreements

that allow for multiple transfers consisting of both up-front and deferred elements will not be eligible for the concession. However, please note that it is common industry practice for farm-in agreements to be structured to allow an upfront transfer of an exploration permit to the farmee, with deferred elements to follow once exploration expenditure has been committed.

Accordingly, there appears to be a departure from the Public Ruling as it did not prohibit hybrid arrangements from being eligible for the concession. The Public Ruling defines a 'farm-in agreement' as "a deferred farm-in agreement and an upfront farm-in agreement". Under the Bill, the definition of a 'farm-in agreement' is proposed to be "a deferred farm-in agreement or an upfront farm-in agreement". While the Society commends the Legislative Assembly on maintaining consistency between the Public Ruling and the Bill, this inconsistency is concerning and may have a negative effect on Queensland's reputation as a stable regulatory environment (particularly for entities that entered into hybrid arrangements in reliance on the Public Ruling).

Definition of 'exploration amount'

16. Sections 84B(1)(b) and 84C(1)(b) refers to the 'exploration amount'. Section 84F states that exploration or development is ***relevant exploration or development*** for an exploration amount if the exploration or development is "comprised of, **or associated with**, the carrying out of an activity under the exploration authority…[emphasis added]".
17. The Society thinks section 84F as currently drafted requires further specificity as to what might constitute an exploration amount. This is crucial for the likes of junior exploration companies whose operations are fundamentally based on the exploration and management of just one tenement. In such example, it would be difficult to delineate what portion of expenditure constitutes an exploration amount and what portion does not given that much, if not all of the company's expenditure is put towards the management of that one tenement.
18. The Society also queries to what extent certain provisions in the Bill might interact and possibly conflict with the conditions of a tenement held under the *Mineral Resources Act 1989* or the *Petroleum and Gas (Production and Safety) Act 2004.* For example, sections 84K and 84L(3) set out stringent notice requirements around the spending of the exploration amount or a failure to spend the exploration amount. In this regard, the Society asks the following:

a. Has an analysis been carried out to ensure that the requirements set out in these sections reconcile with the information a tenement holder is otherwise required to give to the Queensland Department of Natural Resources and Mines (**DNRM**) under cover of a work program and budget (see for example Regulation 14 of the *Mineral Resources Regulations 2013* (Qld))?

b. Has it been considered whether the 'exploration amount' described in the Bill ties in with any categories of expenditure already detailed in a work program and budget supplied to the DNRM?

c. Rather than putting the onus on the farmee to give notice to the commissioner, can the commissioner source its information around the spending of (or failure to spend) an exploration amount under a farm-in agreement directly from the DNRM?

<u>Is a re-conveyance of the whole interest necessary?</u>

19. Section 84B(1)(c) requires a forfeiture of an interest in the exploration tenement if the obligation to spend a stated amount on relevant exploration or development is not achieved by the completion date.

20. While this requirement is not uncommon, industry practice for farm-in arrangements also includes arrangements that allow the farmee to earn a pro rata interest based on the amount spent compared to the *'stated amount'* set out in the farm-in agreement.

21. The Society thinks both sections 84B(1)(c) and 84C(1)(b) should be amended to fall in line with this industry practice to allow a transfer or a retention of a pro rata interest when only a portion of the stated amount is spent. Appropriate changes would also be required to sections 84H and 84I(b).

22. This would be consistent with the approach taken by the Australian Taxation Office in relation to its ruling on farm-in and farm-out agreements: see Miscellaneous Tax Rulings MT 2011/D1 and MT 2011/D2.

23. As a matter of policy, the Society considers that there is no justification for denying a concession under section 22(2) if the parties commercially agree to transfer an interest despite the exploration amount not being fully spent.

Timing for lodgement of notice and mining information

24. Section 84K requires the farmee to lodge certain information each time the exploration amount has been spent to acquire an interest.

25. Under the Duties Act, normally the time allowed for lodgement for the stamping of a dutiable transaction is 30 days following the entering into of that dutiable transaction. However, in this particular case the time allowed for lodgement has been reduced to 14 days even if, as will be the case in a number of instances, no additional duty will be payable because of that event happening.

26. This is a further example of the proposed compliance regime being overly rigorous and prescriptive. To reduce possible inadvertent non-compliance, the Society thinks that the time limit under this section should be made consistent with all other time limits for lodgement under the Act and also under the Bill (see, for example, section 84L(2)). Therefore, the time period for lodgement under section 84K should be extended from 14 days to 30 days.

27. The Society thinks it is inequitable for stamp duty to be assessed on mining information in the context of a farm-in agreement and not on any other style of transaction involving the provision of information. Furthermore, duty on farm-in agreements were intended to be concessionally assessed under this Part 8A however, as a matter of fact, in the case of mining information, farm-in arrangements are being penalised by comparison to other dutiable transaction such as the transfer of operating mines or the transfer of exploration tenements for cash consideration.

28. Therefore, despite the Public Ruling, the Society thinks as a matter of principle, section 84N(1)(c) should not include consideration paid for mining information under a farm-in agreement and section 84J should also be amended to confirm that position.

Consideration paid to the farmor

29. Section 84J(2) provides as follows:

   'The dutiable value of a farm-in agreement is the consideration paid or payable to the farmor, or a related person of the farmor, for the farmor entering into the agreement, other than an exploration amount.'

30. It would be expected that payments made to the farmor under a farm-in agreement for mining information would not be payments 'for the farmor entering into the agreement'. However, the comments made in the earlier Public Ruling might suggest otherwise.

31. The Society thinks that the FAC should confirm, for the avoidance of doubt, that this section does not intend to cover payments made under the farm-in agreement for mining information which is not dutiable property and which is not subject to duty under any other type of transaction.

Reassessments

32. Equally, section 84N, particularly paragraph (c) in subsection (1), needs to be redrafted to better define the dutiable value for reassessment.

33. Currently section 84N provides that the dutiable value for a reassessment includes, among other amounts, 'any other consideration under the agreement paid or payable to the farmor, or a related person of the farmor, on or before the day the latest reassessment event happens'. With respect, the Society submits that this is particularly unhelpful. The section does not clarify who, or on whose behalf, the consideration is to be paid and does not connect the consideration to any corresponding obligation. The Society assumes it is intended to at least capture payments for mining information and the reimbursement for exploration previously expended by the farmor given what was contained in the earlier Public Ruling. However, is it also intended to cover fees paid for services provided by the farmor, which are not within the ambit of the term 'exploration amount'? For example, fees for maintenance, security or some other recurring payment agreed to be paid under the farm-in agreement might fit within the broad definition. The Society expects that it was not intended to cover these payments as the resulting increase in the stamp duty liability for taxpayers would hardly provide an incentive for exploration activity.

34. The Society thinks section 84N(1)(c) should be deleted or, failing that, redrafted to provide greater certainty.

Anti-avoidance

35. Taxpayers are going to be in breach of section 84P(1) every time they seek to have the concession applied to their farm-in agreements. This is because a taxpayer would enter into a

complying farm-in agreement to access the concession which has the effect of avoiding the imposition transfer duty. The Society thinks this section should be deleted in its entirety, with the FAC relying instead on the general anti-avoidance provisions within the Duties Act. At the very least, a sole or dominant purpose test, and some concept of artificiality (i.e. relating to artificial, blatant or contrived schemes) should be built into this anti-avoidance section.

SECTION 2: AMENDMENT OF THE *ENVIRONMENTAL PROTECTION ACT 1994*

General comments

36. The following submissions apply to the proposed amendments to the *Environmental Protection Act 1994* (**EPA**). Therefore, any section references in these submissions are a referral to the amendments proposed to the EPA pursuant to the Bill.

Transitional Environmental Program and Temporary Emissions Licence

37. The Society notes the inconsistencies in the administering authority's power and discretion to amend, suspend or cancel Transitional Environmental Programs (**TEPs**) and Temporary Emissions Licences (**TELs**) compared to Environmental Authorities (**EAs**), as follows:

    a. TELs can presently be amended, cancelled or suspended under section 357J of the EPA but only if the release of a contaminant is greater than anticipated, other TELs are issued in relation to the same environmental values, or the licence holder agrees to the change.

    b. TEPs can presently be amended under section 344 of the EPA, but apparently only on the holder's application (i.e, with their consent and at their instigation).

    c. EAs can presently be amended under sections 211-215 of the EPA, either with the holder's consent or where the administering authority considers it 'necessary or desirable' due to a matter such as a contravention of the EPA, an environmental offence, a miscalculation of the environmental values affected by the relevant activity, a significant change to the activity, or 'another circumstance prescribed under a regulation'. This level of flexibility is required to preserve environmental values.

    d. EAs can presently be surrendered voluntarily (section 257 of the EPA) or as ordered by the administering authority (section 258 of the EPA). In addition, the chief executive may remove the approval holder's registration entirely under section 318K of the EPA.

38. The Bill provides at clause 47 for the insertion of new sections 344E to 344G, which allow for the cancellation of a TEP, however only with the approval holder's consent, or where the

relevant activity has ceased. This change is commendable however the circumstances for cancellation should not be so limited. They should reflect the circumstances under which an EA may be amended, as above. Section 344 of the EPA should be further amended so that TEPs can also be amended without consent, in circumstances similar to those for EAs (sections 211-215). TEPs should also be able to be suspended.

39. The Bill provides at clause 49 for the replacement of section 357H of the EPA and at clause 50 for the insertion of section 357J, so that TELs can be cancelled with consent. This is an administrative necessity, but as in the case of TEPs, it does not go far enough. TELs should be able to be cancelled without the approval holder's consent, not just in the limited circumstances provided for under section 357J of the EPA, but in circumstances similar to those for EAs, as set out above.

40. The flexibility to change TELs and TEPs as proposed above is even more important than in the case of EAs, because of the very short timeframes in which TEPs and TELs are approved and applied, compared with EAs. The limited information and investigation prior to the issue of a TEL or TEP may result in a higher level of environmental risk, which needs to be addressed in this Bill by providing the administering authority greater flexibility to respond to new circumstances or information with amended approval conditions for optimised environmental outcomes. At the same time, it is not required that TEPs and TELs are able to be amended, cancelled or suspended at the administering authority's absolute discretion. A list of defined grounds for amendment (including the ability to add to that list through regulation) similar to that in section 215 of the EPA would provide sufficient certainty for approval holders to act in reliance on the provisions of their TEP or TEL.

41. The Society notes that pursuant to section 344G, proposed by clause 47 of the Bill, the administering authority must give the holder a new copy of the EA without the transitional environmental plan notation. While it is unclear from the Bill as to how the public will be notified of the removal of a TEP, the Society considers it important that any notification to the public of a change to an EA or a TEP notation on an EA should clearly identify what the changes are. EAs are usually large documents released as non-searchable .pdf files, and thus it would benefit the public if any such changes were clearly identified to avoid the hassle of a page turn. Moreover, the Society also thinks it would be useful if the public could see the terms of the TEP and for that matter, the terms of any temporary emissions licence.

We would be pleased to liaise with you further. Please contact QLS' Manager, Advocacy & Policy, Mr Shane Budden at [redacted] for further inquiries.

Yours faithfully

Michael Fitzgerald
President