Property Rights Australia Submission on Land Access Ombudsman Bill 2017

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Property Rights Australia (PRA) was formed in 2003 to provide a strong voice for landowners with regard to property rights issues. It aims to promote fair treatment of landowners in their dealings with government, business and the community.
Our philosophy is that if the community or business wants our resource for any other purpose such as environmental protection or resource industries and associated infrastructure then the community or enterprise must pay fair and unsterilised value for it.

Property Rights Australia welcomes the concept of a Land Access Ombudsman and the establishment of the Office of the Land Access Ombudsman.
Only time will tell if it will save time and money for landowners and not just be another hurdle in getting a fair and binding ruling on land access and make good issues.
It must be remembered that there are significant financial disparities between resources companies and landowners. This raises a cautionary note when both parties approaching the Ombudsman must bear their own costs but the recommendations of the Land Access Ombudsman are not binding. It is possible to envisage a situation where a resources company ties up a landowner with a referral for which he is disadvantaged by cost and advice, and then the company does not stand by the ruling. If the landowner anticipates this – or if this proves to be a regular occurrence – landowners will be reluctant to expend their limited finances for legal advice and certainly not expert advice of any sort. This would particularly be the case in disputes over "make good agreements" which may require the services of a hydro geologist. A resources company, in contrast, might view using the Ombudsman as a useful strategy to run the landowner's finances down and limit further action. Consequently, if legal and expert advice is necessary producers may well be better off in the Land Court where the decision is binding.

PRA views the fact that the Ombudsman must report on systemic problems under S 16 (c) as a positive. It is heartening that the Ombudsman is to report breaches, or likely breaches of Resources Acts, the Water Act 2000 and the Environment and Heritage Act 1994 and recommend investigation under S's 53(c), 54(c) and 55 (c). How successful this is will depend on the incisiveness of the ombudsman and the responsiveness of the government and its departments.
PRA would also have hoped that such problems were already being reported and being acted on by agencies such as the Co-ordinator General's Department and other responsible departments.

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PRA also believes there are some weaknesses in S 18 What **land access ombudsman cannot deal with**

(1) The land access ombudsman can not accept a land access dispute referral about any of the following matters—

S 18 (e) – PRA believes "chief executive" should be omitted from this section. The risk is that any issue viewed as a possible point of contention will be made a decision of the chief executive to circumvent referral to the Ombudsman. It is the role of a chief executive to implement decision of the Government, not to be the Government.

S 18 (g) PRA believes that excluding *a matter that is, or has been, the subject of an investigation by a department* is removing one of the key duties of most Ombudsmen, namely ruling on unfair or

disputed decisions of Government departments. There has been a noticeable inability of Government departments to find against resources companies for breaches such as dust and noise, as well as on other issues. This subsection will negate against many of the systemic complaints against resources companies and will limit its usefulness. PRA believes it should be omitted. If the Government really believes the Land Access Ombudsman can play a useful role in bringing balance to this area, it will not seek to exclude scrutiny of departmental conduct or decisions.

Referrals

There appears to be a possible cause of confusion for landowners between **S 18 (1) (f)** which states that the Land Access Ombudsman cannot deal with "a matter that is or has been the subject of a proceeding or an arbitration" and

S 32 Land access dispute may be referred

(2) However, a party to a land access dispute **may not** refer the dispute unless the party has made a reasonable attempt to resolve the dispute with the other party to the dispute.

If the landowner chooses a formal dispute resolution procedure as mentioned in S 18 1. (f) he will be disqualifying himself from making a referral to the ombudsman, but he may not refer the dispute to the Ombudsman unless has made an attempt to resolve the dispute.

It seems clear to PRA that unless a landowner is very familiar with this piece of legislation, and particularly if arbitration is the dispute resolution method in his agreement, he may make a wrong decision about a dispute resolution process or be persuaded to make a wrong decision which excludes him from this process in spite of S 34.

S 34 Protection from liability for referring land access dispute

(1) This section applies if—

(a) a party refers a land access dispute to the land access ombudsman; and

(b) the conduct and compensation agreement or make good agreement the subject of the dispute contains a condition about a dispute resolution process other than the process under this Act (a dispute resolution condition).

(2) The party does not incur any civil liability for breach of the dispute resolution condition for referring the land access dispute to the land access ombudsman.

There needs to be public discussion and information on what may exclude a landowner from referring his case to the ombudsman.

S 36 Acceptance or refusal of referral

(3) For subsection (2)(b)(i), the land access ombudsman may be satisfied the referring party has complied with section 32(2) regardless of whether the referring party has used, or attempted to use— (a) for a conduct and compensation agreement—the dispute resolution process, if any, in the agreement; or (b) for a make good agreement— (i) the dispute resolution process, if any, in the agreement; or (ii) the process under the Water Act 2000, chapter 3, part 5, division 4.

This section should read "(3) For subsection (2)(b)(I), the land access ombudsman **must** (instead of may) be satisfied the referring party has complied with section 32(2) regardless of whether the referring party has used, or attempted to use (etc.)

This is because the CCA may have a dispute resolution process which excludes the landowner from referring a case to the ombudsmen.

The process under the Water Act 2000, chapter 3, part 5, division 4 S's 429 &431) is a dispute resolution process in name only and is a means of dragooning a landowner into signing a "make good" agreement which is binding on his successors and assigns, without legal advice and is entirely inappropriate for the Land Access Ombudsman Bill, not only because this Bill requires that a "make good" agreement already be signed.

Both the legislation and the explanatory notes tell us that "Parties may, at their own cost, be represented by another person at a meeting if the land access ombudsman gives permission. The ombudsman must not unreasonably withhold that permission", which implies that legal advice will be allowed with the ombudsman's permission which is in direct contrast to the "make good" so-called dispute resolution process under the Water Act which (unfairly in PRA's view) expressly forbids legal advice.

S 38 3. Refusal of Referral

PRA regards it as a positive that even if a referral is refused that the matter may be referred to a regulator.

43 Power to require attendance

(4) A party may be represented by someone at a meeting only with the leave of the land access ombudsman.

(5) The land access ombudsman must not unreasonably withhold leave for a party to be represented at a meeting.

(6) A party must bear the party's own costs of representation for a meeting.

S 48 Consent

The office of the ombudsman may find over time that having to obtain the consent of all owners or occupiers of land who are not party to the dispute means that they are drawn into unrelated personal disputes that have nothing to do with the matter at hand. As the entry is for inspection only, and unlike resources activity will cause no damage or loss of amenity, this may prove to be an unnecessary step as long as property biosecurity plans are adhered to.

S 51 Notice about outcome of investigation

(9) The land access ombudsman must, in giving reasons under subsection (6)(b)(iii), state that the ombudsman has relied on a confidential document or information given by the party, without disclosing what that document or information is.

This would be very frustrating for a landowner to go through this process and then be given a decision but no reasons for it. PRA believes that if confidential material is to be relied on, that it must be disclosed at the beginning of the process and participants told of the likely outcome if it is relied upon.

S 52 Evidentiary provision

(1) A notice given by the land access ombudsman under section 51 for a land access dispute referral about a conduct and compensation agreement is admissible in a proceeding about the agreement before the Land Court under the Mineral and Energy Resources (Common Provisions) Act 2014, section 99A, as evidence of the matters in the notice.

(2) A notice given by the land access ombudsman under section 51 for a land access dispute referral about a make good agreement is admissible in a proceeding about the agreement before the Land Court under the Water Act 2000, section 434, as evidence of the matters in the notice.

(3) A notice given by the land access ombudsman under section 51 for a land access dispute referral about a conduct and compensation agreement or a make good agreement is admissible in an arbitration about the agreement as evidence of the matters in the notice.

PRA considers that a favourable outcome may be of benefit in the Land Court or arbitration. However, if a confidential document is relied on and, particularly if the outcome is unfavourable, more information must be made available. For the purposes of a Land Court hearing, all parties must have access to the evidence. Without access to such evidence a landowner is not even able to determine what his chances might be.

S 53 Recommendation about Resource Act offence or resource authority breach

S 54 Recommendation about offence against Water Act 2000

S 55 Recommendation about offence against Environmental Protection Act 1994

These sections are welcomed by Property Rights Australia. We sincerely hope that recommendations for an investigation are taken seriously by the responsible departments.

For time-sensitive and intermittent issues (dust and noise would be an example), no notice should be given as it allows the tenure holder to desist from illegal or possibly illegal acts.

S 56 Advice about systemic issues

(1) This section applies if the land access ombudsman identifies a systemic issue relating to access to land arising from one or more land access dispute referrals.

This whole section may be one of the most useful functions performed by the Land Access Ombudsman.

S 58 Protection from liability for giving agreement to land access ombudsman

This section is welcomed.

S 63 Annual report

PRA welcomes this section.

Yours sincerely

Joanne Rea

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