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Our ref (VK/ M&R Committee)

Committee Secretary
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: ipnrc@parliament.qld.gov.au

Dear Committee Secretary

Land Access Ombudsman Bill 2017

Thank you for the opportunity to provide comments on the Land Access Ombudsman Bill 2017 (the **Bill**). Queensland Law Society (**QLS**) appreciates being consulted on this important proposal.

This response has been compiled with the assistance of the QLS Mining & Resources Law Committee, whose members have substantial expertise on issues relating to access to private land for resource development.

QLS is the peak professional body for the State's legal practitioners. Our policy committees and working groups are the engine rooms for the Society's policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise. In doing so, the Society achieves its objective of 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 supports the broad policy intent to establish a mechanism that will assist in timely and low cost resolutions to the disputes that may arise out of the operational relationship between landowners and tenure holders.

However, the Society is concerned with several aspects of the proposed framework for the role of the Land Access Ombudsman (**Ombudsman**), as it is described in the Bill. These concerns are set out below.

1. Land Access Ombudsman is not bound by the rules of evidence

The Society is particularly concerned with the proposed inclusion of clause 41(4)(a) of the Bill, which provides that the Ombudsman is not bound by the rules of evidence. The common law principles of the rules and the statutory framework established by the *Evidence Act 1977* ensures, so far as practicable, that courts act only on evidence that is relevant, reliable and probative. The Society is of the view that the Ombudsman should also be bound by the rules.

Doing so will provide an appropriate degree of certainty for parties during the Ombudsman's investigation of a dispute. This is particularly important given the serious consequences of the actions that the Ombudsman may take after the investigation process under Part 4 and the power to require information under clause 42.

Clause 41(5) clarifies that nothing 'said' to the Ombudsman in an alternative dispute resolution (**ADR)** process commenced during an investigation is admissible in a proceeding, unless the person has provided their consent. This limited protection does not extend to statements made to the Ombudsman during the investigation but outside of an ADR process, or to documents or other evidence that may be introduced during ADR.

Clause 52 sets out that a notice given by the Ombudsman is admissible in a proceeding about the agreement in dispute before the Land Court. Given that a notice may subsequently be tendered in judicial proceedings, it is appropriate that the evidence gathered by the Ombudsman in the course of an investigation which will inform the content of that notice should be obtained in accordance with the rules of evidence.

Recommendation 1

That clause 41(4)(a) should be amended to clarify that the Ombudsman is bound by the rules of evidence when carrying out an investigation under Division 2.

2. Implications for confidentiality and privilege

The Society notes that the Bill provides the Ombudsman with certain powers to require information or attendance. Clause 42(1) states:

"If a land access dispute referral has been accepted by the land access ombudsman, the ombudsman may, by notice given to a party to the land access dispute the subject of the referral, require the party to give the ombudsman –

(a) a stated document or information at a stated reasonable time and place; or
(b) access to a stated document or information."

This is problematic not only because of the concerns outlined above relating to the exclusion of the rules of evidence, but because of the confidential nature of conduct and compensation agreements (**CCAs**) and make good agreements (**MGAs**). Confidentiality provisions are often the subject of thorough negotiation between the parties before they are settled and included in the agreement. Further, while the Bill contemplates that a party may have a '*reasonable*

excuse' to not comply with a requirement to produce a stated document or information, the excuses identified at clause 42(5) do not extend to withholding for reasons of commercial sensitivity.

The inclusion of clause 42(2), confirming that the obligation to provide the Ombudsman with information or documents is constrained to only that which is 'related to' the investigation of the land access dispute referral provides limited comfort. QLS takes the view that if a party is compelled to provide information which may later be used in a court proceeding or prosecution, the information must be material to, and not loosely 'related to', the land access dispute.

The Society is concerned that these powers are extraordinarily wide, inadequately restrained and that the Bill does not offer an opportunity for a party to withhold information or documents whose content is commercially sensitive or valuable or contains confidential or personal information.

This approach is particularly troubling given that:

- penalties will be imposed upon a party who does not comply; and
- this information can then be referred to regulators under clauses 53, 54 and 55 of the Bill, for use in potential prosecutions.

The Society is extremely concerned about clauses 53, 54 and 55 of the Bill which inappropriately condone the use of information obtained in an investigative process for a subsequent unrelated prosecution.

As a minimum, the reasonable excuse in proposed clause 42(5)(c) should not be limited to the party who is an individual but should be available to all parties in the dispute. The law relating to the derivative use of compelled evidence is exceptionally complicated and technical and as such, the current draft may have unintended and adverse consequences.

In its current form and in the context of clauses 53, 54 and 55 of the Bill, the provision abrogates the right to claim privilege against self-incrimination. Any breach of a fundamental right, such as the right to claim privilege against self-incrimination, should be a last resort. Fundamental rights of this nature underpin the rule the law and the justice system as a whole.

As a general principle, such information, gathered during an investigative process which is not subject to the rules of evidence and which is designed to resolve disputes, not investigate offences, should not then be provided to regulators to be relied upon in subsequent prosecutions.

On balance, the Society recommends that clause 42 be narrowed and clauses 53, 54 and 55 be removed from the Bill.

However, if clause 42 or clauses 53-55 are to be included, then strong and specific protections of the admissibility and use of that evidence must be included in the statute. Further, the legislation should include a specific prohibition against the Ombudsman relying upon any correspondence between the parties that has been given on a 'without prejudice' basis, or any discussion or information disclosed during the alternative dispute resolution which is facilitated by the Ombudsman.

Recommendation 2

QLS recommends that clause 42(1) be amended to clarify that any documents or information which are required by the Ombudsman must be central to the matters in dispute and under investigation.

Recommendation 3

The Society also recommends that clause 42(5) is amended so that documents or information which a party can demonstrate to be commercially sensitive or that contain confidential or personal information that is not relevant to the parties or issues in dispute should constitute a 'reasonable excuse'.

Recommendation 4

The Society recommends that clauses 53, 54 and 55 be removed from the Bill.

3. Impediment to existing dispute resolution provisions

The Society has concerns in relation to clause 32(2), which states that a party to a land access dispute may not refer the dispute to the Ombudsman unless they have made a 'reasonable attempt' to resolve the dispute with the other party.

As is contemplated by clause 34(b), it is common for CCAs and MGAs to contain a process for resolving disputes that may arise. Therefore it is problematic that the Ombudsman is empowered to accept a referral from a party at any time while an agreement is on foot – this may include at such time that the contractual dispute resolution provisions have been initiated.

This introduces an unacceptable degree of uncertainty for both parties, and diminishes the utility of dispute resolution provisions which have been negotiated and settled prior to the parties entering into the agreement.

Further, it is unclear how the Ombudsman's powers would work if the dispute resolution provisions set out in the relevant agreement includes arbitration. If it is the case that the Ombudsman would not accept a dispute referral which has already been the subject of an arbitration, this exception should be expressly included in the Bill.

This issue was contemplated by Mr Robert Scott's report following the review of the Gasfields Commission Queensland[1], and the explanatory notes to the Bill make reference to Mr Scott's concerns that there was no avenue for landholders or resource authority holders to discuss an alleged breach of a CCA or MGA except to resort to a court or to arbitration, ***once any dispute resolution provisions in the agreement have been exhausted.***

It is the Society's position that this is a critical component of any dispute resolution powers held by the Ombudsman. There should be a clear expectation that the parties should act in

[1] Robert Scott, State of Queensland, Department of State Development, *'Independent Review of the Gasfields Commission Queensland'*, July 2016.

accordance with negotiated dispute resolution provisions prior to relying on the Ombudsman. To suggest otherwise is simply unworkable, and will only serve to introduce uncertainty and further destabilise any common understanding between the parties which was borne from the negotiation of the relevant agreement.

Recommendation 5

Dispute resolution functions will only be effective if they provide certainty to the process of resolving a dispute.

The Society recommends that clause 36 be amended to specify that the Ombudsman will refuse a referral received from a party until such time that the parties have exhausted any alternative dispute resolution processes which are required by the relevant CCA or MGA.

4. Restriction on legal representation

The Society does not support the proposal at clause 43(4) that a party must apply for leave to be represented at a meeting to answers questions asked by the Ombudsman. The Society assumes this includes legal representation, and cautions against this approach.

The key concerns with excluding a legal representative from a meeting are as follows:

- a party might unintentionally waive legal professional privilege, which may have a serious impact on future litigation should the dispute not resolve; and
- the seriousness of possible implications which may result from the Ombudsman's referral to a regulator of information and documents gathered for the purpose of potential future litigation cannot be overstated.

Further, this restriction perpetuates a false assumption that excluding lawyers from a process such as this reduces costs. QLS asserts that this assumption is incorrect, as has been demonstrated in several commissions and tribunals where self-represented parties make the process more cumbersome, as they are ill equipped to traverse and speak to key issues. The consequence is often additional cost and delay, and increased risk of an adverse outcome for a party.

Recommendation 6

Insert a new subsection at clause 43(5) to clarify that a party need not apply for leave to the Ombudsman if the party is seeking to be represented by a legal practitioner who is the holder of a current practising certificate.

5. Dual role of Land Access Ombudsman

The proposed dual role of the Ombudsman, encompassing both investigator and facilitator of dispute resolution, is a concern.

Given the obligations which are imposed upon the Ombudsman to prepare an advice that will ultimately be admissible in court proceedings and to make recommendations regarding existing or potential breaches of the legislation, it will be difficult for the Ombudsman to facilitate genuine and transparent negotiations between the parties.

Recommendation 7

The Society recommends that, if the Ombudsman is to retain the dual role status, that consideration be given to measures which will restrict overlap of the investigator and facilitator roles.

One way to achieve this could be to prohibit the commencement of an investigation until any alternative dispute resolution facilitated by the Ombudsman has been completed. This would also provide the referrer of the dispute an opportunity to withdraw the matter prior to commencement of an investigation.

Further, QLS submits that the Bill should expressly provide that any information retained by the Ombudsman during an alternative dispute resolution process cannot be used or relied upon by the Ombudsman in the course of conducting a subsequent investigation into the dispute, without the consent of the parties. If this approach is adopted we suggest that consideration be given to implementing Chinese Walls in the Ombudsman's Office, which will assist in avoiding the effects of subconscious bias accumulated by a facilitator or investigator. An aspect of this might include a direction that separate officers are to carry out the investigation and facilitation aspects of the role.

Again, thank you for the opportunity to provide comments on the Bill. The Society would welcome further consultation on the issues raised in this letter and on the Bill more generally. Thank you for your consideration of the Society's feedback.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor,

Yours faithfully

Christine Smyth
President