To the Infrastructure, Planning and Natural Resources Committee

Submission on the Land Access Ombudsman Bill 2017

Please accept this submission to the Queensland Land Access Ombudsman Bill 2017 on behalf of Lock the Gate Alliance.

We greatly appreciate the opportunity to provide comment to the Land Access Ombudsman Consultation Bill 2017. We are very supportive of the provision of a Land Access Ombudsman to address the problems facing landholders dealing with resource companies, and we congratulate you on moving to consider the creation of an Ombudsman.

However, we have major concerns with the framework that is proposed, and with the scope of the disputes which can be addressed by the Ombudsman.

Our major concerns with the Consultation Bill are that:

1. There is no power to making binding decisions on resource companies
2. It allows companies to refer issues, thus creating another coercive process for landholders
3. The scope is too narrow in terms of the agreements it can consider
4. The scope is too narrow in terms of excluding negotiation processes
5. The scope is too narrow in terms of excluding all matters for which there have been departmental investigations
6. The scope is too narrow in terms of excluding any issues which arise after the cessation of a CCA or MGA
7. It will likely result in increased costs for landholders
8. It may reduce landholders access to and representation by lawyers
9. It may provide increased powers to access land without consent (s47)

Consumer Protection

Our primary concern is that this does not deliver the consumer protection mechanism that we were expecting, but instead provides yet another potentially coercive process that resource holders can use against land holders.

The concept of an ombudsman as we understand it, is that it is designed to provide citizens with recourse to an authority who can address abuses of power by very powerful elites (such as governments, banks, resource companies) where the legal, financial and political playing field is heavily tilted towards those entities.

Any Ombudsman Bill must address the extreme imbalance that comes from resource holders having far-reaching legal rights to access landholders properties, and extraordinary and disproportionate recourse to legal expertise and access to justice, compared to landholders, as well as at the same time the state owning the resources, receiving royalties for them, and yet regulating how they are extracted at the same time. This creates inherent and far-reaching potential for abuses of power.

Therefore, the Bill should be designed to provide a right of recourse by individuals to have binding outcomes imposed on the companies they are dealing with and thereby prevent landholders from being bullied or having to resort to expensive court processes. It should not allow mining companies to refer disputes.

The consumer protection model is the model that has been used, for example, with the banking ombudsman. It recognises the power imbalances that exist and provides a special mechanism for consumers who are caught as victims in that situation.

However, this proposal fails demonstrably to deliver on that consumer protection outcome. Instead, it provides another potentially coercive process that tenure holders can use against landholders, and even if the ombudsman finds in a landholders favour, they still have to go to court to enforce the recommended outcomes.

The problem in achieving an equitable playing field is always that landholders do not have the same access to the courts as companies, by virtue of the costs of legal action and the costs implications of losing. This proposal categorically fails to fix that problem, and continues the massive advantage which companies have in that regard.

We are deeply concerned that this Ombudsman process can create another forum for companies that can lead to more pressure on landholders. It is notable that the findings of the Ombudsman are admissible in a Court of Law, whereas in any of the conferences under the legislation currently things said thereat are not admissible. Therefore, this risks opening landholders to further legal implications than a conference. If this Bill was about consumer protection, then landholders would be protected from court action by resource holders subsequent to an Ombudsman process.

We understand from the Department that they have allowed resource holders so much power in this process because they want it to be available to small mineral resource companies who are subject to a power imbalance with landholders. Whilst we question whether such an issue ever arises, if it is indeed a genuine issue, the best way to deal with it would be to make an exclusion for very small companies to enable them to refer matters, rather than undermining the entire process in favour of large resource companies based on what is undoubtedly only an issue in exceptional circumstances.

We believe there are fundamental difficulties for an Ombudsman when it is dealing with corporations who are not bound by any Code of Conduct. We believe the introduction of an Ombudsman needs to be accompanied by the introduction of a Code of Conduct which requires that gas companies:

1. Cannot engage in conduct that could mislead or deceive
2. Cannot engage in unconscionable conduct
3. Must fully disclose any matter that could affect a landholder

Scope of disputes that can be considered

A major problem with the proposal relates to the limitation it sets as to the type of matters that can be dealt with.

Section 7 defines a land access dispute and limits them only to matters that relate to Conduct and Compensation Agreements and Make Good Agreements. Section 18 carves out what cannot be dealt with, and the exclusions are so large that all that is left is an ability to decide disputes in relation to executed CCAs and Make Good Agreements whilst they are on foot, and not if they have been the subject of an investigation by a department.

We strongly disagree with the limited scope. We can see no reason as to why the legislation would not cover Opt Out Agreements, Deferral Agreements, Alternative Arrangements, Decommissioning Agreements, and Plug and Abandon Agreements. The intention of this legislation, surely, is to address all forms of abuse of the power imbalance, not just executed CCAs and MGAs.

Similarly, limiting the scope to considering agreements only as made, and not being able to refer disputes during negotiations of agreements, dramatically undermines the value of the reforms. It is during the negotiation that sharp practices and unconscionable conduct are most likely to occur on the part of companies, and it is during the negotiation that landholders most need protection. However, they have no access to the Ombudsman during that process.

Preventing the Ombudsman from considering any matters where there has been any form of departmental investigation also represents a potentially enormous carve out of disputes that can be considered. Almost every landholder we know that has problems with CSG on their properties has made some form of complaint to departments and there has been some sort of cursory (albeit unsatisfactory) investigation.

Similarly, limiting considerations to CCAs and MGAs that are 'on foot', means that the Ombudsman cannot consider any legacy issues either. Therefore, damage left behind for landholders to deal with and un-rehabilitated sites will not be referrable to the Ombudsman.

We contend that the phases during which an Ombudsman is most needed to protect landholders are:

1. During negotiations for agreements
2. When other agreements such as opt-out agreements and deferral agreements are used to avoid proper CCAs and MGAs

3. When there are issues that raise concerns about legality and are likely to be subject to departmental investigation as well
4. After an agreement has ceased and landholders are dealing with legacy issues

However, the Bill as currently drafted will exclude all of those situations from the scope of the Ombudsman dispute resolution procedures.

Recommendations

We recommend that changes are made so that:

1. Resource tenure holders are not be able to refer disputes to the Ombudsman
2. The decisions of the Ombudsman are binding on resource tenure holders whilst retaining the rights of landholders to pursue the matter further through the courts. This would reflected the banking ombudsman framework, and would provide a genuine consumer protection mechanism.
3. All and any costs of the process should be paid for by resource tenure holders.
4. In relation to the scope of the Ombudsman dispute resolution processes, it should be expanded to encompass:

    - The conduct leading up to an agreement
    - All agreements including Opt Out Agreements, Deferral Agreements, Alternative Arrangements plus any other relevant agreements, and should NOT be limited to CCAs and MGAs.
    - The conduct of companies after the completion of an agreement, particularly as it relates to legacy issues affecting landholders.
    - Matters that are subject to, or have been subject to, departmental investigation of any kind.

5. Amend provisions which appear to exclude lawyers from assisting landholders (such as section 32 (3)), to ensure that landholders are able to obtain legal assistance if required. Amend provisions such as 43 (5) to ensure that company complaints are made available to landholders, and to allow legal representation and costs in appropriate circumstances to landhholders.
6. Amend provisions which appear to provide new powers for the ombudsman to enter landholder properties without consent (s47).
7. Include new provisions to amend MERCPA to provide that a breach of a condition of an agreement with a landholder is a breach of the licence.
8. Introduce a Code of Conduct which mandates that gas companies:

    - Cannot engage in conduct that could mislead or deceive
    - Cannot engage in unconscionable conduct
    - Must fully disclose any matter that could affect a landholder