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RIGHT WRONG.

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

By Email: *ipnrc@parliament.qld.gov.au*

Dear Sir/Madam,

LAND ACCESS OMBUDSMAN BILL 2017 (QLD)

Thank you for the opportunity to provide submissions on the Land Access Ombudsman Bill 2017 (**the Bill**).

We are a legal firm that practices extensively in the field the subject of the Bill and have extensive first-hand experience in the day to day workings of land access. In this area of the law we act exclusively for landholders and, together with the firm Shannon Donaldson Province Lawyer (which we acquired), we have been involved in negotiating hundreds of land access arrangements over the better part of the last decade. We therefore have particular insight into the issues proposed to be addressed by this Bill, which had the potential to offer so much but is delivering so little in its current form.

As an overall statement we would firstly like to say that the Bill has failed to address the fundamental power imbalance that exists between landholders and companies who extract State owned resources. In our view, the Bill has the following critical flaws issues:

1. It departs from the fundamental concepts of an Ombudsman;
2. It does not adequately address nor recognise the power imbalance issues which currently exist under the land access framework;
3. It severely restricts the matters the ombudsman can deal with; and
4. It has the potential to enable an abuse of process.

We have addressed these issues in detail below.

Departure from fundamental concept of an Ombudsman

The State has given resource authority holders a licence to explore, develop and produce from State owned resources. That licence is enabled by both State and Commonwealth legislation.

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What ultimately transpires from the licence and supporting legislation is a significant power imbalance between the companies and the landholders whose land the authorised activity is taking place upon.

We note the Minister's reference to the Australian and New Zealand Ombudsman Association (**ANZOA**) in the first reading speech for the Bill. In that regard, we note in particular the following excerpts from ANZOA's *Guide to Ombudsmen Services in Australia and New Zealand*:

1. *An Ombudsman takes complaints from citizens or consumers about agencies or service providers.*

2. *The modern meaning of Ombudsman arose from its use in Sweden with the Parliamentary Ombudsman instituted in 1809, to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch.*

What has emerged from the Bill is likely to lead to entirely different outcomes, including further disempowerment of landholders and further abuse of power by resource authority holders.

Landholders in the instance of resource development are akin to consumers in the usual context of such legislation. Those consumers are often vulnerable, at the mercy of the decisions/action the industry takes and have far less resources and capacity to "take up the fight" than the company that may have wronged them. Legislation in respect of consumer protection usually addresses the power imbalance that results in those circumstances by enabling only the consumer (and not the company whom enjoys the imbalance of power) to raise a complaint or refer a dispute to an ombudsman (an independent body that imposes a binding decision on the company, yet provides the consumer with the right to seek further recourse should they so wish). The Bill has however failed to follow the same steps.

In the instance of resource development, Landholders often have very limited resources or see very little point in taking on the goliath that is some of Australia's largest companies. They often have very little control over what the sub-sub-sub-contractor of the parent company does on their land, despite whatever the agreement they signed with the parent company might say. The time it takes to "police" the activity of the contractors on the property is never reimbursed nor compensated, and often no action is taken despite multiple requests, meetings and correspondence back and forth, because the company already has access to the property. This power imbalance had the potential to be somewhat rectified by this Bill, but it has not.

The Bill has failed to address this power imbalance by enabling the company to refer the dispute to the ombudsman (which is in clear conflict with the guide produced by ANZOA). Given the power imbalance, we submit that clauses 32 and 51 of the Bill (and other clauses consequential to such amendments) should be re-drafted to reflect a process similar to the one adopted by the external dispute resolution schemes for the financial services and telecommunications sectors (which involve similar power imbalance situations). Adopting a similar approach to those schemes would, broadly speaking, see the following amendments to the Bill:

1. the right to refer a complaint or dispute with a resource authority holder is vested in the landholder only; and

2. any decision made by the ombudsman is binding on the resource authority holder with the landholder still being able to make a further application for determination by a Court of competent jurisdiction.

If it is genuinely contented that a power imbalance exists in reverse in certain scenarios (i.e. large landholders exerting power over small opal or gold mining/prospecting companies to prevent development), which we are not aware of, then provision can be made for that in the Bill - i.e. companies of less than $*x* turnover (excluding the subsidiaries of large companies) may refer a dispute to the ombudsman or the ombudsman may exercise its discretion to hear a dispute where a contrary power imbalance exists. However, to leave this unaddressed and enable all resource authority holder's (regardless of their size) to be able to refer a dispute to the ombudsman has the potential to lead to adverse consequences and an abuse of process (see further **below**).

Matters the Ombudsman cannot deal with

In our view, the definition of "*land access dispute*" under clause 7 and the restrictions imposed on the ombudsman under clause 18 of the Bill defeats the entire purpose of and intention behind establishing a land access ombudsman.

By limiting the ombudsman's ability to hear disputes <u>only</u> in respect of executed Conduct and Compensation Agreements (CCA's) and Make Good Agreements (MGA's) and <u>only</u> whilst they are on foot, and <u>not</u> if they have been the subject of an investigation by a Department, fails to address many areas where disputes can arise in respect of land access.

For example, the legislation already allows for numerous ways in which the companies can circumvent or reach agreement with landholders outside of CCA's and MGA's for land access related matters – i.e. Opt Out Agreements, Deferral Agreements, Alternative Arrangements, Decommissioning Agreements (i.e. not technically Make Good); Plug and Abandon Agreements (which the companies are using to circumvent Make Good legislation) etc. If the Bill is left unamended, disputes in relation to those agreements, whilst still relating to land access, would not be able to be heard by the ombudsman. We can also see companies arguing that CCAs and/or MGA's that didn't follow the legislative regime (e.g. no notice of intention to negotiate was served) and/or provisions in easements etc. are exempt from referral.

Further, most of the matters we have handled for landholders where an impasse has arisen have already resulted in some form of Departmental investigation. For instance, if the Department has looked into a Make Good issue and found some short comings on the part of the company in its approach to a baseline assessment, why should that mean the landholder is denied access to the ombudsman to resolve a dispute in relation to the company's obligation to provide make good measures?

The Department can also sometimes commence investigations without a landholder complaint – will a landholder be denied access to the ombudsman's service because OGIA (assuming it is considered part of the Department) was deciding on whether or not to order some kind of remediation or compliance direction of its own accord?

Without detracting from any of the above, we note as follows with respect to clause 18 in particular:

1. (a) – it needs to be clear that the conduct leading up to the Agreement can be the subject of a complaint and we don't really see why the power to investigate should only be after execution (as detailed above).

2. (c) – does this mean that after the cooling off period, the relevant agreement is immune from any kind of investigation because it was previously subject to a cooling off period? A ridiculous outcome if that is the case.

3. (d) – we do not see why the fact the agreement is at an end contractually should relieve the company from wrong doing or investigation – it simply encourages "smart" drafting of documents.

4. (e) – this is particularly confusing because the legislation and policies necessarily interact with the ombudsman's actions – presumably this means that landholders can't just complain about new laws or why the law should change etc., but it introduces uncertainty with its current wording.

5. (f) – again clarity is needed. The definition of "proceeding" needs to be considered and again context needs to be given to avoid a situation where the company can start proceedings and thereby frustrate the ombudsman process given that the ombudsman cannot continue to investigate a matter detailed in section 18(1).

6. (g) – see comments above.

The intention conveyed by the expression "ombudsman" is surely to address all forms of abuse of the power imbalance – not just executed CCAs and Make Goods. We urge the Bill be amended accordingly.

Potential for abuse of process

There is potential for the Bill to simply provide another forum for the companies to threaten and intimidate a landholder with. The findings of the ombudsman are admissible in a Court of Law whereas in any of the conferences under the legislation things said thereat aren't admissible. Therefore, if a company feels the landholder is being difficult, presumably they will opt to go with the ombudsman and hold them up by any admissions they made during that process. It is therefore crucial once again that the landholder (the entity that requires protection through the ombudsman service) be the only one who can refer a matter to the ombudsman.

Further, whilst we don't entirely disagree with the provision in clause 32 that a matter can't be referred unless reasonable attempts are made to resolve the matter, we can see that becoming problematic because well-resourced companies might argue that they don't have to participate until "reasonable" attempts have been made.

By the same token, the proposed changes to MERCPA which will allow either party to apply to the Land Court about an alleged breach may have the potential for abuse because the ombudsman can only deal with matters that haven't been referred to the Court, even if the Bill is changed so that the ombudsman process is only available to landholders. For example, the companies can simply start proceedings in the Land Court to stymie an ombudsman enquiry. We do not disagree with the proposal for the Land Court to have jurisdiction to hear disputes, but simply note that if the ombudsman referral process is not appropriately considered, there is real potential for an abuse of process.

Other

If the Bill is left unamended there will be a duplication of forums between a dispute referred to the ombudsman and a conference called by an authorised officer under section 734B of the PAG Act. We also note that the role of the authorised officer at those conferences (i.e. *to endeavour to help those attending to reach an early and inexpensive settlement of the subject of the conference*) is almost identical to the purpose of the Bill (i.e. *to facilitate the time resolution of disputes between parties to conduct and compensation agreements and parties to make good agreements*). In our view there should be a clear difference between the two forums (which was presumably the intention in any event). That difference can be established

through the amendments we have proposed above, particularly those amendments relating to the matters which can be referred to the ombudsman, who can refer the matter and the effect of the ombudsman's decision upon the matter being referred to it and investigated.

Further, we once again take this opportunity to again emphasise that section 276(i) of the MRA should be imported into MERCPA. Whilst that section has not been interpreted by a Court, it has often served as a sobering condition for authority holders under the MRA – i.e. authority holders can be found to have breached their mining lease if they breach a term of an agreement relating to the mining lease. As that section has not been imported into MERCPA, the ombudsman process will assume a crucial role in correcting the power imbalance, however, the current drafting of the Bill fails to do so.

We would be pleased if you would consider our comments in relation to the Bill and would welcome the opportunity to meet with Committee to discuss our concerns.

Yours faithfully

SHINE LAWYERS