QUEENSLAND resources COUNCIL

Working together for a **shared future**

23 June 2017

Jim Pearce MP
Chair
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
BRISBANE QLD 4000
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Dear Mr Pearce

Thank you for the opportunity to comment on the *Land Access Ombudsman Bill 2017* (the Bill). The Queensland Resources Council (QRC) understands the Bill includes provisions to establish the Land Access Ombudsman as well as amendments to the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCPA). The MERCPA amendments relate specifically to transitional arrangements for restricted land and consequential amendments to the coal and coal seam gas overlapping tenure framework. QRC fully supports the amendments to MERCPA.

QRC has been genuinely consulted on this Bill by the Department of Natural Resources and Mines (DNRM), on all the amendments outlined in this Bill. Despite the short timeframes required, QRC is deeply appreciative of the Department's approach to working with stakeholders.

As you know, the QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses exploration, production, and processing companies, energy production and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

The resources industry has delivered many benefits to Queensland landholders. Over the last 15 years we have seen one of the largest concentrations of private capital in Australia's history in the Surat basin gas developments. With the best part of a 70-billion-dollar investment, it is the equivalent of three Snowy Mountain Hydro Schemes (which took 25 years to build). These developments have enabled farmers to share their land and share in the wealth of the gas below it which belongs to all Queenslanders.

The aggregated compensation paid to landholders from gas projects between 2010 and 2015 totalled $238 million.[1] One company operating in the Surat Basin alone provides over $400 million to ten landholders affected by their operations. The industry provides further income to farmers which has been gratefully received in times of drought and slumps in cattle prices. Farmers can structure these payments to match their circumstances. For some, it funds a retirement and a transfer to the next generation, others look for the

[1] http://www.gasfieldscommissionqld.org.au/news-and-media/did-you-know-nov-2016.html

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security of an annual guaranteed payment every year. Resource companies also provide non-pecuniary compensation which can sometimes be more valuable to the productivity and/or value of the land. Some examples are building new gravel roads, cattle grids, fences, irrigation and in a few instances providing access to treated water.

Historic context of the Land Access Framework

Before talking about the Bill specifically, it is beneficial to first consider the Land Access regime broadly.

Queensland's land access framework provides the statutory and policy framework for accessing private land to undertake resource activities and compensating for associated impacts. In Queensland, resources belong to the state, not the individual landholder. The Government grants proponents the right to explore for, develop and produce these resources. To explore for resources, proponents have the right to enter and conduct authorised activities on land which is owned by someone else. Before the authority holder conducts any activities[2] which will have an impact upon the landholders' land, a Conduct and Compensation Agreement (CCA) must be negotiated and agreed upon by the parties. The landholder is entitled to be compensated for any adverse effects caused by the activities conducted.

In 2010, the Queensland Land Access Framework (the framework) was introduced with the aim of balancing the interests of landholders and resource authority holders, through a particular focus on compensation arrangements and the need for good communication and relationships. The framework specifically introduced requirements for:

- Providing landholders with entry notices for 'preliminary activities';
- Negotiating a CCA before accessing private land to undertake 'advanced activities';
- A statutory graduated negotiation and dispute resolution process for CCAs, with the Land Court being the last resort; and
- Compensating landholders for reasonable and necessary accounting, legal or valuation costs incurred in negotiating or preparing a CCA.

Since the establishment of the Land Access Framework, industry has experienced several issues, particularly in regards to excessive costs and some reports of delay. To be clear, feedback to QRC points to the large part of the problems stemming from a process that encourages lawyers to be involved from the beginning of the process, rather than develop up an agreement based on the issues addressed between the landholder and the company. QRC has numerous examples where the legal costs far exceed the benefits paid to the affected landholder. QRC acknowledges the process is not perfect, however it has provided a clear process for landholders and companies to reach agreement on access. The fact alone that the process allows for access has been at the centre of the frameworks criticism.

Each year the Canadian Fraser Institute releases its results from a global survey of mining companies and a separate survey for petroleum companies. In every edition, there is mention of the issues for industry around land access.

[2] Preliminary activities which have little to no impact, such as soil sampling, can be undertaken without a CCA.

In 2014 a miner was quoted:

> *"Land Access Legislation, its inception, the nature in which it was introduced, the failure it presents for industry and exploration investment, its workability and suitability to industry (i.e., impossibly cumbersome, costly and difficult), and the fact that the current administration is not interested in hearing any criticism of it, nor will it listen to the urgent need to change it. Land access is extremely problematic under new laws—costly and very time consuming."*

And in 2015 and exploration company noted:

> *"Making a land access agreement with freehold and pastoral landowners compulsory in remote regions where exploration has little impact – added to upfront cost of exploration."*

Managing and maintaining good relationships with landholders has been an ongoing learning process for the industry. Resource companies have an active interest in maintaining good relationships with their landholders and being part of the broader community. Most companies land access staff are local people and have a genuine interest in ensuring the company is there for the long term, part of the community.

Collectively with Department of Agriculture and Fisheries (DAFF), Department of Natural Resources and Mines (DNRM) and Australian Petroleum Production and Exploration Association (APPEA), the QRC funds the Agforce Landholder Support Program. This highly successful program delivers workshops and field days to prepare landholders in negotiations with resource companies. Every year Agforce monitors the programs performance with a survey. The results are not always glowing, however QRC is committed to improving the process to ensure landholders have adequate support during what can be a stressful time. The process also provides direct feedback to the resources industry on what concerns landholders most. This is valuable information that can be used when companies are speaking with their landholders and addressing these concerns upfront.

Industry comments on the Bill

QRC understands the government's intentions to establish a Land Access Ombudsman and is supportive of a process that facilitates and encourages long-standing relationships. There is merit to having an independent body that is able to assess all relevant information in relation to a possible breach of a CCA and/or Make Good Agreement (MGA) and make recommendations to parties in the aim of finding a resolution. QRC acknowledges the establishment of the Ombudsman does go some way to ensuring parties to these agreements have a low or no cost mechanism to resolve a dispute. Currently the Land Court's jurisdiction is limited to only those scenarios where parties are negotiating a CCA, not those disputes where there is an existing agreement in place. QRC acknowledges this Bill includes amendments to extend the jurisdiction of the Land Court to those disputes where there is already an agreement in place.

There remain some industry concerns on the operation of the Ombudsman which are largely implementation matters rather than issues to be addressed within the proposed Bill. For example, QRC remains concerned about the Ombudsman function and how it may be confused with other existing statutory roles of the Gasfields Commission, the CSG Compliance Unit and EHP's role in compliance.

The Gasfields Commission review only investigated and made recommendations regarding the gas industry, however this Bill extends the Ombudsman role also to the coal

and mineral industry. Even though on face value it seems reasonable to apply the same process broad brush across the entire industry, this approach, without further considered investigation, is cause for increasing concern for QRC's coal and mineral members.

Availability to landholders and companies
The drafting of the Bill, in some areas, is based on the assumption it is the resource company that is in breach of the CCA. QRC understands what the Bill is trying to achieve and thus accepts this, however it is important all parties to a CCA and MGA understand that either party can refer a potential breach of the agreement to the Ombudsman.

Opportunity to provide transparency
QRC is hopeful the that Land Access Ombudsman will provide transparency to the land access process. The Ombudsman has a significant opportunity to provide some external clarity given most of the information used to evaluate the success of the land access framework is anecdotal. QRC is particularly pleased the Ombudsman will need to report on these disputes through its annual report. This report will give transparency to the volume and nature of disputes between landholders and authority holders.

To provide an accurate reflection of true disputes between the parties, the annual report should only focus on matters which the Ombudsman has investigated rather than compliance matters which have been referred on to the appropriate regulator.

Information collection and admissibility
Section 52 of the Bill outlines that the notice produced by the LAO following their investigation is admissible in a Land Court proceeding. Section 42 of the Bill outlines that the LAO has the power to require information from parties as part of their investigation. It would be beneficial if the Bill could clarify whether the information collected under section 42 (which would presumably underpin the contents of the LAO's notice) would also be admissible as evidence in a Land Court proceeding.

'Reasonable attempt' to resolve disputes
The Bill outlines that before parties refer disputes to the Ombudsman, they must first make a reasonable attempt to resolve the dispute with the other party.[3] The Ombudsman may also direct parties to make a reasonable attempt to resolve the dispute.[4] Further, the Ombudsman may refuse the referral of a dispute since the referring party has not yet made a reasonable attempt.[5]

More information is required around what constitutes a 'reasonable attempt'. QRC is concerned the 'reasonableness' of the attempts does not seem to have any relationship to any dispute resolution clause which is already in most CCAs or MGAs, including the Queensland Government's own standard CCA template. Section 34 of the Bill states that a party does not incur liability if they have referred the matter to the Ombudsman without first using the dispute resolution mechanism in the CCA, which is typically mediation. QRC suggests that the Bill should consider whether one of the thresholds for a dispute to be referred is that the complainant should justify why they are looking to step outside these agreed mechanisms. Alternatively, the circumstances where it is not appropriate to utilise the CCA dispute resolution mechanisms should be defined and justified.

[3] Ibid, s 32(1), (2).
[4] Ibid, s 37.
[5] Ibid, s 36(3)(a)(ii).

Exclusion of dispute resolution clauses in CCAs

Conduct and compensation agreements often outline the dispute resolution mechanisms which are to be utilised if a dispute arises between the parties. The provisions in the standard CCA explicitly outline that failure to follow the dispute resolution mechanisms will result in a breach of the contract. Section 34 of the Bill outlines that a party will not incur any civil liability for breaching a dispute resolution condition in a contract by referring a dispute to the LAO. Therefore, the Bill effectively overrides contractual mechanisms, and calls into question the utility of dispute resolution clauses in contracts. As this is a significant change, it will impact upon the development of future CCA's and the standard CCA developed by DNRM will need to be reviewed. QRC recommends as part of this process that DNRM update and again publish the standard CCA on its website given it will become very confusing for parties that are looking to resolve an issue with this conflict.

QRC's position is that prior to a matter being taken to the Ombudsman, all other dispute resolution mechanisms as outlined in the CCA are exhausted first (except for litigation). This is a critical element given that parties should be able to first demonstrate they have made reasonable attempts to resolve the dispute (as agreed in the CCA). This is consistent with the approach taken by the Queensland Energy and Water Ombudsman. Section 22(1)(d) and (e) of the *Energy and Water Ombudsman Act 2006* states that-

(1) The energy and water ombudsman may refuse to investigate a dispute referral or, having started to investigate a dispute referral, may refuse to continue the investigation, if the ombudsman is reasonably satisfied that—

(d) the relevant entity has not been given a reasonable opportunity to resolve the relevant dispute;

(e) both of the following apply:

(i) the referrer has a right of appeal, reference or review, or another remedy, that the referrer has not exhausted; Example of a right of reference— a right under a relevant contract or law of internal review by the energy entity for it to make an insurance claim for the relevant dispute; and

(ii) it would be reasonable in the circumstances to require the referrer to exhaust the right or remedy before the energy and water ombudsman investigates, or continues to investigate, the dispute referral;

Timeframes

At the Parliamentary Committee hearing on 14 June 2017, the question of timeframes for disputes to be investigated was raised. QRC supports the wording in the Bill regarding an investigation to be carried out in a timely manner and the Ombudsman, once established, should be proactive in providing guidance material on timeframes. Timeframes provide a level of accountability as well as set the expectations of the parties. Some disputes will undoubtedly be more complex than others, and therefore require more time to resolve.

Timeframes will need to be flexible, however it is ideal for parties to understand the process and have certain expectations on when and how matters will be investigated. At the very least a timeframe for the receipt of the dispute and the initial conference/investigation.

Legal representation
At the Parliamentary Committee hearing on 14 June 2017 there was a question about parties being able to have legal representation during an Ombudsman led dispute resolution process. QRC members are happy to accommodate any arrangement for legal representation deemed suitable by the Ombudsman.

If you have any questions about this submission, please don't hesitate to contact QRC's Resources Policy Director, .

Yours sincerely

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Chief Executive