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Office of the President

26 October 2017

Your ref BDS WD VK Gen Advocacy

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, Explosives and Other Legislation Amendment Bill 2017

Thank you for the opportunity to provide comments on the Land, Explosives and Other Legislation Amendment Bill 2017. Queensland Law Society (QLS) appreciates being consulted on this important legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the following QLS committees who have substantial expertise in the areas affected by the Bill:

- Property and Development Law Committee
- Revenue Law Committee
- Mining and Resources Committee

Our policy committees and working groups are the engine rooms for the QLS's policy and advocacy to government. QLS, 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, QLS 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 profile of QLS as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

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Consultation timeframes are inadequate

As a preliminary issue, QLS notes that the Bill is 325 pages long and amends 9 existing acts. The 16 day timeframe for consultation since the Bill was introduced is grossly insufficient to consider the proposed amendments to an appropriate level of detail.

Given the very short consultation timeframe on the Bill, it has not been possible for QLS to conduct an exhaustive review. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

In light of the short timeframes, QLS is only commenting on limited provisions.

By omitting to comment on the full scope of provisions to the Bill, QLS does not express its endorsement of these.

Cape York Peninsula Heritage Act 2007

QLS has not had the opportunity to review the proposed changes to this Act in any detail in the limited timeframe provided.

However, QLS cautions that, in the event that the effect of the proposed amendments is that a right or interest is removed from an affected party, consideration should be given to establishing a framework for compensation as may be appropriate in the circumstances. This would be consistent with sections 4(3)(g) and (i) of the *Legislative Standards Act 1992*.

Explosives Act 1999

The Explanatory Notes identify a number of provisions which will abrogate the right to claim privilege against self-incrimination. We refer to our comments below on similar provisions in the *Land Act 1994* amendments.

Foreign Ownership of Land Register Act 1988

QLS is pleased to support the tenor of the amendments proposed in relation to the *Foreign Ownership of Land Register Act 1988 (FOLR Act)*. In particular, QLS commends the Government on amendments which:

- Amend definitions in this Act to be consistent with definitions in the *Duties Act 2001 (Qld) (Duties Act)* and the *Corporations Act 2001 (Cth)*. However, while consistency of definitions across legislation may give rise to practical benefits to individuals and corporations who are affected by this and related legislation, where there are differing policy intentions for different acts, consistency of definitions may create unintended difficulties. Concerns regarding this are outlined below.
- Omit Part 5 (Forfeiture and restraint) which will remove inappropriate provisions having regard to the scope of the Act.

In connection with the proposed amendments, QLS notes that:

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1. proposed subsection 42(3) includes a definition of "registered office" which is not used in the section. It appears that this subsection should be removed.
2. The revisions to the FOLR Act appear intended to limit its application to only acquisitions of legal interests in land and so only to those legal owners of land.

In this respect it is unclear why the term "foreign trust" has been included as a defined term as a trust cannot act other than through a legal person – in an Australian context, an individual or a company (as trustee).

The inclusion of the term "foreign trust" and the use of the term "foreign person" from the Duties Act (that includes as a foreign person, a "foreign trust") appears problematic in this context.

If the intention of the amendments to the FOLR Act is only to apply to a person who acquires a legal estate of an interest in land (consistent with the statutory regime recording of land ownership under the *Land Titles Act 1994*), the definition of "foreign person" in clause 170(2) should possibly read:

"foreign person" see the Duties Act 2001, section 234, but excluding "foreign trust".

3. Incorporation of the Duties Act definitions may create uncertainty in the operation of the FOLR Act that did not previously exist.

Section 236 of the Duties Act includes "related persons" of "foreign persons" in determining whether a company or trust is a "foreign company" or "foreign Trust".

"Related persons" may include Australian persons and those persons may effectively control the company or trust. However, the operation of the definition would seem to treat Australian persons who are "related persons" of a "foreign person" who also hold an interest, effectively as "foreign persons" as their interests would seem to be aggregated with that of the "foreign person" in determining the interests of the "foreign person". It is suggested that this term should be amended to "related persons of foreign persons ... who are themselves foreign persons."

A similar difficulty arises in connection with section 237(2)(d) of the Duties Act.

The Duties Act provisions are targeted to residential land only and the definitions are assumed to be broadly drawn for anti-avoidance reasons.

The FOLR Act is directed at different purposes and will apply to a significantly broader scope of parties.

The FOLR Act was directed expressly at legal interests acquired by "foreign persons". For the reasons outlined above, the reference to the Duties Act definitions to determine "foreign person" for the purposes of the amendments to the FOLR Act may have the effect of making an otherwise Australian Company (or Trust) a "foreign person" even where it may be controlled by Australian persons.

This seems contrary to the policy intention of the FOLR and will add greatly to uncertainty in its application.

4. The policy intention of the FOLR and its application to a materially broader range of acquisitions than the additional foreign acquirer duty (AFAD) provisions in the Duties

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Act (residential land only) suggests that from a practical perspective the intended scope of operation of the FOLR is more consistent with the concepts of "foreign person" in the *Foreign Acquisitions and Takeovers Act 1975* (Cth). It is suggested that that the terms from that Act are more suitable for the FOLR Act than the Duties Act definitions of "foreign person".

Adoption of the Duties Act definitions with potential flaws in those terms may increase the cost of transactions unnecessarily and may result in the recording of entries that in substance may be incorrect causing the register to be misleading and inaccurate.

Land Act 1994

Clause 201 – section 390ZX and 390ZY document production requirements, new section 390ZF(3) and abrogation of privilege against self-incrimination

QLS finds these clauses very concerning as they abrogate the right for a person to claim privilege against self-incrimination. The limited protection against derivative use evidence provided in these sections is not strong enough to alleviate our concerns.

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. The High Court has found that fundamental rights can be lawfully abrogated either expressly or by implication by statute. Over the past 20 years, and in several recent Queensland bills, there has been a trend to introduce legislation across the country which abrogates fundamental rights, more often than not, relating to the abrogation of self-incrimination privilege. If legislation of this nature continues to be implemented at its current rate the right, the ability to claim privilege against self-incrimination will cease to exist within our justice system.

The Explanatory Notes suggest that the effect of section 390ZZJ is that information obtained cannot then be used in any proceeding to the extent that it tends to incriminate the individual or expose the individual to a penalty. It is suggested that these provisions "legally protect a person from the use against the person notwithstanding the limited loss of privilege against self-incrimination."

QLS considers that this is insufficient justification for abrogating this right.

QLS also considers there is no other justification provided in the Explanatory Notes which justifies the abrogation of this critical and fundamental right of our legal system. As stated, this is a concerning trend, particularly in the context of legislation which purports to regulate land use rather than serious criminal activity. QLS notes that it has made similar comments on this issue in recent submissions on the following bills:

- Court and Civil Legislation Amendment Bill 2017
- Land Access Ombudsman Bill 2017
- Labour Hire Licensing Bill 2017
- Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017

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Given the context in which a person is required to provide the information, it is also unlikely that he or she will seek legal advice in relation to the consequences of providing this information. This is also concerning as it could easily lead to an individual inadvertently losing or waiving rights and privileges to which they are entitled.

The policy objective could be achieved in an alternative way:

- the investigating officer should be required to obtain a warrant to search the premises to seize the information required – this will ensure that there is independent magisterial oversight of the process; or
- the person can be requested to provide the information with a warning that if they fail to provide the information voluntarily, the court may subsequently draw an adverse inference against the person with respect to the lack of evidence provided.

Any provision that requires a person to provide information should include that it is a reasonable excuse for the person to refuse to provide the information if the information could incriminate the person.

Offence provisions – collated on page 12 of Explanatory Notes

A range of new offence provisions are proposed to be added to the Land Act.

QLS has not had the opportunity to conduct an exhaustive comparison of the levels of penalties proposed with those of similar offences.

At page 12, the Explanatory Notes suggest that the penalties are “appropriate, reasonable and proportionate” and that the maximum penalties were developed having regard to similar Queensland legislation. However, details of the “similar” offences are not provided.

The maximum penalty of 400 penalty units is proposed for new offences under new sections 214J, 403H, 403K, 403M and 403N. This equates to \$50,460 for an individual and up to 5 times that amount for a body corporate under section 181B of the *Penalties and Sentences Act 1992*.

These amounts are potentially excessive. Without further details of which similar offences were considered when determining these penalties, it is difficult to comment on the proportionality of the maximum penalties.

Powers of entry

As a general comment, powers of entry must be carefully drafted as the exercise of such powers will amount to an intrusion on a person’s rights which have been granted under an existing right to occupy the land.

The strong preference of QLS is that entry to places should generally only be exercised with a valid warrant, the consent of a landholder or following an appropriate notice period.

QLS notes that section 4(3)(e) of the *Legislative Standards Act 1992* provides that legislation should generally confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

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This is particularly the case when the general powers provided for in section 390ZD apply if an authorised officer has entered a place under section 390N. These powers apply even if no warrant was obtained or consent given and extend to searching any part of the place, filming any part of the place or taking things from the place.

QLS raises the following concerns in relation to section 390N:

- Paragraph (c) – This paragraph gives a blanket right to enter land, including leasehold land, based on a reasonable belief that any term or condition of a “trust, lease, licence, permit or reservation applying to the land” is not being complied with. The concept of “reasonably believes” is very broad and there is no limit on which “term” of the occupation right might give rise to the exercise of this power. Some terms are more significant than others and entry to a place will not be required to determine compliance with some terms. No warrant is required and there is no requirement to obtain consent or give notice. This provision will override a landholder’s contractual rights under the relevant trust, lease, licence, permit or reservation. This seems to be an extraordinary right of entry and there are other avenues under proposed section 390N which are more appropriate methods of obtaining entry which are not so invasive.
- Paragraph (e) – under the current drafting, there is no mechanism for the landholder to object to the date or time proposed or to negotiate with the authorised officer. It would appear to be a matter of procedural fairness that a landholder should have the opportunity to raise safety or other concerns around the proposed exercise of the power. A landholder may, for example, have particular harvesting or mustering activities planned which could give rise to genuine safety or operational concerns about the entry of an authorised officer during the timeframe.

The legislation should include a process for the landholder to object to or negotiate the timing. This should also be addressed in the “policies, procedures and training” which the Department of Natural Resources and Mines are expected to develop (as noted on page 11 of the Explanatory Notes).

- Paragraph (g) - QLS considers that it is inappropriate to authorise an unrestricted power of entry simply on the basis that a place is “open” for business. An authorised officer should be required to obtain consent and follow the process outlined in Division 2 “Entry by consent”.

The authorised officer should notify the business operator that he or she is there to carry out a function under the Act. The business operator should then be entitled to withdraw consent to the authorised officer being present on the place of business before the authorised officer has carried out a function, unless the authorised officer has obtained a warrant.

The requirement the place simply has to be “open for carrying on a business” is far too broad in our view for entry to be authorised. There is the potential for this power to be misused. Further, this general power of entry may be broader than the powers of entry under the Police Powers and Responsibilities Act and raises privacy concerns and contravenes a right to privately enjoy premises. This is concerning as many

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businesses will be in possession of commercially sensitive, private and confidential information.

We have previously raised similar concerns in our submissions on:

- Labour Hire Licensing Bill 2017
- Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017

General Powers

Seizure of evidence

QLS again notes that section 4(3)(e) of the *Legislative Standards Act 1992* provides that legislation should generally confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

There are a number of provisions authorising the seizure of evidence at a place that may be entered without consent or warrant. In the absence of consent or a warrant, this raises concerns in relation to an occupier's rights and whether an occupier has the opportunity to obtain legal representation before being subject to a search.

New section 390ZG (seizing evidence at a place that may be entered without consent or warrant) is extremely broad. It permits seizing a thing based only on a reasonable belief that it may be evidence of an offence under the Act or a breach of any condition of a lease, licence or permit. There is no distinction drawn in relation to the nature of the conditions potentially breached (whether minor or significant conditions) or of the degree of seriousness of the offence alleged. We note that subsection (2) provides only limited protection where the entry has been permitted under this Act rather than by consent or under a warrant.

In relation to section 390ZH, if entry to a place is authorised only by the consent of the occupier, then consent should also be required before evidence is seized or anything else is removed from the place. If consent is not given but there is a reasonable belief that an offence is being committed, the appropriate course should be that the authorised officer obtains a warrant to seize the evidence.

Obtaining a person's criminal history

In relation to Chapter 6A, Part 5, QLS is also concerned that an authorised officer can obtain a person's criminal history based only on a reasonable suspicion that there might be a risk when entering a place under Part 3 of Chapter 6A. This raises privacy concerns. Obtaining a person's criminal history will not necessarily address the safety concerns of an authorised officer when entering a property without consent. If there are concerns, it would be more beneficial and appropriate to follow the due process of obtaining a warrant and seeking the assistance of the police to enter the place.

Scope of section 390ZU

Section 390ZU provides that an authorised officer may require a person to provide a name and address if the authorised officer "finds a person committing an offence against this Act" or

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the circumstances lead the officer to reasonably suspect the person has just committed an offence against this Act.

QLS considers that it is inappropriate for an authorised officer to make such a finding. This is a judicial determination to be made by a court after being presented with appropriate evidence and arguments.

QLS is also concerned at the introduction of a power to require a person's name and address to be provided. This is a compulsive power usually vested in officers of the Queensland Police Service or similar organisations who have rigorous training and are subject to legislative obligations and codes of conduct with respect to such powers.

Establishing a monitoring site on the land

Section 390ZD provides that if land is entered that is lease land, licence land or certain types of permit land is entered without consent or a warrant, an authorised officer may establish a monitoring site on the land to monitor compliance with the Act, the lease or other notices or orders.

QLS considers that this right should only be exercised with a court order, with consent or after giving appropriate notice, depending on the nature of the monitoring. As a matter of procedural fairness, the occupier should have the opportunity to object to such a proposal given that, for example, a video camera could have serious implications for a person's privacy and an impact on commercially sensitive operations.

Land Title Act 1994

QLS raises the following issues for further consideration:

- 1. Clause 224 – Amendment of section 54D Registration of building management statement**
 - a. QLS queries whether the wording "binds the successors in title" will be sufficient to achieve the objective of the section and reverse the common law position that a successor in title is not subject to the burden of a positive covenant (see discussion in *Rural View Developments Pty Limited v Fastfort Pty Limited* (2011) 1 Qd R 35, which considered similar wording in section 53(2) of the *Property Law Act 1974*).
 - b. In this regard, QLS notes the wording in section 28AH of the *Transport Planning and Coordination Act 1994*, which identifies that each term, whether positive or negative, for a transport easement for support is for the benefit of any successors in title and any burden of the covenants are also binding on any successors in title. Specific wording addressing these issues is required to alter the common law position.
- 2. Amendment of section 199 (Regulation making power)**
 - a. If a regulation is made in the future to effectively "mandate" the use of electronic conveyancing in Queensland, it will have a significant effect on Queensland's legal practitioners and their day-to-day practice.

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- b. However, QLS notes that there has been a very low level of take up by Queensland practitioners using e-conveyancing to transact property transfers. QLS is carrying out more detailed consultation with members about the reasons for this.
- c. Some of the concerns raised to date include cost, increased risk to practitioners and the limited range of transfer transactions which can be dealt with in the PEXA system due to some existing restrictions limiting the types of transactions which can be processed. The practical effect of this is that practitioners using the e-conveyancing platform must still operate and train staff to work in both a paper and electronic environment.
- d. Any decision to mandate e-conveyancing for property transfers will need to consider the above issues, including undertaking further consultation with all affected stakeholders and allowing a significant lead-in time.
- e. QLS acknowledges and appreciates the ongoing consultation by the Titles Office with QLS in this regard. QLS looks forward to continued consultation with the Titles Office.

3. Clause 245 (New Part 12, Division 7, Subdivision 2 – Certificates of title)

- a. QLS acknowledges the considerable lead-in time allowed of 1 January 2019. However, the current drafting does not provide any protection for persons holding titles under a lien, if the debt protected by the lien is not paid before certificates of title are cancelled. QLS recommends that consideration be given to this issue.
- b. Certificates of title are relied on to create equitable mortgages. QLS recommends that the legislation provide that an equitable mortgagee has the right to require an equitable mortgagor to deliver to the mortgagee a mortgage which is capable of registration.

Amendment of Mineral and Energy Resources (Common Provisions) Act 2014

QLS has not conducted an exhaustive review of the proposed amendments in the limited time provided. We raise the following issues for further consideration:

1. Clause 255 – Amendment of section 670

There may be an error with the cross reference of "subsection (2)(j)" in the proposed new s 670(8)(c), which appears to be incorrect.

2. Clause 259 – Replacement of section 699

The consequence of the current drafting in proposed subsection (2) may be broader than intended. An obligation imposed on a person under proposed subsection (1) could be quite narrow, whereas the requirement under subsection (2) requires a person who has any such obligation to ensure that no person is exposed to a risk at more than an acceptable level.

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For example, obligations in relation to an operating plant could be imposed on two people. One of those persons may have a wide range of obligations that are central to the operating plan, and the second person may have less and/or more limited obligations.

The requirement in subsection (2) imposes the same standard on both persons for the whole of the operating plant. The requirement under subsection (2) should be tied to the particular obligation that the person has under subsection (1), rather than being an 'at large' requirement.

3. Clause 268 – Replacement of section 840

The proposed insertion of a new section 840(3) will have the effect of establishing a different, and likely higher test for a principal in relation to their representatives, in order to demonstrate that the act or omission was not done by them.

The wording under the existing section 840(3) is common wording which is included in legislation that is dealing with the actions of representatives. It is not clear why it is now proposed to depart from this well-established standard.

4. Clause 269 – Amendment to section 851A

QLS has concerns with regard to the proposed amendments to section 851A and would appreciate further information as to the reasons why the changes are required, including an appropriate justification. Under the existing section 851A(3), a statement can only be issued if it is in the public interest to do so.

Considerations which extend to potential liability (including defamation) ought to be considered as part of the State's obligations pursuant to the existing subsection (3).

Amendment of Mineral and Energy Resources (Common Provisions) Act 2014 and Amendment of Mineral Resources Act 1989

QLS has not had the opportunity to review the proposed changes to these Acts in any detail in the limited timeframe provided.

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

Yours faithfully

Christine Smyth
President