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QUEENSLAND resources COUNCIL

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Friday, 8 April 2016

Dr Jacqueline Dewar
Research Director
Infrastructure, Natural Resources & Planning Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Dear Dr Dewar,

Thank you for the opportunity to provide a submission to the Committee's inquiry into the *Mining and Other Legislative Amendments (MOLA)* Bill 2016.

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

As the Department of Natural Resources and Mines (DNRM) explained to the Committee at the public hearing on 16 March, the drafting of the MOLA Bill is technically complex. It aims to amend an earlier Act passed by the previous Parliament, but many of the provisions of that 2014 Act have not yet commenced. As such, these amendments are inherently complex in amending provisions that have not yet commenced. The primary focus of the MOLA Bill in 2016 is to amend the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCP Act) so that key provisions are consistent with the new government's policy before those clauses commence and come into effect on 27 September 2016.

The Bill's drafting complexity is compounded by the fact that much of the focus of the original amendments (in the 2014 MERCP Act) and the subsequent amendments (in the 2016 MOLA Bill) focus on the technical processes of making and assessing an application for resource tenure. The application processes for resource tenure have a long and complex history and it is important for the Committee to understand that the application for resource tenure is not a standalone process. Once granted, to conduct any activities on the tenure, also requires an Environmental Authority (EA), which is subject to a separate assessment process under a different Act.

Much of the assessment of impacts of resource projects (particularly social and environmental) occur under the *Environmental Protection Act 1994* process that govern the process of assessing an Environmental Authority (EA); rather than under the resource legislation, which governs the process of applying for tenure. In essence, tenure grants a

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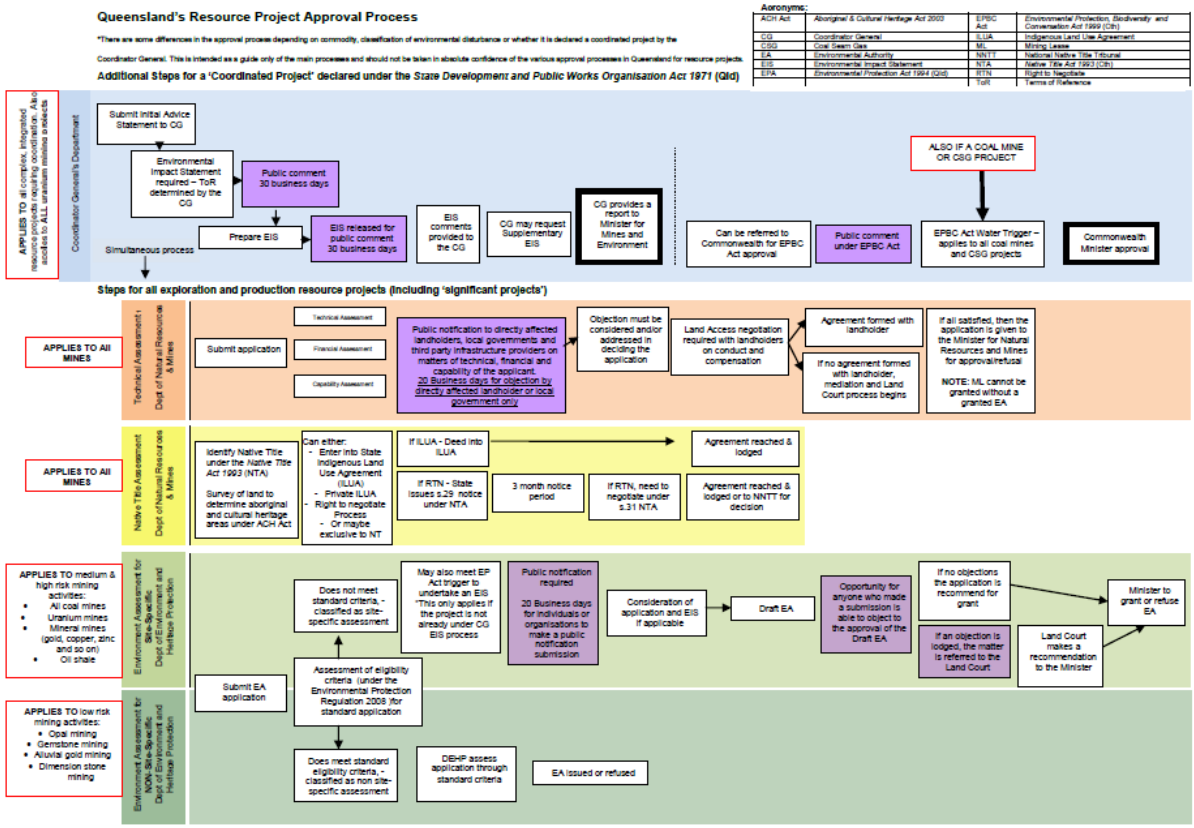
temporary, bounded and limited form of property right over the Crown's resources; whereas an environmental authority assesses and conditions the activities which can occur on that tenure.

At Attachment one, QRC has set out a simplified schema of the approval process for a mining project. What the schema sets out are the multiple opportunities for public consultation and input (in purple).



The schema (attachment 1) also sets out the three parallel approval processes, each of which must conclude before any operations can commence:

- Technical assessment associated with applying for tenure (shown in pink),
- Native Title approval process (shown in yellow).
  (What is not shown is the additional process, governed under a separate Act, of applying for Cultural Heritage approvals.)
- Environmental assessment for conditioning the activities through the environmental authority (EA) (which is shown in green).

During the debate over the MERCP Act in 2014, the limited time available for consultation meant that many stakeholders reviewed the tenure changes in isolation, and so provided comments on that Bill which were based on an incomplete understanding of the full assessment process for resource projects (shown above and in attachment one). QRC suggests that had more time been allowed for consultation on the MERCP Act, so that stakeholders could fully understand the interaction between the resource tenure and the Environmental Authority (EA) that many stakeholders would have realised their concerns were already addressed under a related but separate assessment process.

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ISSUES RAISED IN THE EXPLANATORY MEMORANDUM

(a) Estimated cost for government implementation
The explanatory memorandum note on page 4 that, "*no costs to government are currently envisaged for the proposed changes to the MERCP Act*". QRC suggests that this is likely an over-simplification as there will be direct costs associated with the time and effort of consultation as well as the policy work that has gone into the development of the both MOLA Bill and MERCP Act.

More importantly, a number of the changes in the MOLA Bill clearly involve an increased role for the Department (DNRM) in compliance and reporting, and QRC suggests that these costs should not simply be assumed away in the explanatory memorandum. As an example, the Bill's requirement to re-apply for leases over restricted land (if an agreement is reached after the grant of the original lease) will also impose significant compliance cost on government, the resources sector and affected landowners.

A regulatory impact statement would have required a proper quantification of these implementation and delivery costs and in a format which allowed informed consultation on the proposed changes.

(b) Consistency with fundamental legislative principles (FLP)
The explanatory memorandum notes two possible areas where the Bill may not be generally consistent with fundamental legislative principles. QRC supports the memorandum's conclusion that neither constitute a breach of fundamental legislative principles.

On the first matter – the regulatory framework for entering land to identify mine boundaries without a mining tenement – QRC agrees with the explanatory memorandum that delegating these powers to the chief executive in the MOLA Bill does pay sufficient regard to the institution of Parliament because there is a show-cause and appeal process that tempers the application of this delegated responsibility.

On the second matter – providing an immunity from prosecution, section 4(3)(h) of the *Legislative Standards Act 1992* – QRC agrees with the explanatory memorandum that a prescribed arbitration institute does not incur a civil monetary liability for nominating an arbitrator under the MOLA Bill.

(c) Consultation
QRC notes the comments on page six of the memorandum regarding the consultation process which informed the development of the MOLA Bill, but would note that the time allowed for consultation on the draft Bill was only very brief and far from adequate.

Similarly, QRC suggests that the need for many of the amendments made in the MOLA Bill relate to major deficiencies in the consultation around the development of the MERCP Act, which were very rushed and poorly explained to stakeholders[1]. The result

[1] The MERCP Bill was introduced on 5 June 2014 with submissions closing almost 5 weeks later on 9 July 2014. The Committee hosted public hearings in August. The decision regulatory impact statement (RIS) was only released on the eve of the first Committee hearing. The Committee's report tabled on 5 September and the Bill was passed with amendments on 9 September 2014.

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was that many stakeholders raised what they saw as grave objections to the changes proposed in the MERCP Act based on their incomplete understanding of the broader context.

In both cases, there is a risk that when Departments are placed under extreme time pressure that they rely too much on the public scrutiny of the Parliamentary Committee process as a substitute for a genuine process of engagement ***before*** the Bill is tabled in Parliament.

FOCUS OF THE MOLA BILL

QRC's comments on the MOLA Bill are essentially in two parts. The first relates to the amendments to the MERCP Bill to give effect to the Government's election commitments. The second relates to the implementation of the industry-developed overlapping tenures framework for coal and coal seam gas.

(1) Election commitments – amendments to MERCP Act

The development of a single common resources Act is one of the most significant reforms to Queensland's system of tenure in a generation. It is a project that was initiated under the Bligh Government, continued under the Newman Government and has also been supported by the Palaszczuk Government. This bipartisan support has been critical to the success of this multi-year reform process which offers the prospect of substantial streamlining and transparency for all resource stakeholders – including administrators, landholders, tenure holders and regulators.

The MERCP Act was intended to provide the backbone of the first in a series of reforms to establish the common resources Act. However, in introducing the Act, the Newman Government also made a number of further amendments to respond to concerns which had been raised by the resource industry about further opportunities to streamline the approval process. Unfortunately, many of these further reforms were not well explained to stakeholders. Many of these stakeholders, in the absence of information to the contrary, assumed the worse and strenuously opposed any change.

In particular, any changes to the land access framework should be set out very clearly, as there is a small group of professional advisers who have become adept at creating the impression of a very one-sided system that favours the resource sector. The business model of these advisors is predicated on creating fear amongst landholders that they will be short-changed by the resource sector unless they engage highly adversarial legal advisers. Accordingly, this small group of advisers embarked on a high-profile media campaign that was successful in tarnishing the entire MERCP Act.

One advisory company went as far as labelling the MERCP Act at the Committee's Toowoomba hearing as:

> *"…a wrecking ball. It is a train wreck. It is an acid bath for the rights of the landholder".*[2]

[2] Mr George Houen, Landholder Services Australia Pty Ltd, 19 August 2014, page 6, http://www.parliament.qld.gov.au/documents/committees/AREC/2014/24-MinEngResBill/Trns-19Aug2014Toowoomba.pdf

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A spokesperson for the Lock the Gate Alliance and former President of Friends of Felton went one step further in saying:

> *"It feels as if there's been a takeover of the Government by the mining industry. It's a bit like a coup - it's not a military coup, it's a minerals coup."* [3]

Clearly, it is difficult to achieve effective consultation on complex technical reforms in an environment of such extravagant media claims. In this highly politicised context, the approach of the MOLA Bill to rewind some of the MERCP Act reforms was almost inevitable.

In this context, QRC **does not support** the amendments in the MOLA bill to:

- **a.** limit notification and objection rights for mining projects; or
- **b.** repeal the proposed change that would have allowed a mining lease to be granted over restricted land where landholder consent has not been given and compensation has not been agreed; or
- **c.** remove the Minister's power to extinguish restricted land for mining lease applications where coexistence is not possible on proposed mining sites.

However, QRC can understand the political rationale behind these three amendments.

The change made in the MOLA Bill which *was* developed in consultation with industry and which QRC members do support is the change to:

- **d.** include key agricultural infrastructure within the definition of restricted land and enshrine the distances for restricted land in the primary legislation;

While these changes in the definition of restricted land and the new 200 metre circumference of restricted land involve different impacts for different tenure types, industry agreed to the change to a single consistent set of rules because of the simplicity that the new approach offered for dealing with landholders and other stakeholders.

(1a) Limiting notification and objection rights for mining leases

As noted above, QRC does not support the MOLA amendments to limit notification and objection rights for mining projects. The amendments proposed in the MERCP Act were to streamline resource project processes but still ensuring genuine concerns on environmental matters have a pathway for comment and consideration.

These MERCP Act amendments sought to remove a duplicate appeal right which currently exists under the *Mineral Resources Act 1989* (MRA). The reason this duplication exists for members of the public against mining projects seems to be an anomaly of history, ie, environmental conditions used to be included in mining tenements before 2001 so it used to be appropriate for objections (and appeals) to environmental issues to be considered under the MRA. All of the issues that are considered by the Department of Natural Resources and Mines ('DNRM') when granting a mining tenement are within the professional expertise and experience of DNRM to assess, not objectors, for example, whether a resource applicant is best placed to extract the

[3] Mr Rob McCreath, 12 September 2014, ABC News http://www.abc.net.au/news/2014-09-12/late-night-amendment-changes-right-of-qld-landholders-mining-lea/5741032

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resource by having the best technical and financial capacity to undertake those resource activities.

There does not appear to be any logical reason why members of the public (such as Non-Government Organisations) should have a general right to have their objections to a mining tenement considered by the Land Court at all, given that members of the public do not have a corresponding right of appeal in relation to a wide range of other types of tenure decisions by the Queensland Government. QRC suggests that the more appropriate focus for such appeals is under the *Environmental Protection Act 1994* ('EP Act'). The right to lodge an objection against a mining tenement application and have it considered by the Land Court is currently completely unrestricted by the *Mineral Resources Act 1989* in relation to both the content of the objection and the standing of objectors, leaving the process open to strategic misuse.

The Department's decision regulatory impact statement explains the situation well[4]:

> *"Under the MRA [Mineral Resources Act 1989], it is possible for objections to the Land Court to be heard where only one party brings evidence before the Court. This results in the Land Court providing an administrative function in assessing the application rather than settling legitimate questions of law or arguments about the appropriateness of the proposed mine and its management.*
>
> *This generally occurs where the technicalities of the mining operation, geology and financial considerations and commercial in confidence matters are objected to. In these cases, the Land Court will generally attract submissions from only one party (the Mining Lease applicant)* ***as often the objector provides no evidence*** *to support their objection [emphasis added]. This can be attributed to the highly technical or confidential nature of the issue or alternatively* ***the objection is speculative****, made on the basis that the matter raised is one of the Court's considerations* ***rather than there being any identified ground*** *on which the objection has been based. [emphasis added]*
>
> *In some instances applications have been delayed for* ***a number of years*** *where no evidence is ever brought to the Court by the objector [emphasis added]."*

The strategic misuse of appeals are motivated by a desire to disrupt and delay the mining project as opposed to appeals with the aim of minimising impacts of the project (constructive appeals). The anti-coal strategy, *Stopping the Australian Coal Boom*, describes the application of these appeal tactics very well[5]:

> *"We will lodge legal challenges to the approval of all of the major new coal ports, as well as key rail links (where possible), the mega-mines and several other mines chosen for strategic campaign purposes.*
>
> *By disrupting and delaying key projects, we are likely to make at least some of them unviable. Delaying some projects will also help to delay others. We are*

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4 Department of Natural Resources and Mines, *Mining lease notification and objection, decision regulatory impact statement*, 7 August 2014, page v https://www.dnrm.qld.gov.au/__data/assets/pdf_file/0008/196946/mining-lease-notification-decision-ris.pdf

5 *Stopping the Australian Coal Boom*, November 2011, page 6 https://www.qrc.org.au/_dbase_upl/stopping%20the%20australian%20coal%20export%20boom.pdf

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confident that, with the right resourcing for both legal challenges and public campaigning, we can delay most if not all of the port developments by at least a year, if not considerably longer, and may be able to stop several port projects outright or severely limit them."

QRC reminds the Committee that the Land Court rules have been amended to reduce delays in hearing matters. These changes enable the Court to make directions where a party, usually the objector, is being obstructive. Further the Land Court was given new powers to award costs. Both of these changes suggest that the Land Court has recent experiences of struggling to deal with frustrating or mischievous appeals.

(1b) Restricted land

As noted above (dot point b), QRC does not support the Government's commitment to revoke to the MERCP Act provisions to grant a mining lease over restricted land. Specifically, the MERCP Act allowed for the *initial* grant of a mining lease over restricted land, but with access prohibited unless, and until, there was an agreement with land holders. This provision removed the requirement for a new "surface area" tenure application (or applications) to be made in the future if agreement was reached with the landholder for access to the restricted land.

Under existing *Mineral Resources Act* 1989 provisions, (which MOLA aims to restore), subsequent "surface area" applications must follow the same process as any new mining lease application. This adds substantially to the administrative burden on, (and hence cost to), government, as well as for the mining lease applicant and the landholder. The process also potentially opens up the mining lease to further objections from parties other than the landowner (who has entered into an agreement with the applicant).

QRC recommends to the Committee that these MERCP Act amendments could be easily retained without impacting on the rights of any landholder, as mining can still only occur on the restricted land with the agreement of the landholder. The MERCP Act amendment simply eliminated an unnecessary and cumbersome process for later inclusion of surface area rights if the landholder agreed to allow access to restricted land.

(2) Overlapping tenures

The system of overlapping tenures which is the subject of amendments in the MOLA Bill, reflect the May 2012 industry developed paper, "*Maximising Utilisation of Queensland's Coal and Coal Seam Gas Resources – A New Approach to Overlapping Tenure in Queensland*".

QRC members, both coal and coal seam gas, worked hard to negotiate this new approach to overlapping tenure and QRC members strongly support this new direction. The MOLA Bill includes amendments to the overlapping tenure framework to:

- only apply the requirement to have a joint development plan to situations involving overlapping production tenures (that is a Mining Lease and a Petroleum Lease);
- replace the concepts of proposed and agreed mining commencement dates with a single 'mining commencement date', identified by the coal resource authority holder;

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- preserve existing industry commercial arrangements;
- strengthen requirements for information exchange between overlapping tenure holders;
- clarify the operation of the dispute resolution process; and
- clarify transitional provisions and other minor miscellaneous provisions.

QRC has actively participated in consultations with the Department of Natural Resources and Mines regarding proposed changes and is pleased that many of its recommendations, including in the QRC submission of 1 February 2016 have been incorporated in the Bill. QRC firmly holds the view that ongoing, timely and direct consultation with industry is the most efficient and effective means of improving the legislative environment. QRC commends the support and participation in consultations provided by its industry members and wishes to acknowledge the efforts of officers of the Department in those consultations.

However, there are opportunities to further improve the outcomes of the MOLA Bill as discussed further in attachment two. A number of the concepts and issues addressed in the MOLA Bill requires multiple provisions in order to properly apply those concepts and address those issues in different circumstances. Accordingly, in order to properly understand the ramifications of the different provisions concerning a singular concept or issue, attachment two is structured differently to MOLA Bill. Attachment two does not address clauses of the Bill in the sequence in which they occur in the Bill, rather it discusses all of the relevant matters concerning a particular issue in one section. In order to facilitate a clause by clause review, the conclusions and recommendations of this submission are re-presented in the Appendix in the same sequence as the clauses appear in the Bill.

I can confirm that this submission is not confidential and the Committee is welcome to publish this submission on the Inquiry's website. QRC would welcome the opportunity to address the Committee at a public hearing.

The QRC contact on this submission is Andrew Barger, who can be contacted on (07) 3316 2502 or alternatively via email at andrewb@qrc.org.au

Yours sincerely

Greg Lane
A/Chief Executive

ENCL:

Attachment One: Queensland's resource project approval process
Attachment Two: Specific industry comments on overlapping tenure amendments

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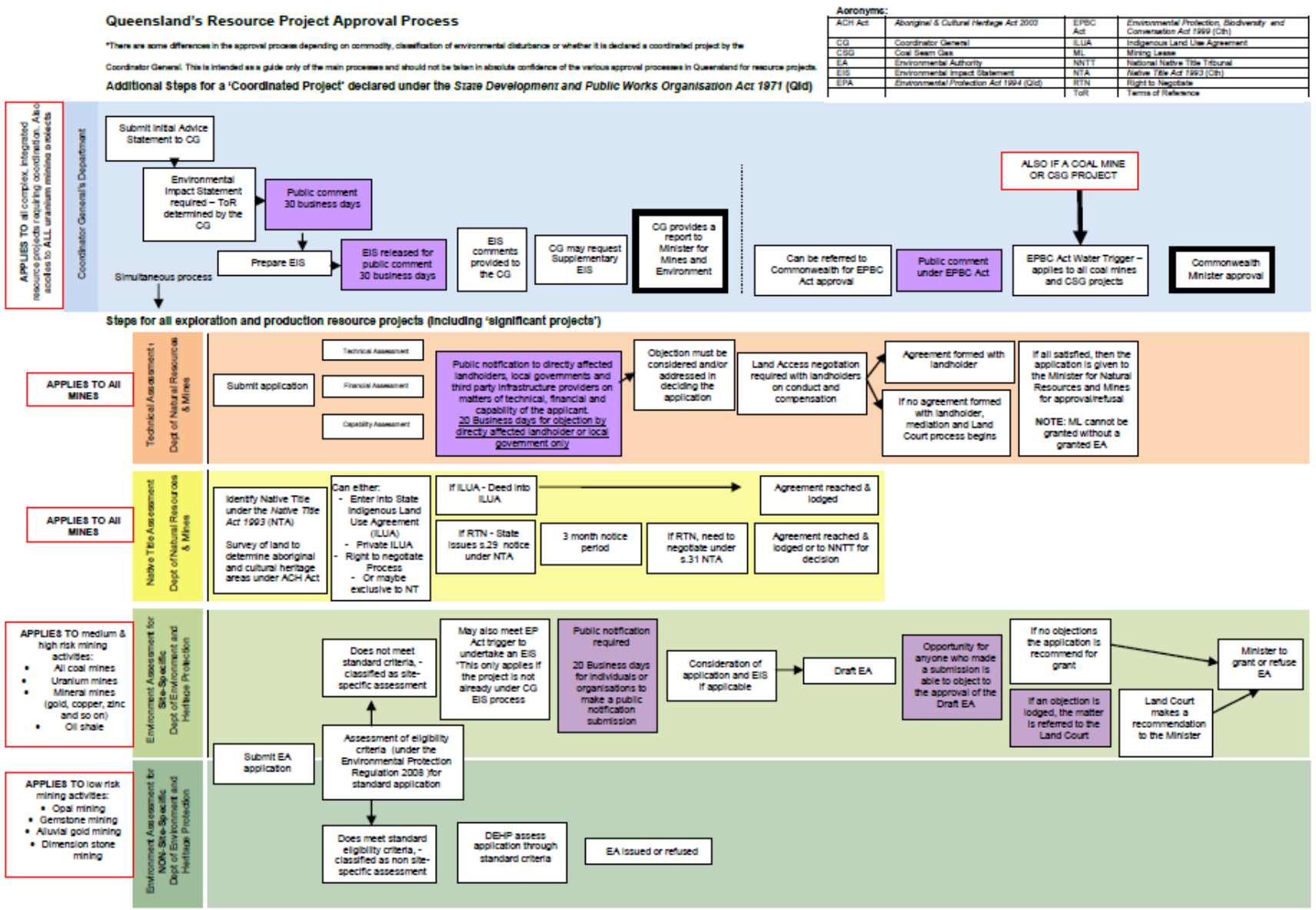
Queensland's Resource Project Approval Process
*There are some differences in the approval process depending on commodity, classification of environmental disturbance or whether it is declared a coordinated project by the Coordinator General. This is intended as a guide only of the main processes and should not be taken in absolute confidence of the various approval processes in Queensland for resource projects.
Additional Steps for a 'Coordinated Project' declared under the State Development and Public Works Organisation Act 1971 (Qld)
Acronyms:
ACH Act | Aboriginal & Cultural Heritage Act 2003 | EPBC Act | Environmental Protection, Biodiversity and Conservation Act 1999 (Cth)
CG | Coordinator General | ILUA | Indigenous Land Use Agreement
CSG | Coal Seam Gas | ML | Mining Lease
EA | Environmental Authority | NNTT | National Native Title Tribunal
EIS | Environmental Impact Statement | NTA | Native Title Act 1993 (Cth)
EPA | Environmental Protection Act 1994 (Qld) | RTN | Right to Negotiate
ToR | Terms of Reference
APPLIES TO all complex, integrated resource projects requiring coordination. Also applies to ALL uranium mining projects
Coordinator General's Department
Submit Initial Advice Statement to CG
Environmental Impact Statement required – ToR determined by the CG
Public comment 30 business days
Prepare EIS
EIS released for public comment 30 business days
EIS comments provided to the CG
CG may request Supplementary EIS
CG provides a report to Minister for Mines and Environment
Simultaneous process
ALSO IF A COAL MINE OR CSG PROJECT
Can be referred to Commonwealth for EPBC Act approval
Public comment under EPBC Act
EPBC Act Water Trigger – applies to all coal mines and CSG projects
Commonwealth Minister approval
Steps for all exploration and production resource projects (including 'significant projects')
APPLIES TO All MINES
Technical Assessment
Dept of Natural Resources & Mines
Submit application
Technical Assessment
Financial Assessment
Capability Assessment
Public notification to directly affected landholders, local governments and third party infrastructure providers on matters of technical, financial and capability of the applicant.
20 Business days for objection by directly affected landholder or local government only
Objection must be considered and/or addressed in deciding the application
Land Access negotiation required with landholders on conduct and compensation
Agreement formed with landholder
If no agreement formed with landholder, mediation and Land Court process begins
If all satisfied, then the application is given to the Minister for Natural Resources and Mines for approval/refusal
NOTE: ML cannot be granted without a granted EA
APPLIES TO All MINES
Native Title Assessment
Dept of Natural Resources & Mines
Identify Native Title under the Native Title Act 1993 (NTA)
Survey of land to determine aboriginal and cultural heritage areas under ACH Act
Can either:
- Enter into State Indigenous Land Use Agreement (ILUA)
- Private ILUA
- Right to negotiate Process
- Or maybe exclusive to NT
If ILUA - Deed into ILUA
Agreement reached & lodged
If RTN - State issues s.29 notice under NTA
3 month notice period
If RTN, need to negotiate under s.31 NTA
Agreement reached & lodged or to NNTT for decision
APPLIES TO medium & high risk mining activities:
• All coal mines
• Uranium mines
• Mineral mines (gold, copper, zinc and so on)
• Oil shale
Environment Assessment for Site-Specific
Dept of Environment and Heritage Protection
Does not meet standard criteria, - classified as site-specific assessment
May also meet EP Act trigger to undertake an EIS *This only applies if the project is not already under CG EIS process
Public notification required
20 Business days for individuals or organisations to make a public notification submission
Consideration of application and EIS if applicable
Draft EA
Opportunity for anyone who made a submission is able to object to the approval of the Draft EA
If no objections the application is recommend for grant
If an objection is lodged, the matter is referred to the Land Court
Land Court makes a recommendation to the Minister
Minister to grant or refuse EA
Submit EA application
Assessment of eligibility criteria (under the Environmental Protection Regulation 2008)for standard application
APPLIES TO low risk mining activities:
• Opal mining
• Gemstone mining
• Alluvial gold mining
• Dimension stone mining
Environment Assessment for NON-Site-Specific
Dept of Environment and Heritage Protection
Does meet standard eligibility criteria, - classified as non site-specific assessment
DEHP assess application through standard criteria
EA issued or refused

ATTACHMENT TWO

The Mineral and Other Legislation Amendment Bill 2016

Queensland Resources Council (QRC) welcomes the opportunity to make this submission on the Mineral and Other Legislation Amendment Bill 2016 (MOLA) to the Parliamentary Infrastructure, Planning and Natural Resources Committee.

QRC supports the overlapping tenure aspects of the MOLA Bill and believes that it addresses many of industries' concerns and improves the alignment of the legislation with the original policy intent of the industry-developed White Paper entitled, 'Maximising Utilisation of Queensland's Coal and Coal Seam Gas Resources – A New Approach to Overlapping Tenure in Queensland'. The proposed amendments will streamline the new framework, clarify the operation of important provisions, reduce the regulatory burden on industry and the administrative burden on government, and ensure the legislation operates more effectively.

The QRC has actively participated in consultations with the Department of Natural Resources and Mines regarding proposed changes and is pleased that many of its recommendations, including in the QRC submission of 01 February 2016 (the QRC Submission) have been incorporated in the Bill. QRC firmly holds the view that ongoing, timely and direct consultation with industry is the most efficient and effective means of improving the legislative environment. QRC commends the support and participation in consultations provided by its industry members and wishes to acknowledge the efforts of officers of the Department in these consultations.

However, there are opportunities to further improve the outcomes of the MOLA Bill as discussed further below. A number of the concepts and issues addressed in the MOLA Bill requires multiple provisions in order to properly apply those concepts and address those issues in different circumstances. Accordingly, in order to properly understand the ramifications of the different provisions concerning a singular concept or issue, this submission is structured differently to MOLA Bill, in that it does not address clauses of the Bill in the sequence in which they occur in the Bill but it discusses all of the relevant matters concerning a particular issue in one section. In order to facilitate a clause by clause review, the conclusions and recommendations of this submission are re-presented in the Appendix in the same sequence as the clauses appear in the Bill.

Mining Commencement Date

Contrary to the intent of the industry-developed White Paper entitled, 'Maximising Utilisation of Queensland's Coal And Coal Seam Gas Resources – A New Approach to Overlapping Tenure in Queensland' (the industry-developed White Paper) the current legislation requires the agreement of an overlapped petroleum resource authority to a mining commencement date which is an essential concept to allow the ML holder to commence mining under the right of way principle.

The primary amendment in the MOLA Bill to correct this is in **clause 18** which replaces section 115 of MERCPA. Consequential amendments are required and are achieved through **clauses 13, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 39, 45, 46, 51, 65, 66, 71, 72** and **73** which amend or replace respectively sections 103, 116, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 142, 149, 150, 167, 234, 235, 241A, 243 and Schedule 2 of MERCPA and through **clause 64** which introduces a new section 233A of MERCPA.

QRC supports these amendments to the extent that the sections of the clauses deal with mining commencement date.

However it is noted that clause 64 which inserts a new section 233A dealing with transitional arrangements for existing applications under MRA chapter 6 has an unhelpfully narrow application. The proposed section 233A is intended to deal with ML applications made under the MRA where there are no overlaps at the time of the application. It does this effectively if an application for an ATP is made after the ML is applied for and the ATP is granted before the ML is granted and the ML application is undecided at commencement. However an ML application could be validly made under chapter 6 of the MRA even if an application for an ATP has been made prior to the ML application as no overlap is created until the ATP application is granted.

QRC recommends that for the proposed section 233A to be fully effective it should be amended so that it deals with all ATPs granted after the ML application is made, regardless of when the ATP application was made.

As the section essentially achieves the purposes of s.121 but without requiring the giving of an advance notice, it is understood that, notwithstanding that the new overlap provisions apply (under section 233A(2)), the ATP holder cannot give a concurrent notice under section 149 because no advance notice is given by the ML applicant.

Abandonment Date

Clause 30 amends section 129 to remove the reference to the abandonment date being provided in an agreed joint development plan (JDP) on the same rationale as for the amendments to mining commencement date.

QRC supports this amendment.

Joint Development Plan – Remove requirement for JDP for exploration overlaps

The current legislation requires that a JDP must be in place for all overlap situations. This is not consistent with the original policy intent of the industry-developed White Paper. JDPs should only be required where a production tenure overlaps another production tenure.

The primary amendments in the MOLA Bill to correct this are in **clause 31** and **clause 39** which amend respectively section 130 and section 142 of MERCPA. Consequential amendments are required and are achieved through clauses **13, 15, 16, 17, 21, 22, 25, 28, 30, 32, 33, 34, 35, 36, 38, 39, 40, 42, 44, 45, 46,** and **49** which amend or replace respectively sections 103, 109, 110, 111, 120, 121, 124, 127, 129, 131, 132, 133, 134, 135, 141, 142, 142A, 144, 147, 149, 150, and 158 of MERCPA.

QRC supports these amendments to the extent that the sections of the clauses deal with joint development plans.

While the provisions are clear in the situation of an application for production tenure in the area of an existing overlapping production tenure there is uncertainty in other overlap situations which needs to be clarified to ensure the legislation works effectively and efficiently in all circumstances.

Consider the circumstance in which section 149 as amended by **clause 45** would apply.

1. an ML applicant has given an ATP holder an advance notice (which must identify the IMA and any RMAs and the mining commencement date for the IMA or RMA (section 121(c) as amended) but does not include a joint development plan)
2. within 3 months, the ATP holder gives a concurrent notice that it intends to apply for a PL
3. within 6 months the ATP holder makes a PL application and provides a petroleum production notice (which does not include a proposed JDP)
4. to the greatest practicable extent, the PL applicant must be treated as a PL holder when the advance notice was given
5. the mining commencement date is determined under section 149(5)
6. the ML holder must ensure that the agreed JDP is in place in the timeframes provided in section149(6) (which are related to the time of giving the petroleum production notice).

While the provisions in section 149 are clear in terms of timing to agree the JDP, they do not specify which party is responsible for supplying the JDP to be agreed. It is also unclear what happens if the ATP holder does not give a concurrent notice within the required time frame but still lodges a PL application within 6 months of the advance notice. Does section 142 apply? If so, what is the mining commencement date?

QRC recommends that further clarification is required to section 149 specifying which party is responsible for supplying the JDP to be agreed.

QRC recommends that further clarification is required to identify which provisions apply if a concurrent notice is not given but a PL application is made within 6 months after the advance notice is received.

Now consider the circumstances in which section 142A as amended by **clause 40** would apply.

1. an ML applicant has given an ATP holder an advance notice (which must identify the IMA and any RMAs and the mining commencement date for the IMA or RMA (section.121(c) as amended) but does not include a joint development plan)
2. then after more than 6 months the ATP holder lodges a PL application and gives a petroleum production notice (which does not include a proposed JDP)
3. the PL is granted but the ML has not been granted
4. the mining commencement date is determined under section142A(2)

There are no provisions setting out which party must provide the JDP for agreement, nor when that JDP must be provided nor when the JDP must be agreed. If the ML is granted first, section 142A would not apply and there are no other provisions dealing with which party must provide the JDP for agreement, nor when that JDP must be provided nor when the JDP must be agreed.

QRC recommends that further clarification is required to section 142A to specify: which party is responsible for providing the JDP for agreement; when that JDP must be provided; and when the JDP must be agreed.

Further, consider the circumstance in which section 150 as amended by **clause 46** would apply.

1. a PL applicant has given an EPC or MDL holder a petroleum production notice (which does not include a joint development plan)
2. then the EPC or MDL holder make an ML application before the PL is granted
3. the ML applicant must give an advance notice as required under part 2 (which must identify the IMA and any RMAs and the mining commencement date for the IMA or RMA (section 121(c) as amended) but does not include a joint development plan section 121 because the overlapped petroleum tenure is not a PL)
4. the mining commencement date is determined under section 150(3)
5. the timeframe for agreeing the JDP is in determined in accordance with section130(2)(a)

There is no obligation on the ML (coal) holder regarding the time at which a JDP must be given to the PL applicant for agreement. It could be inferred that it should be given with the advance notice but this is not strictly required by the application of the provisions. It is suggested that section 150(2) could be further amended to provide that the advance notice must include a joint development plan.

There are no provisions which require an advance notice when an application is made for an ML and at the time there is no overlap, but an overlap is subsequently created by the grant of an exploration tenure. An advance notice is necessary to establish the coal right of way (e.g. see section 120 and section 124). Section 154 does require the exchange of information when the overlap comes into existence but does not specifically refer to giving of an advance notice. Further amendments are required to MERCPA to ensure that the legislation is effective in this circumstance.

QRC recommends that further clarification is required to section 150 to specify when the JDP must be provided by the ML (coal) holder.

QRC recommends that additional provisions are required to deal with the giving of an advance notice in the circumstance when an ML application is made without any overlap but an overlap is subsequently created.

Joint Development Plan – Authorised Activities

The QRC Submission requested clarification by the DNRM on the requirement in the draft bill to comply with an agreed JDP in section 134 and section 147. **Clause 35** of the MOLA Bill replaces section 134 and **clause 44** replaces section 147 with the relevant amendments providing that, in the absence of an agreed JDP, the party holding the production lease(s), over which the other production lease application has been made, may undertake activities in accordance with the development plan(s) for their production lease(s) (section 134(4) and section 147(4), each as amended).

It is unclear what happens after the application is granted and there is no agreed JDP or the agreed JDP does not deal with an activity. If the agreed JDP is silent on an authorised activity (e.g. it was unable to be agreed in the available timeframe and is not subject to compulsory arbitration or it was not considered in the JDP discussions), then is the party wishing to undertake that activity prevented from doing so because it is not in the agreed JDP and therefore the activity is not 'consistent' with the JDP, or perhaps the converse, is the party free to undertake that activity as it wishes (subject to

other constraints such as the relevant development plan), because it is not inconsistent with the agreed JDP?

If the applicant is prevented from undertaking authorised activities, following grant of the production lease, because they are not included in the agreed JDP (for any reason) or there is no agreed JDP, then the earlier lease holder could effectively veto the activities of the later applicant, thereby frustrating the core 'right of way' principle but allowing the earlier lease holder to operate unaffected. This outcome could arise even with the 'good faith' obligations in negotiating an agreed JDP as contained in sections 133 and 146. This would perpetuate the current problem which the White Paper sought to remove.

QRC supports these amendments but strongly **recommends** further amendments are required to ensure that the core White Paper principle of 'right of way' is not frustrated by the inability to undertake authorised activities in the event that the later production lease is granted and there is either no agreed JDP or the agreed JDP does not deal with an authorised activity.

Joint Development Plan – content

It is fundamental to the operation of the legislation that an agreed joint development plan must include any agreed (or arbitrated) IMA, RMA and any SOZ. It is noted that the requirements for the content of agreed development plans are different in section 130 and section 142. Section 130(3)(d), as amended by **clause 31**, includes the word 'proposed' twice in connection with the IMA, RMA and SOZ. Section 142(3)(c) does not include the word 'proposed'.

QRC recommends that, for consistency, section 130(3)(d) should be amended to remove the word 'proposed'.

Joint Development Plan – timeframe for agreement

The legislation provides that certain matters may be determined by arbitration and provides timeframes of up to 9 months subsequent to the appointment of the arbitrator for such decisions to be made. However the current legislation does not properly allow for this time in setting deadlines for producing an agreed JDP if arbitration is involved. **Clauses 31, 39** and **45** respectively amend sections 130, 142 and 149 to correct this position.

QRC supports these amendments.

Definition - Mine Safety Legislation Definition

The *Water Reform and Other Legislation Amendment Act 2014* amended section 175 to also include a dispute mentioned in the Mineral Resources Regulation, section 25(3) or (4), or section 28(7). Mining safety legislation is mentioned in section 182(3)(b) of the MERCP Act. **Clause 13** amends the definition of 'mining safety legislation in section 103 to include the relevant parts of the Mining Resources Regulation.

QRC supports this administrative amendment.

Definition - ML (coal) holder

Clause 14 makes administrative amendments to section 105 to clarify the precise meaning of the term as extended to applicants for an ML (coal). **Clause 37** makes a consequential amendment to section 139(3) to remove duplication. However the amendment relies on the ML (coal) applicant being the holder of prerequisite tenure and this is overly narrow as the ML (coal) applicant need not hold prerequisite tenure in order to validly apply for an ML (coal).

QRC supports these amendments with a **recommendation** that additional wording is required to include an applicant which does not hold prerequisite tenure.

Definition – Schedule 2

Clause 73 amends Schedule 2 to ensure consistency of defined terms.

QRC supports this amendment.

Notices - General

MERCPA imposes a significant administration requirement on tenure holders as section 185, which is a mandatory provision (under section 117), requires copies of all notices required under the MERCPA Chapter 4 to be given to the chief executive. In order to streamline the legislation and simplify administration for tenure holders **clause 59** deletes section 185.

QRC supports this amendment.

Consequential amendments are required and are achieved through **clauses 28, 31, 39, 43, 58, 62, 63,** and **71** which amend respectively section 127(8), 130, 142, 146, 184, 232, 233, and 241A of MERCPA as well as clause 69 which replaces section 240 and 241 of MERCPA and **clause 70** which removes section 241 of MERCPA.

QRC supports these amendments.

In addition, **clause 20** amends section 117 to include section 127(8)(b) so that, among other amendments, it becomes mandatory to give the chief executive a notice concerning the establishment of exceptional circumstances.

QRC supports this amendment.

Notices – Concurrent Notice

Clause 45 (1) amends section 149(2) to require the concurrent notice to state the information in section 149(1)(b). It would seem this means the concurrent notice should merely state that the ATP holder intends to apply for a PL, including the overlap area, within 6 months after receiving the advance notice.

QRC seeks clarification that this interpretation is correct.

Mandatory Provisions

Clause 20 amends the mandatory provision requirements of section 117. Most of the amendments are administrative or consequent on other amendments in the MOLA Bill (e.g. the addition of section 127(8)(b) as discussed above under the Notices section). The substantive amendment is to include part 5, other than section 153, among the mandatory provisions. The Explanatory Memorandum explains that this amendment has

been made to be consistent with the industry-developed White Paper that states that the conduct of authorised activities will be subject to a requirement that any activities must not adversely affect safe and efficient production activities on the overlapping production tenure. QRC has made submission to the department that it is not necessary to make this a mandatory provision because it is already a default provision of MERCPA and it would require mutual agreement of both holders of overlapped resource tenures to avoid the obligations of this provision. QRC further commented that there is also a principle in the White Paper that the parties should be allowed to agree bespoke arrangements where appropriate.

QRC does not support the amendment proposed by **clause 20** to make part 5, excluding section 153 mandatory, as it denies the parties the ability to negotiate a bespoke agreement in regard to adverse effects.

QRC supports all the other amendments in **clause 20**.

Expedited Land Access

Clause 47 amends section 153 to exclude the expedited land access provisions from applying to an IMA or SOZ.

QRC supports this amendment.

Information Exchange

Information exchange is a key foundation of the effective working of the new overlapping tenure regime. However the existing legislation does not deal with the requirement for information exchange when an overlap first comes into existence (e.g. when a new resource exploration authority is granted and overlaps an existing resource tenure). **Clause 48** amends section 154 to provide a timeframe for the initial exchange of information when an overlap first comes into existence.

QRC supports this amendment.

Optimisation of the State's Resources

Optimisation of the development and use of the State's coal and coal seam gas resources is one of the main purposes of Chapter 4 of MERCPA. The current legislation refers to maximising the benefit for all Queenslanders in several places. **Clauses 49(1), 50,** and **56(1)** amend respectively sections 158, 159 and 178.

QRC supports these amendments.

Compensation – Reconciliation Payments and Replacement Gas

The compensation provisions of MERCPA contemplate compensation liabilities for lost production being met by the supply of gas or monetary payments or a combination of both. However, section 172 refers only to compensation payments. To avoid confusion and ensure consistency, **clause 52(1)** amends section 172(1) to include both payments and amounts of coal seam gas to meet compensation liabilities. However, as QRC pointed out to the department in discussions on the provisions of this Bill, the White Paper contemplated that compensation liability for lost production could potentially be met by the supply of conventional gas. This is excluded in sections 170, 171 and 172 because the term coal seam gas is used.

QRC recommends that sections 170, 171 and 172 should be amended to not exclude the ability to supply natural gas to meet compensation liabilities for lost production (e.g. by deleting the words 'coal seam'). **Otherwise QRC supports** this amendment.

The White Paper recognised that in the circumstances in which section 172 would apply, the obligation on the PL holder should be "in respect of the lesser of the quantity of gas subsequently produced and the quantity of gas which was the subject of compensation" (White Paper, p.50). Section 172(3), as amended by **clause 52(2)**, attempts to give effect to this but is ineffective because it limits the amount of a reconciliation payment (i.e. monetary payment because it does not include any amount of replacement gas) to not more than the amount received to meet the compensation liability even though the compensation liability may be met by a monetary payment or an amount of gas or a combination of both.

QRC recommends that section 172(3)(b) be amended to give proper effect to the intent of the White Paper.

Furthermore, QRC advised the department that the industry view was that any amount of replacement gas in settlement of the PL holder liability should be subject to mutual agreement and this is not reflected in the amendments in the MOLA Bill.

QRC recommends that sub-sections 172(2)(b) and (c) should require mutual agreement.

Compensation – Arbitration

Clauses 53 replaces section 174 and **clause 54** amends section 175 to make it clear that in respect of compensation matters, arbitration is only available to determine the amount and timing of compensation liabilities. The Explanatory Memorandum comments that the provisions of chapter 4, part 6, division 3 clearly set out the entitlement to compensation such that "there should be no question over the entitlement to compensation" and there should be provision for no referral to arbitration to determine whether there is any entitlement to compensation. Industry does not agree that the provisions of chapter 4, part 6, division 3 are so clear cut that there will be no disputes as to the existence of a compensation liability and that in the absence of arbitration it is likely that any disputes will be taken to the courts, leading to delays and diminution of the benefits of the new tenure framework.

QRC supports these amendments and **recommends** that further amendment should be made to allow arbitration of disputes about the existence of an entitlement to compensation.

Arbitration – Liability of Arbitration Institute

Clause 55 amends section 177 to shield a prescribed arbitration institute from any civil monetary liability through carrying out its obligation to nominate an arbitrator except when the prescribed arbitration institute performs in a manner that is in bad faith or negligent.

QRC supports these amendments.

Arbitration – Arbitrator's Functions
Clause 56(2) amends section 178 to improve certainty about the arbitration process.

QRC supports these amendments.

Arbitration – Appeal of Awards
Clause 57 amends section 182 to ensure there is no contradiction with the supervisory role of the Courts under the Constitution.

QRC supports these amendments.

Existing Commercial Arrangements
Clause 61 inserts a new section 213A which provides recognition of existing rights and obligations of resource authority holders contained in commercial arrangements at commencement.

QRC supports this amendment.

Transitional Arrangements – Exploration Resource Authorities
MERCPA does not provide transitional arrangements concerning exploration tenures at commencement. **Clause 61** inserts a new chapter 7, part 4, division 1A, section 231B to deal with this situation.

QRC supports this amendment.

Transitional Arrangements – Production Authorities
Consistent with the principle of allowing parties to make bespoke agreements, **clauses 62** and **63** amend sections 232 and 233 to allow the parties to opt into the new tenure regime.

QRC supports these amendments.

It is noted that both **clauses 62** and **63** introduce new sub-sections numbered (2) into sections 232 and 233 respectively. However the existing single paragraph in each of sections 232 and 233 are un-numbered. Further amendments are required to insert (1) at the beginning of the single paragraphs in the pre-amended sections 232 and 233.

QRC recommends administrative amendments to sections 232 and 233 to ensure correct numbering of the sub-sections.

Transitional Arrangements – ML (coal) Application over Authority to Prospect
MERCPA does not provide transitional concerning ML (coal) applications over authority to prospect. **Clause 64** inserts a new chapter 7, part 4, division 2A, section 233A to deal with this situation.

QRC supports these amendments and **recommends** that further amendments should be made to remove the requirement that the relevant ATP application must be made after the ML (coal) application and that new provisions be included to deal with RMA in the same manner as the current provisions deal with IMAs.

Transitional Arrangements – PL Application over Coal Exploration Authority
To simplify the legislation **clause 67** inserts a new section 238 which merges the previous sections 238 and 239 and **clause 68** which deletes section 239.

QRC supports these amendments.

Transitional Arrangements – PL Application over ML (coal)
To simplify the legislation **clause 69** inserts a new section 240 which merges the previous sections 240 and 241 and **clause 70** which deletes section 241.

QRC supports these amendments.

Transitional Arrangements – PL Applications over ML (coal) Applications
Clause 71(1) inserts a new section 241A(3) which provides that the pre-amended MRA and PGA apply if there is a coordination arrangement in place at commencement. Consistent with the principle of allowing parties to make bespoke agreements, **clauses 71(1)** also inserts a new section 241A(3A) to allow the parties to opt into the new tenure regime.

QRC supports this amendment.

New Incidental Coal Seam Gas Provisions
The QRC Submission on the draft bill sought clarification from DNRM of the interpretation of section 408 of MERCPA which amends the MRA by the insertion of a new section 826 concerning the application of the new incidental coal seam gas provisions (sections 405 – 407 of MERCPA, amending sections 318CL, CN, CNA and CO). The coal industry believes that the new incidental coal seam gas provisions should be able to be applied to holders of MLs (coal) granted before commencement but that, in order for the new incidental coal seam gas provisions to apply, the holder of an ML granted before commencement and the holder of the overlapped petroleum resource authority would have to opt-in to MERCPA to be able to meet the requirements of section 826(4) of MRA regarding: making of offers and non-acceptance of offers under section 138 of MERCPA.

The coal seam gas industry also believes that the new incidental coal seam gas provisions should be able to be applied to holders of ML (coal) granted before commencement but does not believe that the parties would have to opt-in to MERCPA in order to comply with section 408.

No clarification is provided in the MOLA Bill.

QRC recommends that section 408 of MERCPA should be amended to provide certainty that the holder of an ML (coal) granted before commencement and the holder of the overlapped petroleum resource authority do not need to opt-in to MERCPA to meet the requirements for section 408 to apply.

Queensland Resources Council
8 April 2016

APPENDIX: QRC SUBMISSION SUMMARY

MOLA clause Reference	MERCPA section	QRC position
13	103	Supported
14	105	Supported with a recommendation that additional wording is required to include an applicant which does not hold prerequisite tenure.
15	109	Supported
16	110	Supported
17	111	Supported
18	115	Supported
19	116	Supported
20	117(a) – (d), (f)	Supported
	117(e)	Not supported
21	120	Supported
22	121	Supported
23	122	Supported
24	123	Supported
25	124	Supported
26	125	Supported
27	126	Supported
28	127	Supported
29	128	Supported
30	129	Supported
31	130	Supported with a recommendation that section 130(3)(d) should be amended to remove the word 'proposed'.
32	131	Supported
33	132	Supported
34	133	Supported
35	134	Supported with a recommendation that further amendments are required to ensure that the 'right of way' principle is effective and the later production lease applicant is not frustrated from undertaking authorised activities due to the absence of either an agreed JDP or an agreed JDP which does not deal with an authorised activity.
36	135	Supported
37	139	Supported
38	141	Supported
39	142	Supported
40	142A	Supported with a recommendation that further clarification is required to specify: which party is responsible for providing the JDP for agreement; when that JDP must be provided; and when the JDP must be agreed.
41	143	Supported
42	144	Supported

MOLA clause Reference	MERCPA section	QRC position
43	146	Supported
44	147	Supported with a recommendation that further amendments are required to ensure that the 'right of way' principle is effective and the later production lease applicant is not frustrated from undertaking authorised activities due to the absence of either an agreed JDP or an agreed JDP which does not deal with an authorised activity.
45	149	Supported with a recommendation that the further clarification is required to section 149 to specify which party is responsible for supplying the JDP to be agreed. Also, it is recommended that, further clarification is required to identify which provisions apply if a concurrent notice is not given but a PL application is made within 6 months after the advance notice is received.
46	150	Supported with a recommendation that further clarification is required to section 150 to specify when the JDP must be provided by the ML (coal) holder. Also, it is recommended that, additional provisions are required to deal with the giving of an advance notice in the circumstance when an ML application is made without any overlap but an overlap is subsequently created.
47	153	Supported
48	154	Supported
49	158	Supported
50	159	Supported
51	167	Supported
52	172	
52(1)	172(1)(a)	QRC recommends that sections 170, 171 and 172 should be amended to not exclude the ability to supply natural gas to meet compensation liability for lost production.
	172(1)(b)	Supported
	172(2)(b) and (c)	QRC recommends amendments so that these sub-sections should be subject to mutual agreement.
52(2)	172(3)(b)	QRC recommends that section 172(3) should be amended so that the limit on reconciliation payments should be as in the White Paper (i.e. "in respect of the lesser of the quantity of gas subsequently produced and the quantity of gas which was the subject of compensation").
53	174	Supported with recommendation that further amendments are required to allow arbitration of disputes concerning entitlement to compensation to avoid unnecessary delays.

MOLA clause Reference	MERCPA section	QRC position
54	175	Supported with recommendation that further amendments are required to allow arbitration of disputes concerning entitlement to compensation to avoid unnecessary delays.
55	177	Supported
56	178	Supported
57	182	Supported
58	184	Supported
59	chapter 4 part 6 division 5, section 185	Supported
61	231A	Supported
	chapter 7 part 4 division 1A, section 231B	Supported
62	232	Supported with recommendation for further administrative amendments to ensure proper numbering of sub-sections.
63	233	Supported with recommendation for further administrative amendments to ensure proper numbering of sub-sections.
64	chapter 7 part 4 division 2A, section 233A	Supported with recommendations for (1) further amendments to remove the requirement that the relevant ATP application must be made after the ML (coal) application and (2) that new provisions be included to deal with RMA in the same manner as the current provisions deal with IMAs.
65	234	Supported
66	235	Supported
67	238	Supported
68	239	Supported
69	240	Supported
70	241	Supported
71	241A	Supported
72	243	Supported
73	Schedule 2	
	408	Recommend amendments to provide certainty that the holder of an ML (coal) granted before commencement and the holder of the overlapped petroleum resource authority do not need to opt-in to MERCPA to meet the requirements for section 408 to apply (as agreed by both the coal industry and the CSG industry).

Queensland Resources Council
8 April 2016