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Committee Secretary
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
Brisbane Qld 4000

Email: ipnrc@parliament.qld.gov.au

RE: Mineral, Water and Other Legislation Amendment Bill 2017

APPEA is pleased to provide feedback on the *Mineral, Water and Other Legislation Amendment Bill 2017*.

APPEA is the peak body representing Australia's oil and gas exploration and production industry. Our members account for the vast majority of Australia's oil and gas production and exploration.

The oil and gas industry is an integral part of the Australian economy, including through:

- the supply of reliable and competitively priced energy;
- the investment of hundreds of billions of dollars of capital;
- the payment of taxes and resource charges to governments;
- the direct employment of tens of thousands of Australians; and
- the generation of significant amounts of export earnings.

APPEA seeks a land access framework in Queensland that provides a balanced, timely, and secure system for access to land and protection and reasonable support for private landholders to ensure ongoing confidence in the framework.

APPEA is supportive of empowering parties to resolve disputes without seeking a determination by the Land Court by establishing a range of options in the statutory negotiation process to encourage the parties to reach an agreement (such as the establishment of arbitration as a distinct pathway and the proposed establishment case appraisal under the Land Court). APPEA is concerned, however, that MWOLA will have the following unintended and adverse impacts:

1. there will no longer be certainty on the time when Holders or Landholders may access the Land Court;
2. case appraisal will not be able to be used as an effective tool to encourage parties to entertain settlement discussions after obtaining a better understanding of the likely Land Court outcome and it should be established as a separate process from the prerequisite ADR step in section 88; and

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3. the costs required to be incurred by Holders will increase.

The basis for these concerns is explained below.

1. Introduction of uncertainty in timeframes in the statutory negotiation process

APPEA is supportive of MWOLA's intention to provide parties to Conduct and Compensation Agreement and Make Good Agreement negotiations with a range of dispute resolution options to empower the parties to resolve disputes without seeking a determination from the Land Court.

APPEA is, however, concerned that MWOLA is corroding the clear timeframes currently set out in the statutory negotiation process to seek Land Court relief. We understand this is not the intent of the Bill.

Holders are currently able to rely on the statutory negotiation process with absolute confidence in the minimum 50 business day timeframe to gain access to private land under the Land Court exemption. The process sets out clear minimum timeframes and there is a clear circuit breaker to move from one stage of the process to the next (i.e. 20 business days to negotiate under a Notice of Negotiation; 20 business days to attend a conference or ADR; and 10 business days under an Entry Notice and Land Court application). The amendments to the ADR step under section 88 proposed by MWOLA remove this certainty in timing and the process by:

1. connecting the criteria to make an application to the Land Court under section 96(1)(b) to a 30 business day timeframe that is calculated from the day the ADR Facilitator is appointed (s 89(2)) but failing to place a timeframe on the parties to appoint an ADR Facilitator under section 88; and
2. including case appraisal as a type of ADR that may be selected as a prerequisite to Land Court relief but failing to place case appraisal under an effective timeframe (as the 30 business day timeframe in s 89(2) is calculated from the day the Case Appraiser is appointed and does not recognise that the parties are unable to negotiate a resolution under case appraisal until after the Case Appraiser's decision is made).

a. No timeframe to appoint an ADR Facilitator after an ADR refusal

Section 88(6) threatens to remove clear and reliable timeframes because:

1. in the event the party receiving the ADR Election Notice accepts the type of ADR and the ADR Facilitator within the 10 business days under s 88(5) – the parties are not under an obligation to appoint the nominated ADR Facilitator within a set timeframe; and
2. in the event the party receiving the ADR Election Notice does not accept the type of ADR and/or the ADR Facilitator within the 10 business days under s 88(5) –

a. the parties are not under an obligation to accept or reject "another proposal" under s 88(6) within a set timeframe; and
b. the ADR Institute is not under an obligation to use reasonable endeavours to make a decision within a set timeframe under s 88(6).

There is no longer any certainty of timing in the statutory negotiation pathway because s 89(2) requires the parties to use all reasonable endeavours to negotiate a resolution of the dispute within 30 business days after the ADR Facilitator is appointed but there is no requirement to appoint the ADR Facilitator within a certain timeframe.

Recommendations

- **The Bill should be amended to ensure there is a clear and reliable minimum timeframe established under s 89(2) to satisfy triggering the next step in the statutory negotiation process under s 96(1)(b). This certainty could be maintained by:**

  1. **amending s 89(2) to calculate a period of time from the date the ADREN was given; or**
  2. **amending s 88 to: require the ADR Institute to make a decision by a certain time; and require the parties to appoint an ADR Facilitator by a certain time.**

b. Timeframe to conduct ADR is not effective for case appraisal

If the parties are required to participate in a case appraisal under sections 88 and 89, there is no longer any certainty of timing in the statutory negotiation pathway. Case appraisal may take months to yield a decision and there is no lever to be able to move out of the ADR step and into Land Court Application/Entry Notice step in the event the case appraisal takes an unreasonable time. This is because the obligation on the parties to use all reasonable endeavours to negotiate a resolution within 30 business days after the ADR Facilitator is appointed under section 89(2) does not function appropriately for case appraisal.

By the very nature of case appraisal, the parties are not able to start negotiating a resolution of the dispute as soon as the Case Appraiser is appointed. Rather, the parties are participating in a Court-like process where the Case Appraiser assesses the merits of each party's case and makes a decision. Other than complying with directions from the Case Appraiser, the parties have no control in influencing a Case Appraiser to assess the case and make their decision within a period of time.

Recommendations

- **If, as we strongly advocate below, case appraisal is separated from the ADR step in s 88, the uncertainty about the timing to end the ADR period for case appraisal (to make an application to the Land Court under s96(1)(b)) falls away.**

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- **If, however, case appraisal remains in s 88, then section 89(2) should be amended to cater for the different nature of case appraisal from the other types of ADR available under s 88 and provide a clear timeframe that reflects the nature of the Case Appraisal process.**

2. Inability to use case appraisal where appropriate

APPEA believes case appraisal could, if established effectively, significantly benefit Holders and Landholders and supports the concept of including case appraisal as an option to resolve disputes in the statutory negotiation process. Case appraisal will provide the parties with a better view of their case and will likely encourage parties to entertain further settlement discussions and reach resolutions without going to the Land Court. Given case appraisal is fundamentally different in concept and operation to conciliation, mediation and negotiation (**CM&N**) APPEA considers that parties should be able to use both CM&N and case appraisal under the statutory negotiation process.

CM&N involve an independent person guiding the parties to reach a mutual agreement and are non-determinative dispute resolution forums. Case appraisal, however, involves an independent person assessing the merits of the case and providing an objective view of the likely outcome if the matter went to Court.

MWOLA does not currently support Holders and Landholders first trying to resolve the dispute under a non-determinative ADR type such as CM&N and subsequently participating in a case appraisal where appropriate. It is implied that, after a party had sought one type of ADR under one ADR Election Notice (**ADREN**), a party could not then serve another ADREN requiring the parties to participate in a different type of ADR. In order for case appraisal to be used as an effective alternative dispute resolution option, it needs to be removed from the general ADR step in section 88 and established as a distinct avenue that can be opted into after the parties have participated in a CM&N.

The separate case appraisal process should:

1. require both parties to participate in the case appraisal once called;
2. only be able to be called by the Holder or the Landholder after the parties have attended (or the party given an ADREN failed to attend) a non-binding, non-determinative ADR (i.e. CM&N) under s 88;
3. require the Holder to pay for the costs of the Case Appraiser;
4. should be an option available (i.e. case appraisal should not be a further prerequisite step to the Land Court) for the parties to use before making an application to the Land Court; and
5. should be immediately available by referral (and not require pre-dispute steps).

APPEA considers that it is reasonable for the Holder to pay the costs of the Case Appraiser (whether the Holder of the Landholder activates the case appraisal). If the Holder calls the case appraisal, we consider that it is reasonable for the Holder to pay the Landholder's reasonable and necessary costs of preparing their case (because the Holder has required the

Landholder to do so and it is an optional ADR step that the Holder has chosen). In our opinion, there is no downside for Landholders if Holders call a case appraisal because it will give the Landholder a better view of their case (at no cost to them, provided their costs are reasonable and necessary) and will possibly incentivise a resolution outside Court. If, however, the Landholder calls the case appraisal, APPEA considers that the parties should bear their own costs of preparing their case because case appraisal is not a pre-requisite step before Land Court and the Landholder has opted into the process. If Holders were required to meet the Landholder's costs preparing for case appraisal in circumstances where the Landholder calls the case appraisal, it could potentially result in Holders funding the costs of Landholders preparing their case for Court. We consider this position strikes a fair balance.

Recommendations

- **Case appraisal should be removed from s 88 and established as a separate, optional path to provide Holders and Landholders with the flexibility to receive a decision from a qualified person about the merits of their case in the event the parties cannot reach a resolution by using all reasonable endeavours to negotiate a resolution after they have attempted to do so under the ADR Step in the statutory negotiation process.**

3. Increasing costs

MWOLA currently has the potential to require Holders to fund the costs of Landholders preparing their case for Land Court. As drafted, it requires the Holder to pay the costs of the Case Appraiser (section 89(6)) and the reasonable and necessary negotiation and preparation costs of the Landholder presenting their case (section 91). To avoid Holders funding the costs of the Landholder preparing their case for Court, the parties should bear their own costs of preparing their case if the Landholder calls the case appraisal.

Recommendation

- **If case appraisal remains combined with other types of ADR in s 88, s 91 needs to be amended to avoid Holders paying the Landholder's costs of preparing their case in circumstances where it is the Landholder seeking the case appraisal.**

The intent in s 91E (i.e. that the general liability under s 91 should not apply to the costs of a Landholder choosing to participate in arbitration) needs to be expressly stated to avoid arguments about the Holder's liability to pay the Landholder's costs attending an arbitration.

Recommendation

- **Section 91 needs to be amended to expressly carve out the negotiation and preparation costs incurred by Landholders participating in an arbitration.**

As the party receiving an Arbitration Election Notice is able to decline to attend, we consider the parties should determine how the Arbitrator's costs and their arbitration costs will be dealt with as part of the decision to accept or reject the arbitration under s 91E(4).

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Recommendation

- **Section 91E should be amended to allow the parties to decide how they will apportion the fees and expenses of the arbitrator and their costs.**

We agree that Holders should pay the reasonable and necessary costs incurred by the Landholder in using reasonable endeavours to negotiate a CCA with the Holder under the statutory negotiation process (even where an agreement is not reached). It is extremely difficult to resolve differences in opinion on the reasonableness and necessity of fees because the test is subjective and the parties have no guidance on how this test is to be applied/interpreted. There needs to be quick, easy and inexpensive access to have costs disputes determined outside the Land Court. This is particularly relevant seeing the current drafting of s 91 is broad and does not articulate the time when the liability arises and could have the unintended consequence of some professional fees increasing due to lack of accountability in the work performed and taking advantage of the Holder's practical inability to question unreasonable and unnecessary charges as each invoice is rendered.

Recommendation

- **Section 91 should be amended to:**
  1. **introduce a special costs assessment/taxing service to assist resolve costs disputes;**
  2. **clarify that the Holder's liability to pay arises at the close of the negotiations (once the agreement has been signed or if the Holder 'walks away') and the liability does not arise each time a profession advisor's invoice is due to be paid under the terms of the contract between the eligible claimant and the professional advisor; and**
  3. **provide guidance on the reasonableness and necessity threshold test.**

A separate joint QRC-APPEA submission has been provided on the Bill's overlapping tenure provisions. Detailed comments on other aspects of the Bill are provided in the Attachment.

We would be pleased to appear before the Committee to discuss this submission further.

Regards,

Matthew Paull
Policy Director – Queensland

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Comments on Mineral, Water and Other Legislation Amendment Bill 2017 (MWOLA)

COMPENSATION

Section	Comments
37	*Replacement of s 81 (General liability to compensate)* • We note the stated intent of amendments in this section, as per the Explanatory Notes, is to remove certain costs from the definition of 'compensatable effect' to clarify that the resource authority holder is liable to pay these costs to the eligible claimant even where a CCA or deferral agreement is not reached between the parties. • Given this intent, which does not contemplate any changes to existing requirements to compensate for impact, we note the omission of 'eligible' from section 81(4)(b) which we submit would have the effect of changing requirements to compensate. We suggest that section 81(4)(b) be amended to read: ○ "consequential loss incurred by the eligible claimant arising out of a matter mentioned in paragraph (a)." This will also ensure consistency with section 81(4)(a).

STATUTORY NEGOTIATION AND ALTERNATIVE DISPUTE RESOLUTION PROCESS FOR CONDUCT AND COMPENSATION

Section	Comments
41	*Related s 83A (Party may request conference) and s 83B (Conduct of conference)* • Section 83A should be amended clarify that the party receiving a conference election notice may agree or decline to attend Department-facilitated conferences. Clarity is required because s83A says that the notice "requests" the other party to attend but s83B says that, if a notice is given, the conference "must" be conducted and the officer "must" take all reasonable steps to hold the conference within 20 business days after the notice is given.

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Section	Comments
	• Section 83B should state that it only applies where the party receiving the conference election notice agrees to attend. • Sections 83A and B should be amended to allow the party receiving a Conference Election Notice to accept or reject the request to attend a conference.
45	*Related s 88 (Party may seek ADR)* • We strongly support case appraisal as an ADR option as it will provide the parties with a better view of their case and will likely encourage parties to entertain further settlement discussions and reach resolutions without going to the Land Court. • We consider s 88 should expressly state that the ADR process must be non-binding and non-determinative. *Introduction of uncertainty in timeframes in the statutory negotiation process* • APPEA is concerned that MWOLA is corroding the clear timeframes currently set out in the statutory negotiation process to seek Land Court relief. Holders are currently able to rely on the statutory negotiation process with absolute confidence in the minimum 50 business day timeframe to gain access to private land under the Land Court exemption. The process sets out clear minimum timeframes and there is a clear circuit breaker to move from one stage of the process to the next (i.e. 20 business days to negotiate under a Notice of Negotiation; 20 business days to attend a conference or ADR; and 10 business days under an Entry Notice and Land Court application). The amendments to the ADR step in the statutory negotiation process (section 88) proposed by MWOLA remove this certainty in timing and the process by: 1. introducing a method for resolving disputes about the type of ADR and/or ADR Facilitator nominated in an ADR Election Notice but failing to place any timeframes for that resolution; and 2. including case appraisal as a type of ADR that may be selected as a prerequisite to Land Court relief but failing to place case appraisal under an effective timeframe. *1. No timeframe to appoint an ADR Facilitator after an ADR refusal* • Section 88(5) provides the recipient of an ADR election notice with a 10 business day period to accept or refuse the type of ADR and the ADR

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Section	Comments
	facilitator proposed in the notice. In the event the party receiving an ADR Election Notice rejects the ADR type and/or ADR Facilitator within that 10 business day timeframe, the parties are then able to negotiate a different ADR type/ADR Facilitator (by the ability for the person giving the ADR Election Notice to "make another proposal" or obtaining a decision from the Land Court or a prescribed ADR Institute under section 88(6)). There is, however, no prescribed timeframe under s 88(6) to accept or reject another proposal or to obtain a decision from the Land Court/ADR Institute. • Section 88(6) threatens to remove clear and reliable timeframes in the statutory negotiation process because the parties are not under an obligation to use reasonable endeavours to jointly appoint an ADR Facilitator within a set timeframe and the ADR Institute is not under an obligation to use reasonable endeavours to make a decision within a set timeframe. • Section 89(2) does not assist in providing a circuit breaker to move out of the ADR step and into Land Court Application/Entry Notice step in this circumstance because section 89(2) requires the parties to use all reasonable endeavours to negotiate a resolution of the dispute within 30 business days after the ADR Facilitator is <u>appointed</u>, rather than connecting the timeframe to the date the ADR Election Notice is given (or refused). This is problematic because, in the event of a refusal under s 88(5), there is no timeframe to make an appointment under s 88(6). • It could also be viewed that, even if the ADR type and ADR facilitator is accepted under s 88(5), there is also no obligation on the parties to actually make an appointment of that ADR facilitator within a set timeframe. • Sections 88 and 89(2) needs to be amended to provide a clear timeframe to be able to move out of the ADR step and into the Land Court Application/Entry Notice step (s 96(1)(b)) under the statutory negotiation process. At present, the drafting does not provide a timeframe to appoint an ADR facilitator (it only provides a timeframe to accept or refuse the ADR type and ADR facilitator in the ADR Election Notice) which means that there is no longer any certainty in the timeframe in this step in the process. 2. *Timeframe to conduct ADR is not effective for case appraisal* • If the parties are required to participate in a case appraisal under sections 88 and 89, there is no longer any certainty of timing in the statutory negotiation pathway. Case appraisal may take months to yield a decision and there is no lever to be able to move out of the ADR step and into Land Court Application/Entry Notice step in the event the case appraisal takes an

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Section	Comments
	unreasonable time. This is because the lever under s 96(1)(b) to make an application at the end of the ADR negotiation period set out in s 89(2) does not practically operate for case appraisal. • The obligation on the parties to "*use all reasonable endeavours to negotiate a resolution of the dispute by entering into a conduct and compensation agreement within 30 business days after the ADR Facilitator is appointed*" under section 89(2) does not function appropriately for case appraisal because, by the very nature of case appraisal, the parties are not negotiating a resolution of the dispute throughout the case appraisal process. Rather, the parties are participating in a Court-like process where the Case Appraiser assesses the merits of each party's case and makes a decision. The parties are not able to use reasonable endeavours to negotiate a resolution of the dispute by entering into a conduct and compensation agreement until the Case Appraiser makes a decision about the merits of each party's case. It is only at the time the Case Appraiser's decision is provided to the parties that they will be able to entertain further settlement discussions and reach resolutions. • Unlike non-determinative ADR types (e.g. conciliation, mediation and negotiation (**CM&N**)), the parties to a case appraisal are not able to negotiate a resolution within 30 business days after the Case Appraiser is appointed because there is no value in the parties negotiating a resolution under a case appraisal until the Case Appraiser makes a decision. • Other than complying with directions from the Case Appraiser (e.g. to attend certain meetings and provide certain witness statements and submissions), the parties have no control in influencing a Case Appraiser to assess the case and make their decision within a certain timeframe. This process will be determined by the Land Court. As the parties are not able to use reasonable endeavours to negotiate a resolution until the Case Appraiser's decision is made in writing, there is no certainty in the timeframe under a case appraisal in the way the ADR Step is currently drafted. • This is one of the reasons why it is appropriate for case appraisal to be separated from CM&N in section 88. CM&N involve an independent person guiding the parties to reach a mutual agreement and are non-determinative dispute resolution forums. The parties are have the control, and are able to reach their own decisions, during that process. Case appraisal, however, involves an independent person assessing the merits of the case and providing an objective view of the likely outcome if the matter went to Land Court. The parties merely participate in the process. The outcome of that process will, however, likely trigger negotiations with a view to resolving the

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Section	Comments
	dispute and entering into an agreement by virtue of the parties having a better understanding of their case. *Separate case appraisal from conciliation, mediation and negotiation:* • Case appraisal is fundamentally different to conciliation, mediation and negotiation (**CM&N**) and it is recommended that case appraisal is removed from s88 and regulated under a separate process. Holders and Landholders may want to try to resolve the dispute under a non-determinative ADR type such as CM&N first and then participate in a case appraisal. Having a separate optional path for case appraisal will enable this flexible and act as another option to assist the parties reach agreement out of Court. • It is not clear whether multiple ADR Election Notices (**ADRENs**) can be issued. It is implied that the ADREN is only issued once as it is a precondition to Land Court. Accordingly, the Act does not support the parties attending a non-determinative ADR type and a case appraisal – only one option will be available under the statutory dispute resolution regime. APPEA would like to ensure that the new statutory negotiation process in MWOLA achieves the objectives and does not have unintended consequences. • Proposed s88(4)(d) and s89(6) states 'that the resource authority holder is liable for the costs of the ADR facilitator.' We suggest the costs of the ADR facilitator should be determined as part of the ADR process, either by agreement or the act could empower the ADR facilitator to make such a determination. This would ensure that costs are also consistent with arbitration (see for example – Clause 91E(2)) • Section 88(5) provides the recipient of an ADR election notice with a 10 business day period to accept or refuse the type of ADR and the ADR facilitator proposed in the notice. We question whether the recipient should only be able to refuse the type of ADR and ADR facilitator with reasonable reasons to do so. • Proposed s89(2) proposes a '30 business days' limit. The timeframe of 30 business days to negotiate a resolution is quite short when considering the type of negotiation involved, the geographical constraints of bringing the parties together for the ADR and the requirement to document the outcomes. We suggest the limit should be able to be varied by agreement between the parties. *Related s 91 (Recovery of negotiation and preparation costs)*

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Section	Comments

	• Overall, APPEA is supportive of the intent of this section (for Holders to be liable to pay the eligible claimant's reasonably and necessarily incurred legal, accounting, valuation and agronomy costs in negotiating the CCA (including where the parties cannot reach agreement to enter into a CCA)).
	
	• However, APPEA has the following concerns:
	
	  • MWOLA has the potential to require Holders to fund the costs of Landholders preparing their case for Land Court. As drafted, it requires the Holder to pay the costs of the Case Appraiser (section 89(6)) and the reasonable and necessary negotiation and preparation costs of the Landholder presenting their case (section 91). If the Holder requires a Landholder to participate in the case appraisal, we consider that it is reasonable for the Holder to pay the Landholder's reasonable and necessary costs of preparing their case (because the Holder has required the Landholder to do so and it is an optional ADR step that the Holder has chosen). If, however, the Landholder calls the case appraisal, the parties should bear their own costs of preparing their case (because the Landholder has opted into the process and, otherwise, Landholders could effectively require Holders to fund the costs of Landholders preparing their case for Land Court). This is another reason supporting the separation of case appraisal from CM&N.
	
	  • Section 91 needs to be amended to expressly carve out the negotiation and preparation costs incurred by Landholders participating in an arbitration because the intention in s 91E appears to be that the general liability under s 91 does not apply to the costs of a Landholder participating in arbitration. This intention needs to be expressly stated to avoid arguments about the Holder's liability to pay the Landholder's costs attending an arbitration.
	
	Review mechanism and guidelines for reasonable and necessary costs
	
	• APPEA is concerned that s91 is broad and does not assist in supporting Holders and Landholders understanding of what reasonable and necessary costs truly involve and when the liability arises. To some extent, s 91 disincentivises the parties reaching a mutual agreement swiftly. Payment of negotiation and preparation costs is broad and is likely to lead to an increase in fees payable by Holders.
	
	• Landholder legal fees associated with land access negotiations in some cases significantly exceed what would normally be considered 'reasonable and necessary'. For example, APPEA members have seen fees in the order of

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Section	Comments
	$92,000 for 2 wells; $82,500 for 3 wells; $92,000 for 6 wells; $283,000 for 25 wells; $220,000 for 27 wells; $192,000 for 100 wells; and $260,000 for 127 wells. • It is frequently and extremely difficult to resolve differences in opinion on the reasonableness and necessity of fees because the test is subjective and the parties have no guidance on how this test is to be applied/interpreted. We therefore highly recommend the introduction of a quick, easy and inexpensive mechanism to resolve disputes regarding the reasonableness and necessity of the negotiation and preparation costs (i.e. by introducing special costs assessment/taxing service and providing further guidance on the subjective 'reasonable and necessary' test). This is particularly if Holders are expected to pay the costs before the negotiations are concluded because the current drafting of s91 does not articulate the time when the liability arises (i.e. as each invoice is issued or at the close of the negotiations). • We consider that the current drafting of s 91 (without an accompanying regime to have costs assessed/taxed in the event the reasonableness and necessity is questioned and without providing guidance on what constitutes 'reasonable and necessary' fees) could have the unintended consequence of some professional fees increasing due to lack of accountability in the work performed, including advice around negotiation tactics. Introducing further detail around what constitutes 'reasonable and necessary' costs and introducing a costs assessment/taxing service avenue will assist towards ensuring that professionals are charging appropriately and are not incentivised to prolong negotiations • Section 91 does not state when the liability to pay arises. Without clarification, Holders will be requested by the eligible claimant's professional advisors to pay these costs directly to the professional advisors as and when they fall due under the terms of the contract between the eligible claimant and the professional advisor. This is problematic because the Holders may not be able to meet the contractual terms for payment under a contract to which the Holder is not privy (e.g. the eligible claimant and their advisor may agree to a 14 day payment term and the Holder may require 30 business days under its usual payment terms). Section 91 needs to be amended to clarify that the Holder's liability to pay arises at the conclusion of the negotiation (whether the negotiations ends because an agreement is entered into or because the Holder 'walks away'). Without clarification, Holders will be requested by the eligible claimant's professional advisors to pay these costs as and when they fall due each month. This creates the potential for some professionals to take advantage of the Holder's position in the negotiations (i.e. stretched on time and requiring an agreement for schedule certainty) by issuing invoices

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Section	Comments
	including charges that could clearly be questioned for their reasonableness and necessity with the knowledge that Holders will not likely dispute such questionable changes under a monthly bill as a matter of strategy (because raising a dispute over a component of a professional bill mid negotiation will distract, derail or delay reaching a timely access agreement).
45	*Related s 91A (Party may request arbitration)* • In relation to proposed section 91A(b) the parties are required to name the arbitrator. It should be expressly clear in the Act that in nominating the arbitrator, the parties must have due regard to any qualifications required of the arbitrator and other considerations likely to be necessary to secure the appointment of an independent and impartial arbitrator. • If the parties agree to attend arbitration under s 91A(5) the parties and the Arbitrator should be under an obligation to attend the arbitration within a certain timeframe after the parties agree to attend arbitration to enable the parties to make an informed decision whether to agree to participate in that process and to give certainty to the timing of the step. *Related s 91C (Legal representation)* • We suggest the inclusion of some parameters in relation to instances where 91C(b) may be invoked. Otherwise, it is highly likely the landholder will always request legal representation and the arbitrator will always agree. The resource holder may be drawn unwillingly into arbitration when other forms of dispute resolution could have succeeded. (noting the ability to trigger arbitration and end a conference under s.83B(6)) – • Further, the resource holder is liable for these costs and can find themselves in a situation of having to pay for both sides legal costs when the dispute could have been resolved without legal representation. This is premised on the submission that legal representation would likely increase the formality and length of proceedings potentially increasing the costs of proceedings more generally. • The Bill should be amended to provide that representation by a lawyer is only afforded in certain circumstances, for example if the proceeding is likely to involve complex questions of fact or law. *Related s 91E (Costs of arbitration)*

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Section	Comments

	• Arbitration can be as expensive as litigation. We strongly recommend that s 91E(1) – (3) is deleted and replaced with a new section allowing the parties to determine all of the costs of an arbitration (i.e. the fees and expenses of the Arbitrator and the costs of the parties) as part of the decision to accept or reject the arbitration under s 91E(4) (and any associated arbitration agreement between the parties). The parties are then free to decide whether the arbitration costs will be shared (and to what extent), whether the Holder will pay all of the costs (which could include a capped amount), or whether the parties agree for costs to be determined by the Arbitrator. We consider this position on arbitration costs is appropriate because the party receiving an arbitration election notice is able to decline to attend. We also note that s 33B of the Commercial Arbitration Act 2013 provides that (unless otherwise agreed by the parties) the costs of an arbitration are to be in the discretion of the arbitration tribunal.
	
	• APPEA recommends that s 91E is amended to provide guidelines on sensible arbitration rules and costs (e.g. one Arbitrator only, not a panel of 5 Arbitrators).
	
	• Where the matter goes to arbitration, we suggest the Arbitrator should be enabled to decide the reasonableness and necessity of the negotiation and preparation costs before and during the arbitration (i.e. special costs assessment/taxing service).
	
	• If it remains, 91E(1) should carve out non-attendance (as it questions why the Holder should be responsible for paying the entire costs of the arbitration if the reason why the parties have not participated in an ADR is because the eligible claimant failed to attend).
	
	Related s 91F (Effect of arbitrator's decision)
	
	• With reference to proposed section 91F(3), the arbitrator's decision is only capable of review if affected by jurisdictional error.
	
	• A decision of arbitration should be appealable on the grounds of:
	  ○ An error or mistake in law on the part of the arbitrator; or
	  ○ Jurisdictional error
	
	• With reference to proposed section 91F(3), the wording 'is' may need to be replaced with 'if'.

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Section	Comments
50	<u>*s 96B (Negotiation and preparation costs)*</u> • Holders will likely be hesitant to make an application to Court for a declaration about negotiation and preparation costs and s37 may not assist Holders in seeking a determination about such costs. As submitted above, APPEA considers that there needs to be a quick, easy and cost-effective way to resolve any disputes over the reasonableness and necessity of costs outside Court and suggests the ability for the parties to refer the costs dispute to a special costs assessment/taxing service.

MAKE GOOD AGREEMENTS

Section	Comments
258	• Section 426 should clarify that the types of ADR that may be selected must be non-binding. • APPEA questions if s 426(1) (i.e. the criteria to seek a conference or ADR) should be amended to exclude matters mentioned in ss 425 (b) and (c) (i.e. disputes in relation to existing Make Good Agreements). APPEA understood the policy objective was to achieve consistency in treatment of disputes for Conduct and Compensation Agreements and Make Good Agreements. It understood that all disputes for Conduct and Compensation Agreements and Make Good Agreements <u>before</u> execution were to be regulated by the relevant statutory negotiation process and that all disputes arising <u>after</u> execution were to be regulated by the Land Access Ombudsman (*Land Access Ombudsman Bill 2017*). To give effect to this consistent position, 426(1) must be amended to exclude matters mentioned in ss 425(b) and (c). • We note that arbitration specifically excludes disputes arising out of existing Make Good Agreements under ss425(b) and (c) as s433A(1)(a) only applies to disputes under s425(a) i.e. matters where the parties cannot agree on the terms of a Make Good Agreement. • If the new s426 is intended to apply if a dispute arises out of existing Make Good Agreements, it has the potential to cut across existing contractual dispute resolution processes agreed between the parties. MWOLA does not explain how those existing contractual dispute resolution obligations are to operate given the requirements of s426(1). A hierarchy needs to be

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Section	Comments
	established between contractual dispute resolution processes in existing Make Good Agreements and ss 426(1) and ss 425(b) and (c). • The new s426 applies if a dispute arises out of current s425 (which includes, at s425(c), whether a party to a Make Good Agreement reasonably believes the other party hasn't complied with the agreement). Where there is a MGA on foot with a dispute resolution process, how is it taken to operate given the requirements of s426? Is a party taken to comply with the contractual requirement? • APPEA's comments in relation to ADR (including recommending case appraisal as a separate optional process available after ADR) under the MERCPA (see s31 MOLA above) also apply.
261	• APPEA is supportive of the introduction of arbitration as an option, however questions whether the Commercial Arbitration Act 2013 rules reduces the costs associated with Land Court and whether Department-issued guidelines on what sensible arbitration rules look like for these types of disputes would be suitable (e.g. one Arbitrator only). • APPEA's comments in relation to Arbitration under the MERCPA (see s45 MOLA above) also apply.

CHANGES TO WATER OBSERVATION/MONITORING BORE PROVISIONS

Where government has required proponents to install monitoring bores off-lease, there have been some circumstances in which significant savings could be made by transferring a well to a different operator who doesn't hold the lease to convert to a water monitoring bore. At present to do this, the lease owner must convert to a water bore first – an expense which is often unable to be justified due to JV arrangements and the complexities of recovering these costs.

We suggest addressing this by examining the restrictions associated with transfer to a well between parties.