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Committee Secretary
State Development, Natural Resources and
Agricultural Industry Development Committee
Parliament House
George Street
Brisbane Qld 4000

By email: SDNRAIDC@parliament.qld.gov.au

Dear Committee Secretary

Mineral, Water and Other Legislation Amendment Bill 2018

Thank you for the opportunity to provide comments on the Mineral, Water and Other Legislation Amendment Bill 2018 (the **Bill**).

INTRODUCTION

This submission is made by Shine Lawyers, a publicly listed law firm. Its authors are Peter Shannon and Geoffrey Kelk.

Peter is the former senior partner of the rural practice of Shannon Donaldson and a practitioner of 35 years, all of which have been spent in Dalby on the Darling Downs. He has had extensive experience in the area of coal seam gas, and also been a landholder facing coal seam gas development by 2 companies over farming land near Dalby. Geoffrey is a mature age solicitor, having come to the law recently from a journalistic background and familiar with the social, and now legal issues involved.

Shine acquired Shannon Donaldson in 2012. It has maintained the Dalby branch and continued the extensive work practice area of landholder compensation through that branch throughout the time since. It has shown a commitment to providing legal services "at the coal face" for landholders. As part of its "pro bono" community service budget, Shine allows community interest work to be done, and this submission is part of that. It reflects the very strong sentiment of its authors.

THIS PROCESS

We readily appreciate the purpose, and the constraints, of your Committee and it's "brief" to consider the legislation against 'fundamental legislative principles. We note section 4 (2) of the *Legislative Standards Act* requires that legislation have 'sufficient regard to the rights and liberties of individuals' and that process is not prescribed – it often involves a common

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sense understanding of when rights and liberties are unreasonably infringed to attain the intent of the legislation.

To its credit in the past, this committee process has been willing to address matters in in a significant way and to make a difference by so doing. On several occasions it has made observations or recommendations that have later been acted upon – such as in respect of the 'make good' regime where the recommendations of this committee incidental to this process saw to extensive changes. Even this Bill has content informed by the review process in addressing agronomy fees as part of the professional advice that should be made available to landholders.

The willingness so to do is no doubt an acknowledgement that coal seam gas in particular is at the absolute 'coal face' of infringement on our basic property rights and challenges every person involved to set the bar at a standard that balances the perceived benefits from royalties and jobs against the obvious intrusion on basic and essential property ownership freedoms we also value so highly in our way of life.

Unfortunately this Bill will, in our earnest belief severely interfere with the existing rights of landholders and without any, or any effective checks and balances in place. It will lead to far more problems for landholders than the existing legislation in areas unintended.

This submission will focus on 3 principle problem areas that we would urge the Committee to address by delaying the relevant changes until either an enquiry into the issues raised in it, or without adequate counter-balancing measures being invoked.

The areas are;

1. Arbitration
2. Landholder professional costs
3. Section 81 – neighbour claim and diminution in value claims

ARBITRATION

Power to award Professional Costs is illusory

Arbitration is introduced as an alternative to the Land Court, and on it's face that is appealing. There is however no provision for a landholder to recover their professional fees, beyond provision that in unusual cases, the arbitrator may order the landholders costs be recovered.

That alone is an enormous "stick" that will punish landholders who are, notwithstanding genuine negotiation, not reaching agreement. That may be for a host of reasons – such as the resource company being unreasonable.

The history of the industry is littered by bad corporate behaviour – which the industry itself acknowledges – and a basic enquiry of landholder lawyers would reveal that the behaviour, whilst improved in some companies, is worse in others (apparently emboldened by the prospects of this legislation). Bad behaviour by the companies is only a sharemarket or oil price dip away from being assured. The legislation should address that at every turn and this Bill unfortunately unwittingly does not because it will inevitably incentivise and reward bad behaviour by the companies – the increasing pressure of not knowing if reasonable Professional Fees will be recovered is an enormous pressure on Landholders and

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completely unreasonable given the negotiations are forced on them and only designed to minimise loss (as opposed to the enormous commercial benefits to the resource companies).

To say that an arbitrator has power to order fees is no answer – the drafting actually assumes that the "starting point" is that each parties bear their own costs.

The bill specifically provides a presumption that each party bears their own costs of the arbitration process – apparently assuming that the Landholder must have acted unreasonably not to have resolved the negotiations at an earlier stage.

Section 91E (3) is the relevant section which provides:

"*… each party to an arbitration must bear the parties own costs for the arbitration unless the parties agree, or the arbitrator decides otherwise."*

Section 91E(2) already imposes an obligation on the landholder to pay half the arbitrators fees.

How can that possibly do justice to a landholder who is genuinely negotiating but is simply not met with a reasonable response by the relevant company? Why is it assumed that if things have got to the arbitration stage it must be the landholder that is acting unreasonably?

Every landholders' impacts and reactions are vastly different and often unique. Of course the companies play "hardball" – they are duty bound to do so to ensure the maximisation of profits to shareholders. The companies are huge corporate behemoths standing to make a fortune and do not have the feelings, emotions and social impacts that face landholders. ANY reduction in the protection afforded landholders in this process is an astounding interference with landholders rights and liberties and must surely fail the test of 'fundamental legislative standards' to anyone familiar with the position of landholders in this process.

Arbitration on face value appears to be a superficially attractive alternative to the Land Court.

However, arbitration is rarely less complicated than full court proceedings, yet it suffers the disadvantage of not setting any form of precedent for wider benefit and critically, not allowing any form of review or appeal.

Further, the need for legal representation in the Land Court is readily understood as necessary and desirable whereas arbitration is not so widely understood as necessitating legal representation.

This will be an attractive aspect for resource companies as it will allow them the power of veto for the landholders lawyers yet they can still retain their professional staff many of whom are lawyers without practising certificates. If this were to eventuate then the landholders would be effectively self-represented against a team of legal experts highlighting the vast power imbalance this Bill creates.

An arbitrator will still want to hear from experts and the tabling of evidence would still require the same standard as court proceedings would require, and yet the arbitrator may or may not be required to observe the kind of process that our judicial system has developed to ensure justice is done.

Further, judges have security of tenure which is designed to ensure impartiality, whereas arbitrators have no such security and will be prone to influence from the only repeat player

that ensures future demand – the resource companies. We already see situations where the same mediators are repeatedly used by the same companies and that seem to have little real understanding of the landholders position. In one recent mediation my client was devastated to hear the mediator refer to the gas company's valuer as "our" valuer. That was undoubtedly a slip but does show the extent of repeat connection in the process.

On a brief review the only requirement of the arbitrator is that they be a registered arbitrator as defined under the Commercial Arbitration Act.

That in no way secures to the landholder someone who is familiar with the law in this area – and with very few judicial decisions coming through the binding nature of the arbitration etc will mean there is no development of the law in the area. It is an exceptional thing to impose a contract on a landholder under which they can be exposed to legal liability of unlimited extent, and it is difficult to think of anything more needing of legal assistance than such a process.

The legislation is no longer compensatory if a Landholder, acting reasonably, incurs professional assistance to undertake a formal process imposed upon them to accommodate the development of the resource company's activities, and then does not get compensated for that.

PROFESSIONAL COSTS

Very relevant to the above also is the significant issue of removing professional costs as a head of damage and having it as a separate obligation. That means it does not have to be compensatory in nature and opens a Pandora's box of trouble for landholders.

It benefits the resource companies in two ways:

It benefits the resource companies in many ways:

1. The obligation is no longer necessarily compensatory. As a head of compensation it was clearly intended to make sure that landholders are not 'out of pocket', provided the relevant fees were 'reasonable and necessary'. As a separate statutory obligation the companies will argue that only that part of the professional costs that they consider to be 'reasonable and necessary' is to be paid. The difference is subtle one but important. If therefore we spend 3 hours with a client who is particularly stressed or having difficultly dealing with the prospect of accommodating the enforced activities and undertaking a tight negotiation process, the companies will argue that a reasonable person would not have required a 3 hour attendance and only agree to pay 1 hour. The landholder is then left paying the additional 2 hours and is 'out of pocket' for what should be a compensatory process.
   It is easy for the companies to assert that this in some way protects them from 'unreasonable' costs, however the existing process clearly allowed them to take issue.
   As a head of compensation, established legal principle requires these matters to be addressed in a *'generous not niggardly'* fashion. As a separate statutory obligation, parliament is inviting unending dispute in respect of professional assistance.

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2. The companies can argue proportionality – that is that costs should always be proportionate to the compensation. If therefore a landholder is only entitled to say $80,000 in compensation, the argument will be raised that professional costs (i.e. accounting, valuation, agronomic and legal assistance must be proportionate – and yet the particular issues involved may be extremely complex). A truly compensatory regime would not 'standardise' anticipated processes to that extent. What is important to one landholder (e.g. health issues due to proximity to dwellings or workplaces) may not be as important to another who may be more concerned about disruption to farming practices. A standardised process can never be truly compensatory. Critically, the amendments will mean that the companies can act as unreasonably as they like and impose progressively increasing concern in respect of these matters – and especially the anticipated 'shortfall', in respect of recoverable professional costs.
3. The costs of arguing about costs will arguably not be compensatory either. Under the existing provisions, as a head of compensation professional costs have to be negotiated as part of the CCA process – i.e. it must be 'sorted' before the negotiation process / CCA can be finalised. Moving it out of the head of compensation means it stands independently of that process.
4. Companies will try to argue that the CCA process now stands independently to the issues surrounding costs so a landholder will necessarily find out later how much of the compensation they actually receives.

In any particular matter, any aspect of the professional costs can be problematic – for instance, if a landholder has a complex family structure and intergenerational handover issues or extensive tax losses, extensive input might be required. In other cases, the landholder might be one that has no tax concerns but it particularly worried about agronomic aspects. In the former a large accounting bill can be anticipated. Will the companies argue that the individual aspects are not 'reasonable' in examples like this.

All this places enormous pressure upon the landholder. There is no such pressure facing the companies aside from occasional commercial pressures, which should be planned for in advance.

Notwithstanding the pressure on the landholder there is no assurance within the bill or the current framework to ensure a company acts reasonably in the process.

This all seeks to make a landholder act "reasonably" in the eyes of the company and prevent them from having to do so. Critically, it is an astounding reality that at this stage there is no direct regulation of a resource company's conduct in the negotiation process – no code of conduct, no accountable ethical standards, no statutory requirement securing full and honest disclosure nor any accountability for misconduct.

Finally on this point, if the intent is to ensure these costs are recovered even if agreement is not reached then the safer approach would be to simply say that in a section – i.e. that the reasonable and necessary costs under the compensation head are payable regardless of whether the parties reach agreement.

Finally, we are also concerned that the Bill has potentially reduced costs in another way – it now refers to recovery of "Negotiation and Preparation costs" as a defined term which may well be significantly narrower than the existing wording which does not refer to "entering" but

rather allows "negotiating" especially. It would be an exceptionally unjust outcome if the only costs recovered where those relevant to signing the agreement as opposed to negotiating it. The ambiguity of it should be avoided.

That to, will lead to further "sticks" for the companies to use in the negotiation process and further this empowers and disadvantages the Landholder.

SECTION 81 – THE NEIGHBOUR CLAIM

Much was raised by ourselves and others about the change to the wording of the provisions of section 81.

In particular we, and others, asserted that the change to section 81 meant that "neighbouring" landholders to extensive gas activity that impacted on them could apply for compensation if they were in the relevant tenement.

I understand that the explanation given for the change in the wording is to reflect the 2004 amendment intention. It is unfortunate that this did not rate a mention in the previous explanatory notes, but at least the scant attribution to that is an explanation that enables understanding.

We do not share that view and say that the wording was clear and reflected the previous wording to that anyway.

We persist with the previous submission on that. Certainly also the argument can fairly be raised that even changing the wording to clarify that is a loss of rights. It is if the wording allows such a claim – which it clearly does.

The explanation though at least says that is an intentional outcome, so that is a matter for the Committee to consider.

SECTION 81 - THE "SULLIVAN"ISSUE

In so carefully re-drafting section 81 however, there may be an unintended consequence that can easily avoided.

The wording of the existing section makes clear that it is the impacts on the **whole** of a landholders land have to be compensated. You will see it refers to "the Eligible Claimants Land".

This was a deliberate action on the part of parliament to address the widely acknowledged injustice of the Court of Appeal decision in the case of *Sullivan* .It was acknowledged as having ensured diminution in value of the whole of the property was recoverable – as opposed to the very narrow outcome in *Sullivan* that only allowed the value of the land immediately impacted to be considered – i.e. not the diminution of the whole property and other land the eligible claimant might have owned and been impacted.

There is some concern that the new wording, in attempting to remove the neighbour claim, may enliven some aspects of "Sullivan", or at least see to that being used against landholders, so any ambiguity should be totally avoided. We can consider and discuss that further as needed.

The new wording is ambiguous and likely to again to be used a "grey area".

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CONCLUSION

We suspect that most of the Committee have sympathy for the position of landholders but are suspicious of the motives of lawyers and resource companies when considering amendments drafted at the request of the relevant Minister.

We think it also important to add that the peak agricultural bodies simply do not have the financial capacity to properly analyse the legal implications of every aspect of amending legislation. I learned early in the CSG space they are not lawyers and therefore can't oversee the legislative framework. They receive funding to address the consequential impacts and assist landholders under these impacts but they can't assist in navigating the legal framework and the subtleties involved.

Also it must be noted that the Queensland Law Society is not the guardian of landholder rights. The Society and the committees that feed and inform it, do not advocate the landholder position. Unlike laws that affect more obvious legal rights such as the VLAD legislation and other criminal laws, they simply do not have the insight into how these laws impact landholders and their families.

As a lawyer I have practised in the CSG space since 2009 and have negotiated hundreds of agreements in that time. I remain active in the CSG space and now see that the expansion projects undertaken by resources companies are now planned to intrude on intensive cropping land on the Darling Downs. This is a vastly different proposition to the cattle and like areas in which they have largely operated previously, and if the matters raised in this submission are not assuaged there will be extensive ongoing problems in implementing the industry and an extensive infringement on landholders rights.

Unfortunately, the existing legislation and process allows for far better outcomes for landholders than the amendments as proposed.

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

Yours sincerely

Peter Shannon

Special Counsel
SHINE LAWYERS