Resolution Institute

Submission regarding

Mineral, Water and other Legislation Amendment Bill (QLD) 2018

February 2018

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Preamble

Resolution Institute is pleased to make this submission in relation to the *Mineral, Water and other Legislation Amendment Bill* (Qld) 2018 ('the Bill'). We note that the State Development, Natural Resources and Agricultural Committee is inquiring into the Bill and is seeking written submissions by 27 February 2018.

Resolution Institute has confined comments in this submission to aspects of the Bill related to dispute resolution, and mainly on the proposed removal of the automatic referral of compensation matters to the Land Court of Queensland and the introduction of other dispute resolution processes.

Due to the short timeframe for submissions, Resolution Institute has not been able to follow its usual practice of consulting with its members in relation to the Bill specifically and has relied on previous consultation processes.

Resolution Institute notes that the primary policy objectives of the Bill are to:

- give effect to the Queensland Government's response to four recommendations of the *Independent Review of the Gasfields Commission Queensland and Associated Matters*;
- remove the automatic referral of compensation matters to the Land Court of Queensland under the *Mineral Resources Act 1989*;
- ensure the consideration of the water-related effects of climate change on water resources is explicit in the water planning framework;
- provide for the inclusion of cultural outcomes in water plans to support the protection of the cultural values of water resources for Aboriginal peoples and Torres Strait Islanders;
- provide a mechanism to allow for temporary access to unallocated water held in strategic water infrastructure reserves; and
- establish new powers for dealing with urgent water quality issues[1].

We further note that the Bill also seeks to make minor and miscellaneous amendments to other Acts and Regulations, to improve their operation.

Resolution Institute congratulates the Queensland Government on the Bill and broadly supports all initiatives aimed to simplify process, remove formalised and expensive adversarial processes and address cultural factors and other impediments to resolution of disputes.

[1] *Mineral, Water and other Legislation Amendment Bill* (Qld) 2018 Explanatory Memorandum ('EM'), p.1

About Resolution Institute

Resolution Institute is the largest membership organisation of dispute resolution (DR) professionals in Australasia. Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission ("ACNC") as a not-for-profit organisation. Resolution Institute has a membership base of over 3,000 DR professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

Resolution Institute members engage in adjudication, arbitration, mediation, expert determination, facilitation, conflict coaching, conciliation and restorative justice. Resolution Institute is committed to promoting and supporting the use of dispute resolution through providing education, training and accreditation or grading, to contribute to the provision of quality DR services.

Resolution Institute provides a nomination service for parties in dispute, when:

1. parties need a contractually agreed, independent and unbiased service to appoint a dispute resolver
2. a government, industry or agency scheme requires an independent and unbiased third party to appoint an appropriately qualified dispute resolver; and
3. less commonly, an individual requests a dispute resolver.

Main DR reforms in Bill and Resolution Institute comment

Referral of compensation matters to the Land Court under the Mineral Resources Act – no longer automatic

We note the Bill amends the process to refer compensation matters for mining claims and mining leases to the Land Court.

The Explanatory Note to the Bill states:

"The Bill makes amendments to chapter 3 and chapter 6 of the Mineral Resources Act 1989 to change the way unresolved compensation matters for mining claims and mining leases are referred to the Land Court. For the initial grant and renewal of a mining claim or mining lease, the amendments remove the chief executive's automatic referral to the Land Court if there is no compensation agreement after the statutory negotiation period. The applicant or landowner can refer the matter to the Land Court at any time for determination. If there is no agreement or Land Court referral after the negotiation period ends, the Minister may refuse to grant or renew the mining claim or mining lease. For the renewal of a mining claim or mining lease, the amendments will now require the renewal applicant to notify the landowner of the application, and prescribes new guidance material that must be included with the notification. This new requirement for notification will provide a nine to fifteen month period for the landowner and miner to negotiate a new compensation agreement". [2]

Resolution Institute comment:

Resolution Institute strongly supports removal of the automatic referral of compensation matters to the Land Court for mining claims and mining leases. We understand from the Bill's explanatory notes that compensation matters make up about 20 per cent of the Land Court's case load, the majority of which are automatic referrals from the Department of Natural Resources and Mines under the current system.

Our experience is that compulsory adversarial processes add complexity, cost, stress and delay. This reform will have a positive impact on Land Court case load and therefore efficiency and timeliness of decisions.

We also note that the applicant or landowner party can refer the matter to the Land Court at any time for determination. In the time available we have not assessed if

[2] EM p.5

there are any criteria for this referral in the Bill. Our experience is that listing criteria is useful to keep process moving and to attempt to address any power imbalances between parties.

Conduct and compensation agreements ('CCAs') and make-good agreements ('MGAs')

The Minister's speech introducing the Bill, delivered on 15 Feb 2018, states:

"*This Bill proposes amendments to the Mineral and Energy Resources (Common Provisions) Act 2014 and the Water Act 2000 to improve the statutory negotiation and dispute resolution processes for parties negotiating conduct and compensation agreements and make-good agreements. The amendments will, amongst other things,*

• *clarify the options that are available for parties entering into a non-determinative alternative dispute resolution process and ensure that the resource authority holder is responsible for paying the costs of the ADR;*

• *allow parties to use arbitration where a CCA or MGA has not been agreed as an alternative to having the matter determined by the Land Court—arbitration may only be accessed by agreement between the parties;*

• *ensure that any professional fees reasonably and necessarily incurred by landholders during the negotiation of a CCA will be paid by resource authority holders, even if a CCA cannot be reached;*

• *expand the reasonably and necessarily incurred professional fees that can be recouped by a landholder to include the cost of an agronomist; and*

• *provide the Land Court the explicit power to determine the amount of any reasonable and necessary professional fees incurred during the negotiation of a CCA. These amendments are in line with recommendations of the independent review of the GasFields Commission Queensland."*

Resolution institute comment:

Resolution Institute enthusiastically supports the introduction of non-determinative dispute resolution pathways for parties. We further support the introduction of an arbitration option as an alternative to the Land Court for resource authority holders and landholders if they both agree.

Non-determinative types of DR

Resolution institute applauds that it is beyond doubt that only non-determinative types of alternative dispute resolution can be utilised for clause 45 of the Bill (pre-arbitration stage). We note that these include, but are not limited to, case appraisal, conciliation, mediation or negotiation.

Providing flexibility for parties to choose from these unique forms of dispute resolution enables parties to elect the most suitable mode for their unique dispute. Some factors that will be relevant are the nature of the dispute, the bargaining power of the parties, budget, any geographically limiting factors or other time pressures. Each mode of dispute resolution has its own set of benefits for parties.

It is important that parties are provided with clear and concise information to enable them to make an informed choice. Resolution Institute favours that any information provided be communicated in a way that is suitable for a diversity of audiences and which highlights the opportunities that an interest based dispute resolution process offers. Potential parties are often more familiar with rights based rather than interest based processes. *Your Guide to Dispute Resolution* written and published in 2012 by the National Alternative Dispute Resolution Advisory Council provides a useful model.

Some issues that Resolution Institute has found need to be considered when offering parties a choice of dispute resolution mode include:

- Ensuring appropriate accreditation of dispute resolvers and compliance with on-going professional development requirements.
- Costs of dispute resolution.
- Process for nominating, choosing or rejecting a dispute resolver
- Whether face to face meetings or electronic meetings are suitable. Our experience has been that affording flexibility for electronic modes of meeting is often cost effective and efficient, although can disadvantage those with limited access to technology.
- Whether legal representation or a support person is permitted. Our experience is that allowing non-legal advisers often adds benefit to the process, particularly where advisors are familiar with the process of dispute resolution and the opportunity that it provides for exploring options that satisfy parties' interests.
- Termination or adjournment processes.
- What sort of documentation is required, if any. Resolution Institute has found that encouraging parties to make formal submissions tends to introduce a more adversary style of process rather than encouraging parties to focus on their interests and areas of common ground.
- Access to further dispute resolution.

Arbitration

Resolution Institute supports that parties can utilise arbitration (by agreement) to resolve their dispute, rather than making an application to the Land Court**.**

Arbitration election notice

We note that the time (in business days) for parties to accept or reject an arbitration election notice has been extended from 10 business days to 15 business days. Resolution Institutes agrees that, although on the shorter end of the spectrum for such a pivotal decision, it reflects the need to balance timeliness with allowing a party time to consider the issues and take any advice they see fit.

As with non-determinative types of dispute resolution, it is important that parties receive as much information as necessary to make an informed decision. We note that parties may also agree to go to straight arbitration without first trying to resolve the dispute through non-determinative dispute resolution. In these circumstances, Resolution Institute supports the importance of the election notice for arbitration addressing process, legal representation, costs and the finality of the arbitrator's decision, including limited grounds of appeal.

Costs

We note that primarily, the resource authority holder is liable for the majority of the costs incurred by both parties throughout the statutory negotiation process. We note from several industry submissions made in relation to the 2017 Bill that largely industry accepts this responsibility. We support the importance of landholders being supported throughout the process.

Resolution Institute understands that if the parties cannot reach agreement through non-determinative dispute resolution the costs of the arbitrator are shared equally between the parties. There any many ways in which costs of arbitration can be split between the parties and it can often be difficult to agree in advance of the arbitration. Resolution Institute administers arbitration rules under which the Arbitrator makes an award as to costs depending on the outcome of the arbitration. Although this is less certain for parties, it can be fairer. The Resolution institute Arbitration Rules can be found at

https://www.resolution.institute/documents/item/1844

Legal representation section 91C

Resolution Institute notes that section 91C outlines the circumstances in which a party may have legal representation in arbitration. Legal representation is allowed if both parties agree to it, and the arbitrator permits it. Resolution Institute generally supports legal representation at the arbitrator's discretion bearing in mind that arbitration is intended to be less formal and less expensive than traditional adversarial processes and that legal fees can sometimes become excessive in relation to the value of the dispute. Legal advisers can add value and assist more

readily in resolution of a dispute, although care needs to be taken that costs do not escalate and that the arbitration process retains its level of informality.

Finality of Arbitrator's decision section 91F

Resolution Institute notes that section 91F provides the arbitrator's decision is final and not able to be reviewed or subject to appeal, outside of jurisdictional error. We note that this is important to ensure that the arbitration process is respected as a viable alternative to the Land Court. As already noted, it is important that parties are advised of finality of the Arbitrator's decision in advance. It is also important the Arbitrator is properly trained, accredited and up to date with all on-going professional learning.

Conclusion

Resolution Institute would be very pleased to discuss items raised in this submission and to assist in Committee further.

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